Crowe

Global Tax Newsletter

June 2018

Audit / Tax / Advisory

Smart decisions. Lasting value.

Contents

TAXING THE DIGITAL ECONOMY

The EU has proposed its measures to ensure "that digital business activities are taxed in a fair and growth-friendly way in the EU. The measures would make the EU a global leader in designing tax laws fit for the modern economy and the digital age." Read how Italy and the UK are dealing with taxation in the digital age.

THE EU AND THE ITALIAN WAY

By Crowe Valente

1.The European Union Digital Tax Package

The EU Digital Tax Package was released by the European Commission on 22 March 2018, to provide new rules to ensure taxation of digital business activities at the place of value creation.

The Package includes two separate legislative proposals:

Long-term proposal: Proposal for a Directive laying down rules relating to the corporate taxation of a significant digital presence:

- consisting, wholly or partly, in digital services' supply through digital interface;
- meeting specific thresholds related to total revenue or number of users or number of business contracts.

It is clarified that:

- double tax treaties with non-EU countries shall not be overridden;
- the EC shall seek to integrate this proposal with the Common Consolidated Corporate Tax Base (CCCTB) initiative, which however, at its current stage, could not provide adequate solutions.

Short-term proposal: Proposal for a Directive on the common system of a digital services tax (DST) on revenues resulting from the provision of certain digital services:

- online advertising space sale;
- digital intermediation allowing users' interaction, potentially facilitating exchange of goods and services;
- transmission of users' data generated from users' activities on digital interfaces.

DST should apply only to entities meeting both below thresholds:

- total annual worldwide revenue > €750,000,000;
- total taxable revenues in EU > €50,000,000.

2. The Italian legislative steps on Digital Economy

Before the release of the Digital Tax Package, the Italian Budget Law 2018 introduced two innovations to promote taxation of digital economy in Italy.

2.1 The **Italian Web Tax** is provided to apply from 1 January 2019 at a 3% rate on specific digital service fees (without VAT) as follows:

- on digital transactions in relation to the provision of services through electronic means;
- such transactions should be effected with either Italian residents or Italian permanent establishments of foreign persons;
- relevant service providers should have effected more than 3,000 transactions within the calendar year.

However, the law left a number of open questions, e.g. on the practical application of the 3,000 transactions' threshold; and on the potential deductibility of the tax.

Such questions were expected to be answered in implementing legislation that should have been issued by April 2018. In lack of such legislation, it is doubtful whether the web tax shall finally apply.

2.2 Domestic Permanent Establishment (PE) Definition

The definition of Permanent Establishment has been amended on the following 4 important points:

- PE includes a significant and continuous economic presence in Italy structured in such a way as not to evidence physical substance on the territory;
- there are no specific business activities exempted from PE qualification as such. Business activities through a fixed place of business of a foreign enterprise in Italy may not be qualified as Italian PE only if they are of preparatory or auxiliary character;
- there is an anti-fragmentation rule limiting the business activities that may be considered of preparatory/auxiliary nature; hence the exemption does not apply where the multinational group has already a PE in Italy or where it exercises in Italy several complementary business activities that are not altogether preparatory/auxiliary;
- the Agency PE notion was extended to cover the so-called commissionaire arrangements. The exception for independent agents was also defined more strictly.

The above amendments – with the exception of the first – are in line with the 2017 update to the OECD Model Convention. It is worth noting however that they do not apply in cases falling under the scope of Double Tax Conventions: the latter prevail to the extent they are more favorable.

2.3 UK Position Paper

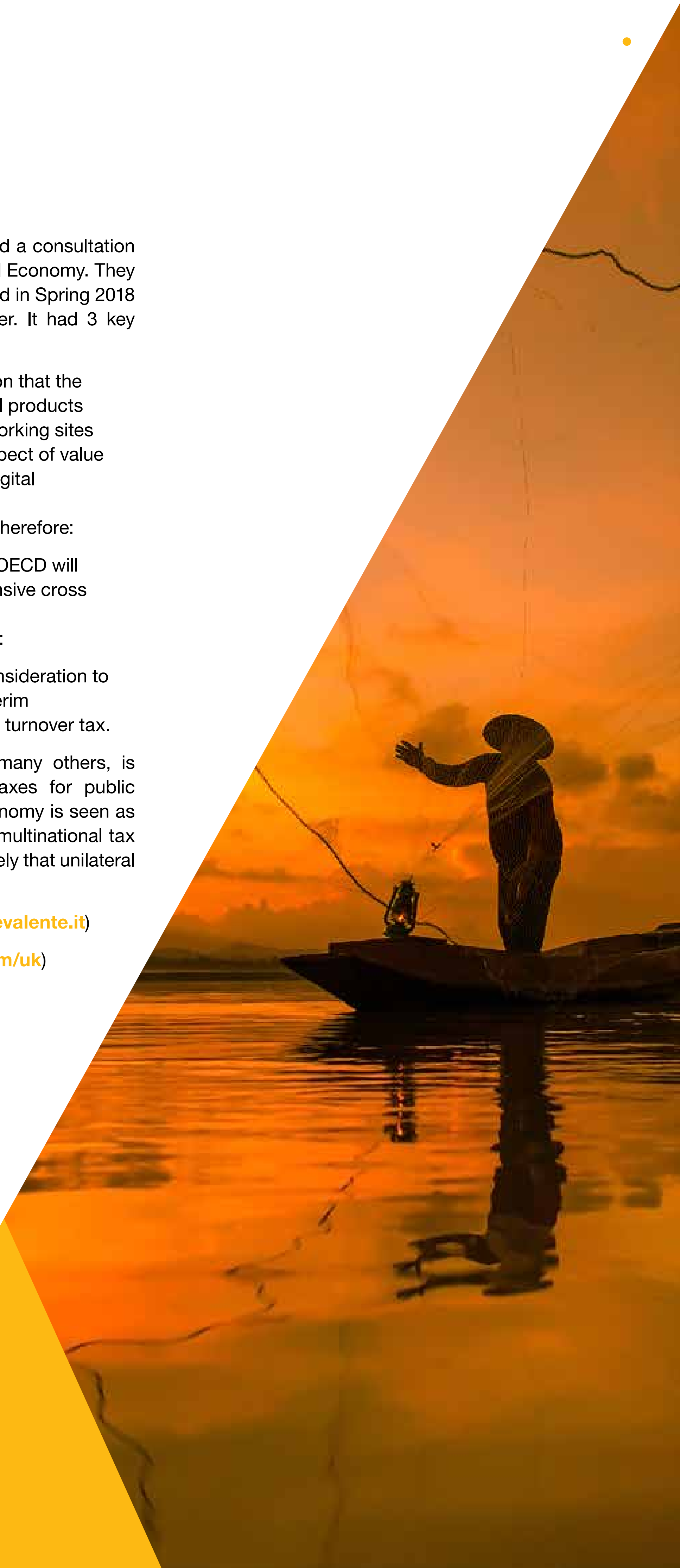
In late 2017 the UK launched a consultation on the taxation of the Digital Economy. They considered the feedback and in Spring 2018 updated their position paper. It had 3 key conclusions:

1. There is a recognition that the consumers of digital products such as social networking sites are an important aspect of value creation for those digital businesses. This is currently untaxed. Therefore:
2. It is hoped that the OECD will propose comprehensive cross border tax reform but in the meantime:
3. The UK is giving consideration to responding with interim measures such as a turnover tax.

The UK government, like many others, is under pressure to raise taxes for public services and the digital economy is seen as an easy target. However, if multinational tax reform takes too long it is likely that unilateral actions will be taken.

Crowe Valente (www.crowevalente.it)

Crowe UK (www.crowe.com/uk)



Argentina

Argentina Tax Reform 2017

By means of Law 27.430 enacted at the end of 2017, Argentina introduces several modifications to the existing tax regime, some of which are described below:

1. Income tax

1.1. Companies

A) Tax rate

Tax rate is gradually reduced for companies, from 35% to 25%, and dividend distribution is levied in order to complete the 35%:

	Corporate tax rate	Dividends withholding
2017	35%	0
2018	30%	7%
2019	30%	7%
2020	25%	13%

B) Other actions

- New anti-abuse measures are incorporated to prevent deferrals and tax avoidance. (e.g. limit to interest deduction between related companies)
- Limits to entities exempted from financial activity or insurance entities (co-ops, mutual) would be introduced.
- Pre-agreements on transfer pricing would be included.
- Exemptions for stock trading transactions and ADR will be clarified.
- Issues regarding international taxation will be enhanced, like stating a definition for permanent establishment, low taxation countries and other topics not completely defined.
- Transparent entities treatment is introduced for trusts and closed-end mutual funds.

Crowe Argentina (www.crowe.com/ar)

Australia

International Related Party Loans: What you need to know

9 October 2017

In what has been touted as Australia's biggest tax case, the Australian Taxation Office (ATO) won against Chevron Australia Holdings Pty Ltd (Chevron Australia) in the Full Federal Court earlier in the year.

In contention is the Australian dollar equivalent of a US $2.5billion loan from US Chevron's subsidiary Chevron Texaco Funding Corporation, to the group's local arm, Chevron Australia. The ATO succeeded in its $340 million assessment of tax and penalties against Chevron Australia, arguing that the 9% loan interest rate charged was excessive, and would have been much lower had the loan been from an unrelated party.

READ MORE...

Crowe Australia
(www.crowehorwath.com.au)

Belgium

Belgian Corporate Tax Reform: what does it mean for you?

14 November 2017

Recently, the government has proposed a thorough reform of Belgian corporation tax as from 2018. The most striking change is the reduction of corporate income tax up to 20% in certain cases. But the proposal also contains a whole series of “compensatory measures”. This will not only create winners, but also losers.

READ MORE...

Crowe Belgium
(www.crowe.com/be/spark)

Canada

Tax Letters: 2018 Federal Budget Summary

February 2018

Finance Minister Bill Morneau presented the 2018 Federal Budget on February 27, 2018. The following is a summary of the key measures proposed.

PERSONAL INCOME TAX MEASURES

Medical Expense Tax Credit – Eligible Expenditures

The budget proposes to expand the medical expense tax credit to recognize such expenses where they are incurred in respect of an animal specially trained to perform tasks for a patient with a severe mental impairment in order to assist them in coping with their impairment (e.g., a psychiatric service dog trained to assist with post-traumatic stress disorder).

READ MORE...

Tax Letters: Year End Tax Planning 2017 – 2018

November 2017

Tax planning is most effectively carried out throughout the year, and the latter part of the year is an appropriate time to review various income tax and financial planning techniques that are available to individual and corporate taxpayers. Most tax planning transactions require analysis before being implemented so that they can be applied properly and in the right circumstances. For this reason, and since certain matters affected by the federal and various provincial budget proposals could differ from the actual law when enacted, all taxpayers should consult with their financial and tax advisors before initiating any of the strategies outlined in this issue.

READ MORE...

Crowe Canada (crowebgk.com)

Colombia

Impuestos y comercio exterior para 2018

15 November 2017

Por Pedro Sarmiento

El 2017 ha sido un año de grandes cambios para Colombia en temas tributarios y de comercio exterior, por la reforma tributaria (Ley 1819 de 2016) y la nueva regulación aduanera (Decreto 390 de 2016), factores que impactan en el crecimiento económico del país.

De acuerdo a las proyecciones de la CEPAL, Colombia crecería en el 2018 un 2,6%, en tanto que, en Fedesarrollo, se espera un crecimiento del 1,5% de las exportaciones y del 3% de las importaciones; y se advierte que para el 2018, los riesgos a la baja se pueden relacionar principalmente con una menor producción de petróleo, la incertidumbre $scal y la posibilidad de una revisión a la baja en la cali$cación de deuda.

READ MORE...

Crowe Colombia (**www.crowe.com/co**)

Germany

Decision of European Court of Justice concerning § 50d (3) EStG

– Abolishment of Anti-

Treaty-Shopping rules -

European Court of Justice combined the two cases Deister Holding (C 504/16) and Juhler Holding (C 613/16) and declared in its decision of December 20, 2017 that § 50d (3) EStG (Income Tax Code) is not conform to European principle of freedom of establishment and the parent-subsidiary directive.

The decision applies to § 50d (3) EStG in the Version of 2007 which was amended by 2012. However, it is likely that Court decision will also affect the current version which is as well pending with European Court of Justice (C-440/17).

In both proceedings corporations domiciled in EU member states applied for reimbursement of German withholding tax for distributions from its German subsidiaries. In both cases it was unclear whether the Anti-Treaty Shopping rule of § 50d (3) EStG (2007) was applicable.

In the Deister Holding as well as in the Juhler Holding case BZSt (German Federal Central Tax Office) refused the refund of withholding tax as holding companies did not carry out their own economic activity in the sense of § 50d (3) EStG.

European Court of Justice pointed out that the Parent-Subsidiary Directive postulates that profits distributed by a subsidiary established in one Member State of the EU to its parent company, established in another Member State, may not be subject to withholding tax.

Any deviation from the Parent-Subsidiary Directive is only allowed if it is "required" and "proportionate". Therefore, overall assumptions that structures were established for tax evasion or abuse purposes cannot justify any disregard of EU law.

European Court of Justice requires national tax authorities to "individually" review group structure and group processes as a whole. In order to identify abuse tax authorities need to review the specific situation within the group, such as the organizational, economic or other significant characteristics of the group structure and group strategies. In addition, national tax authorities are supposed to implement the possibility to prove existence of economic reasons for certain group structures (counter-evidence).

§ 50d (3) EStG was also examined with regard to its compatibility with freedom of establishment. As the regulations are only applicable to non-resident parent companies, these companies may be discouraged from getting economically active in Germany through a subsidiary. This might be qualified as restriction of freedom of establishment which is not justifiable for the reasons stated above.

The decision directly only affects the version of § 50d (3) EStG which was applicable until 2011. However, argumentation can be easily applied to the current version so that it is likely that pending cases are open for counter-evidence.

Michael Schmitz & Veronika Leja

Crowe Frankfurt, Germany
(**www.crowe.com/de/hsa**)

Germany

Limitation of deduction of license fees in case of preferential taxation by the recipient

Teaser: With effect of January 1, 2018, the German legislator implemented a new regulation limiting the deduction of license fees paid to related companies profiting of preferential tax treatment.

Beginning in 2000, more and more countries have implemented tax advantages for so-called **IP boxes** (intellectual property boxes) meaning that respective income is taxed with a lower tax rate or a part of it is tax exempted, so that the effective tax rate is reduced. Regularly, but not necessarily, the ad-vantages are linked with the treatment of expenses for research and development ("R&D") activities. As a transfer of trademark rights to another country can be executed without the existence of the mentioned activities in this country, the respective regulations are used for shifting gains to countries with low tax burdens. As a part of the international Base Erosion and Profit Shifting (**"BEPS"**) Project, the "Agreement on Modified Nexus Approach for IP Regimes" (**"Nexus Approach"**) has been developed in order to set up standardized rules for IP boxes and to avoid misuse in this regard. The Nexus Approach allows a **preferential taxation** in case the IP has been created by qualified R&D activities.

All countries (OECD, G20 and further countries) involved in the BEPS Project have to adopt respective regulations by July 2021. Germany itself does not grant such IP advantages, but - as an involved country - has to accept a deduction of license fees in line with the international rules.

For the meantime and in order to avoid shifting gains to low tax countries, Germany has set up the new section 4j of German Income Tax Act ("ITA") applicable as from January 1, 2018. In general, this tax rule affects expenses for transfer of rights, especially copyrights or the use of knowledge, skills, plans, samples and procedures. The rule is not limited to - but will mostly affect - foreign recipients. The deduction of license fees is limited irrespective of a Double Tax Treaty (Treaty Override) if there is a preferential tax treatment for the recipient when payer and recipient being related parties.

A preferential taxation is defined as a taxation differing from the regular taxation and being lower than 25 %. If this is the case, a part of the license fees is not deductible. The respective proportion is calculated as follows:

$$\frac{25\ \% - \text{recipient's effective tax rate in }\%}{25\ \%}$$

Since the formula only considers the recipient's effective tax rate for the license fees (the preferential tax rate), the non-deductible amount is independent of the regular tax rate and consequently of the actual tax advantage abroad.

For instance, in case of a regular tax rate of 25 % and a preferential tax rate of 10 %, license fees of EUR 100 are taxed with 10 % (EUR 10) and the tax advantage is EUR 15. In case of a regular tax rate of 11 % and a preferential tax rate of 10 %, the advantage is only EUR 1. However, in both cases the effect on German taxation is the same: 60 % of the license fees (EUR 60) are non-deductible and lead to an additional tax of approximately EUR 18 (based on a German average income tax burden of 30 %).

Regarding the determination of the decisive foreign tax rate, the calculation of the taxable income abroad has to be reviewed. It is generally harmless if actual expenses are deducted; nevertheless, from a German perspective, a deduction of fictitious expenses is considered as preferential treatment:

Example 1

A German licensee pays license fees of EUR 100 to a foreign licensor. The licensor has expenses of EUR 50; therefore, his taxable income is EUR 50. Based on a tax rate of 25 %, the respective tax is EUR 12.50. The effective tax burden is 25 %, so there is no additional taxation in Germany.

Example 2

The German licensee pays license fees of EUR 100 to a foreign licensor. The licensor has no ac-tual expenses. Nevertheless, according to the respective foreign tax law, 50 % of the received fees can be deducted as fictitious expenses, so the taxable income is EUR 50. Based on a tax rate of 25 %, the respective tax is EUR 12.50. Compared to example 1 the effective tax burden on the license fees is 12.5 % only, which triggers an additional taxation in Germany. An amount of EUR 50 [(25 % - 12.5 %) / 25 % x EUR 100] is not deductible leading to an additional tax of approximately EUR 15 (assumed German average tax rate of 30 % as above).

In the case of structures with more companies profiting of a preferential taxation, the lowest tax rate is relevant for the additional taxation in Germany.

Example 3

The German licensee pays license fees of EUR 100 to a foreign licensor A (country A). Licensor A is licensee of licensor B (country B).

Both, country A and country B, grant a preferential taxation (country A 15 %, country B 10 %). The applicable foreign tax rate is 10 %, therefore an amount of EUR 60 [(25 % - 10 %) / 25 % x EUR 100] is not deductible in Germany.

In accordance with the international OECD rules, the limitation of deduction is not applicable as far as the foreign IP regime is in line with the Nexus Approach. If the foreign licensee has expenses partly qualifying for Nexus Approach, a breakdown of the license fees will become necessary.

Example 4

The German licensee pays license fees of EUR 100 per year to a foreign licensor. The licensor had expenses for R&D of EUR 140 according to the Nexus Approach and (other) costs for patents of EUR 60. The entire income is subject to preferential taxation. In this case only 70 % of the actual expenses can be subject to preferential taxation. As a consequence, Germany grants an unlimited consideration for 70 % of the EUR 100 (EUR 70) and the remaining amount of another EUR 30 is subject to limitation of deduction (effect depending on the foreign tax rate).

As the new sec. 4j ITA limits the deduction of license fees even though of being business related and at arm's length, there are doubts whether the regulation is in line with German constitutional law. Fur-ther, as actually only foreign recipients are concerned, the new law might violate the EU freedom of establishment and services. Therefore, (fiscal and/or legal) proceedings concerning sec. 4j ITA are likely to be expected and affected taxpayers should monitor the further development carefully.

Dr. Lars Luedemann

Crowe Kleeberg GmbH
(**www.crowe.com/de/kleeberg**)

Hong Kong

Tax News Express

February 2018

Content:

- A new transfer pricing regulatory regime in Hong Kong
- Provisional deferral for withholding tax on direct re-investment in China by foreign investors using profits distributed from tax resident enterprises in China

READ MORE...

Crowe Hong Kong (**www.crowe.com/hk**)

Indonesia

Indonesia Introduces Three-Tiered Approach to Transfer Pricing Documentation

7 June 2017

The Ministry of Finance (“MoF”) has released Regulation No.213/PMK.03/2016 (‘PMK 213”) which came to force on 30 December 2016 and introduces the three-tiered approach to Transfer Pricing Documentation(TPD). This is a standardized approach to transfer pricing documentation developed by OECD/G-20 BEPS Report Action 13 (finalized in October 2015).

READ MORE...

Crowe Indonesia (www.crowe.com/id)

Ireland

Pay 50% less tax on profits from Intellectual Property with KDB

Take our short test to see if you are eligible to pay 50% less tax on profits from Intellectual Property through the Knowledge Development Box regime.

What is the Knowledge Development Box (KDB)

The KDB is a tax relief applying to income from qualifying patents, computer programmes and other certified intellectual property (IP).

READ MORE...

Share-based remuneration schemes – which is best?

The pros and cons of the Key Employee Engagement Programme (KEEP) and the Restricted Share Scheme.

Attracting and retaining staff is one of the key issues for employers. How to reward staff in a manner that encourages both performance and loyalty is a constant challenge. Share-based remuneration has long been a feature of incentive plans for employees. It can take many forms, such as tying bonuses to share price performance or in some cases awarding shares in the company to employees.

READ MORE...

Tax liability on share options for overseas workers

If you were a multinational worker who spent some time working in Ireland and have (or had) share options, you may be liable for Irish tax.

Revenue have recently confirmed they will be contacting multinational workers who have failed to pay Irish tax on share options.

Share options have become particularly popular in large multinationals as a means for rewarding employee performance. A share option is a right that an employer grants to an employee to acquire shares in the company at a pre-determined price. If the share price rises and the multinational employee exercises the option at the fixed price, the subsequent gain is liable to income tax, PRSI and USC.

READ MORE...

Crowe Ireland (www.crowehorwath.ie)

The Netherlands

Roadmap Corporate Tax regulations as of 2018

2018	2019	2020	2021
• CIT rate: ○ EUR 0 – 200K = 20% ○ EUR 200K+ = 25% • Extension exemption dividend withholding tax • PPT for: ○ Foreign taxpayer rules ○ Dividend WHT tax • Innovation box rate 7% • Update Transfer Pricing Decree • Adjustment to fiscal unity regime[1] • UBO-register • Legislation for trust sector	• CIT rate: ○ EUR 0 – 200K = 19% ○ EUR 200K+ = 24% • Earnings stripping rule • CFC rule • Revision of APA/ATR-practice • Substance requirements will include: ○ Office 24 months ○ EUR 100,000 salaries Relevant for: ○ APA/ATR-practise ○ Exchange of information • Loss carry forward limited to 6 years • Limitation depreciation buildings in own use	• CIT rate: ○ EUR 0 – 200K = 17.5% ○ EUR 200K+ = 22.5% • Abolition of dividend withholding tax; excluding certain situations[2] • Anti-hybrid rules to discourage: ○ CV/BV structure ○ PPL • MLI, including (a.o.): ○ Treaty abuse ○ Permanent establishment • Thin-cap regulations for banks and insurance companies • New group relief regime • Fiscal investment funds no longer allowed to invest in real estate	• CIT rate: ○ EUR 0 – 200K = 16% ○ EUR 200K+ = 21% • Introduction of conditional[2] withholding tax on interest and royalties

[1] *Applicable retroactively as of 25th October 2017; will lead to new group relief regime expected in 2020.*

[2] *Payments to low tax jurisdictions, EU black list countries and in case of abuse.*

Crowe Foederer (www.crowe-foederer.nl)

The Netherlands

Dividend withholding tax exemption for treaty countries

3 May 2018

January 1st 2018 the Dutch dividend withholding tax code has been changed. There are tax exemptions for treaty countries. The exemption in case of participation has been expanded per that date. What effects does these changes have for your organization?

Application dividend tax exemption
When a Dutch entity distributes dividend to a foreign shareholder (entity), no dividend withholding tax applies in the Netherlands when:

- There is a tax treaty in place between the states in question.
- The structure does not qualify as tax abuse.

READ MORE...

Crowe Peak
(www.crowe-peak.nl)

Poland

Changes in VAT - Split Payment

25 June 2018

What is a split payment mechanism?

In accordance with the changes in the VAT regulations which will come into force on July 1, 2018, the buyer of the goods / services, when paying to their supplier, will be entitled to apply the split payment mechanism, i.e. to transfer part of the price (net amount) to 'standard' Bank account of the seller, and to pay the amount of VAT into their 'VAT account'.

The VAT account will be owned by every entrepreneur. According to the amendment, banks will be obliged to set up the VAT account - without concluding additional agreements or collecting fees - for every entrepreneur who has an account related to their business activity in a particular bank.

READ MORE...

Crowe Poland (**www.crowe.com/pl**)

Singapore

Singapore Transfer Pricing Regime Undergoes a Substantial Revision

6 April 2018

The Inland Revenue Authority of Singapore ("IRAS") released the 5th revision of the Singapore Transfer Pricing Guidelines on 23rd February 2018. These revised guidelines provide the Singapore tax community with further understanding of the implementation of the amended transfer pricing legislation, which came about as a result of the Income Tax (Amendment) Act 2017 and as well as the gazetted Income Tax (Transfer Pricing Documentation) Rules (hereafter referred to as the "TPD Rules 2018").

1. Ability to Recharacterize Transactions
Further clarification is provided on the circumstances where IRAS may disregard an actual related party transaction. In the exceptional event that taxpayers cannot demonstrate that third parties would enter into similar transactions/arrangements, and cannot support that those transactions are commercially rational, the IRAS will disregard the form of the related party transactions and replace it with an alternative transaction or disregard the transaction, entirely. The expanded Section 34D(1C) suggests that the burden of proof of identifying what the arm's length condition would be (e.g., what unrelated parties would have done), lies with the taxpayer.

READ MORE...

Crowe Singapore (**www.crowe.com/id**)

Switzerland

Radio and Television Fee from January 1st, 2019

21 June 2018

With the introduction of the partially revised VAT legislation on January 1st, 2018 worldwide revenue is to be considered for the determination of the Swiss VAT liability. In consequence, worldwide revenue must be declared in the Swiss VAT statements as of this date.

The revenue determination can be made based on following information:

- Revenue according to VAT statements filed in the domicile country
- Revenue reconciliation or accounts receivables list
- Any other document showing invoiced revenues on quarterly basis

READ MORE...

Crowe Switzerland (www.crowe.com/ch)

United Kingdom

Making Tax Digital for VAT

15 June 2018

Robert Marchant tells you everything you need to know about forthcoming VAT rule changes. VAT is at the forefront of HMRC's Making Tax Digital (MTD) plans, which aim to make HMRC into a 'world leading, digital tax authority'.

READ MORE...

New corporate loss relief rules

29 May 2018

Changes to the corporate loss relief rules from 1 April 2017 will require careful consideration in 2018 by companies and groups with losses to make sure that as much relief for losses as possible is claimed.

READ MORE...

Offshore assessment time limits

18 May 2018

HMRC has published the consultation document 'Extension of offshore time limits' which proposes to extend the time limits to at least 12 years to assess any tax that is due in respect of offshore matters.

READ MORE...

Car Allowances v Company Cars – New OpRA rules

3 May 2018

If you offer employees a car allowance or company car your arrangements may be impacted by the new rules on Optional Remuneration Arrangements (OpRA) which came in from 6 April 2017.

READ MORE...

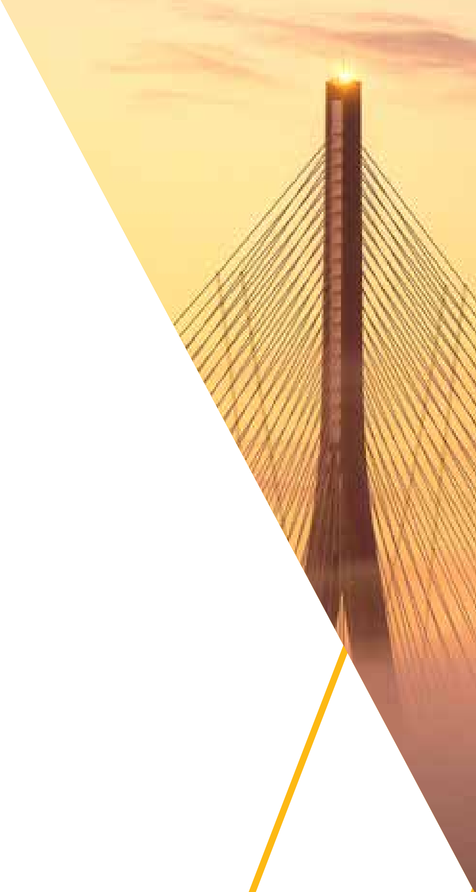
International Tax: When countries go rogue

25 April 2018

Time is running out for attempts to create a coordinated approach to international taxation. If we have seen the death of coordination between countries, what should companies be doing in response?

READ MORE...

Crowe United Kingdom
(**www.crowe.com/uk**)



United States

International Tax Considerations for Coin Offerings

5 April 2018

Initial offerings of virtual currencies are proliferating, and they present a host of domestic and international tax issues.

The core principles of U.S. taxation of cryptocurrencies were spelled out in IRS Notice 2014-21, which established that cryptocurrency is treated as property and not as currency, domestic or foreign. Consequently, if a business issues tokens, whatever it receives in return generally will be taxable to the issues unless the transaction is not taxable under another operative tax provision. In some situations, though, the income from the offering could be deferred. Similarly, trading tokens also will generate gain or loss. In short, the notice only defines a cryptocurrency for U.S. tax purposes – as property and not currency. It does not provide operative tax treatment.

It is common to use a foreign-based cloud company to raise capital through initial coin offerings (ICOs) because of the virtual nature of the technology employed, but this assumes that the substance and ownership of intellectual property (IP) meets existing transfer pricing rules without disrupting the company's overall global business strategy.

Outlined below are some of the key U.S. tax considerations in connection with a foreign-based ICO.

Tax reform

H.R. 1, commonly known as the Tax Cuts and Jobs Act (TCJA), brings a lower U.S. corporate rate of 21 percent, which might make U.S. holding companies quite attractive in many situations. However, the ability to defer both federal and state tax with a foreign structure still provides many planning opportunities, but it requires careful navigation as tax reform evolves and many questions continue to be answered.

Technology transfer

If the new company will employ substantial proprietary IP, including technology related to the cryptocurrency itself, transferring that technology to a foreign affiliate could create significant tax consequences for the U.S. transferor.

Foreign company U.S. source income.

If the foreign affiliate operates in the U.S. (if, say, some or all of the actual business activities and IP development occur in the U.S.), then the foreign affiliate will be subject to U.S. federal and state taxation. To be respected as a foreign taxpayer and to avoid being taxed in the U.S., a foreign affiliate needs to have substance in the foreign jurisdiction and very limited activity in the U.S. At a minimum, a foreign affiliate's contracts and agreements must be conducted and executed outside of the U.S. to avoid creating a taxable presence in the U.S.

Transfer pricing

If the ICO requires substantial U.S. activities or services of U.S. officers and directors, there almost certainly will be a need to form a separate U.S. company to perform any domestic activities that are required in order to avoid taxable presence.

The U.S. company engaging in these activities must be remunerated at arm's-length prices under appropriately executed agreements between the domestic company and the foreign company.

Potential for deemed dividend

The U.S. maintains a set of complex anti-abuse rules commonly known as Subpart F. Subpart F applies only to a controlled foreign corporation (CFC), which is a foreign corporation more than 50 percent owned by five or fewer 10 percent U.S. shareholders. Under the Subpart F rules, income realized from certain activity or from the sale of products both sourced and sold for use or consumption outside the foreign company's host country may be treated as a dividend taxed to any U.S. shareholder at ordinary rates. The ICO and activity of the foreign affiliate must be arranged in a way that does not trigger Subpart F income. Furthermore, the TCJA has initiated several new anti-abuse provisions on foreign-based income that CFCs must navigate as well.

Foreign jurisdictions

Careful review of the foreign jurisdiction's local law is needed to ensure both the tax and regulatory environment are consistent with expectations.

Conclusion

The preceding tax considerations are not an exhaustive list of the issues. As always, the only clear imperative when dealing with tax issues related to international structuring is to proceed with experienced tax advisers.

Brent Felten
Brian Rowbotham

Crowe US (www.crowe.com/us)

About Us

Specialist technical skills along with deep knowledge of business, local laws and customs provide valuable services for multinational clients.

Contact Information
Hugo Everaerd
International Tax Partner
Chair Global International Tax Services Committee
H.Everaerd@crowefoederer.nl

Crowe Amsterdam
Paasheuvelweg 16
1105 BH Amsterdam
The Netherlands
+31 (0)20 564 60 00