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Japan

Proposed changes to taxation of online platforms

On 1 April 2025, Japan intends to introduce changes to the taxation of online platforms, as announced by the Ministry of Finance in the 2024 tax reform proposals. The draft law was submitted to parliament on 2 February 2024.

New Zealand

Offshore gambling duty postponed

Parliament has introduced amending legislation that would tax offshore online gambling by introducing an offshore gambling duty with effect as from 1 July 2024. The duty has been designed to align with the GST rules for the supply of remote services to allow existing systems to be used.

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The government has opened a consultation on the design and administration of the future UK carbon border adjustment mechanism, following the December 2023 announcement that it intends to introduce a UK CBAM, to take effect from 1 January 2027.

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I. Jurisprudencia

1. Tribunal de Justicia de la Unión Europea. Auto de 5 de febrero de 2024. Asunto C-377/23 (DC).

Base imponible — Facturación incorrecta aplicando un tipo impositivo indebido del 0 por ciento — Regularización por parte de la Administración tributaria aplicando el tipo de gravamen general — Inclusión del IVA adeudado sobre el precio de venta.

Un empresario portugués realizó operaciones consistentes en la entrega de vehículos de motor de segunda mano a consumidores finales, aplicando un tipo impositivo del 0 %.

En el ámbito de una comprobación tributaria, la Administración tributaria portuguesa consideró, por el contrario, que, a dichas entregas, les resultaba aplicable el tipo impositivo general del impuesto del 23 %. De esta forma, regularizó el IVA agregando el mismo al importe contenido en las facturas de venta expedidas por dicho empresario a los consumidores finales.

El empresario impugnó dicha regulación al entender que la base imponible del Impuesto debía calcularse teniendo en cuenta el precio de venta indicado en la factura y no, como consideró la Administración tributaria, como un precio sin IVA al que hay que añadir este último. Precisa, además, que no le es posible repercutir el IVA regularizado a los consumidores finales, debido a la falta de un mecanismo de regularización que lo permita.

Planteada la controversia en estos términos, y de acuerdo con la jurisprudencia comunitaria existente, el TJUE concluye que en circunstancias como las del litigio principal, en las que el IVA se repercutía por el empresario en las facturas expedidas a los consumidores finales, pero a un tipo declarado incorrecto por la Administración Tributaria, la aplicación del tipo impositivo general debe calcularse deduciendo del precio de venta facturado el importe del IVA adeudado a la Hacienda Pública, siempre que, según la legislación nacional, dicho empresario no tenga la posibilidad de repercutir el Impuesto al comprador del producto.

Esta conclusión es conforme con el principio de neutralidad que impide que la Administración tributaria pueda percibir un IVA en un importe superior al percibido realmente por el empresario o profesional.

2. Tribunal de Justicia de la Unión Europea. Sentencia de 8 de febrero de 2024. Asunto. C-733/22, Valentina Heights.

Artículo 98 Directiva IVA — Facultad de los Estados miembros de aplicar un tipo impositivo reducido del IVA a determinadas entregas de bienes y prestaciones de servicios — Anexo III, punto 12 — Tipo reducido del IVA aplicable al alojamiento facilitado por hoteles y establecimientos afines — Aplicación de ese tipo únicamente a los establecimientos de alojamiento que dispongan de un certificado de clasificación — Principio de neutralidad fiscal.

Valentina Heights es una sociedad búlgara dedicada a la actividad turística, de restauración, hostelería y organización de viajes. Tras una inspección fiscal, se determinó que la compañía había estado repercutiendo de forma incorrecta un tipo impositivo del IVA

reducido, al no disponer de los certificados de clasificación para el complejo turístico, documentación necesaria para poder probar la existencia de prestaciones a las que se les ha de aplicar el tipo impositivo de IVA reducido para alojamientos hoteleros y afines.

Determina el TJUE que no puede restringirse la aplicación de un tipo impositivo del IVA reducido a que se disponga de una determinada documentación o certificación respecto la naturaleza del contribuyente, en la medida en que la normativa nacional no limite dicha aplicación a aspectos concretos y específicos de la categoría de prestaciones de alojamiento facilitado por hoteles y establecimientos afines, o en el supuesto de que limite esa aplicación a tales aspectos concretos y específicos, y esto último no respete el principio de neutralidad fiscal.

3. Tribunal de Justicia de la Unión Europea. Sentencia de 22 de febrero de 2024. Asunto C-674/22 (Gemeente Dinkelland).

Directiva del IVA — Impuestos recaudados contraviniendo el Derecho de la Unión — Obligación de devolver el impuesto sobre el valor añadido (IVA) y de pagar intereses sobre el importe de este — Devolución originada por errores cometidos en la contabilidad del sujeto pasivo — Devolución originada por la modificación retroactiva de las normas de cálculo del IVA deducible correspondiente a los gastos generales del sujeto pasivo.

El Ayuntamiento de Dinkelland realiza tanto actividades no económicas como actividades económicas y, de cara a determinar si sus gastos se imputan a la actividad económica y, por tanto, son deducibles a efectos de IVA, se basa en su contabilidad y aplica una clave de reparto al impuesto soportado. Con motivo de una nueva normativa sobre la contabilidad municipal y calificación fiscal de las actividades, modificó sus claves, lo que supuso un aumento del derecho a la deducción del IVA, por lo cual presentó la correspondiente solicitud de devolución del importe y los intereses correspondientes. La Administración nacional concedió la devolución del IVA, pero rechazó la devolución de los intereses de demora, por entender que no procedía su devolución por haberse derivado la misma como consecuencia de errores cometidos en la contabilidad.

Establece el TJUE que se tiene derecho a la devolución de los intereses en aquellos casos en los que se haya recaudado el impuesto infringiendo el Derecho de la Unión, y no se proceda a la devolución mencionada en un plazo razonable. Por el contrario, no procede el reintegro de los intereses en aquellos casos en los que el impuesto recaudado se derive de unos errores del empresario o profesional a la hora de determinar el alcance de su derecho a la deducción, siendo dicho error de su exclusiva responsabilidad.

4. Tribunal de Justicia de la Unión Europea. Sentencia de 29 de febrero de 2024. Asunto C-314/22, Consortium Remi Group.

Artículo 90 Directiva del IVA — Excepción prevista en el artículo 90, apartado 2 — Base imponible — Reducción de la base imponible — Impago total o parcial del precio — Obligación de expedir factura rectificativa.

Una sociedad búlgara, dedicada a la construcción, expidió una serie de facturas a varios clientes durante el periodo 2006 y 2012. Sin embargo, al no recibir el pago, solicitó a la Administración, en el año 2020 (pese a haber sido dada de baja a efectos del IVA por la propia Administración en 2019), la modificación a la baja de la base imponible y la

devolución del IVA, junto con los intereses de demora. La solicitud fue denegada por entender la Administración que había expirado el plazo de caducidad para solicitar la devolución, y que no se habían presentado las pruebas del impago correspondientes.

Señala el Tribunal que supeditar el derecho a reducir la base imponible del IVA al requisito de que la factura inicial haya sido objeto de rectificación sería contrario a la Directiva, en la medida en que este requisito resulte imposible o excesivamente difícil de cumplir, y dicha imposibilidad o dificultad no le sea imputable al acreedor. A salvo de lo anterior, considera el TJUE que los requisitos consistentes en supeditar la reducción de la base imponible a la rectificación de la factura inicial (o a la comunicación previa por parte de éste a su deudor de su intención de rectificar el impuesto), no vulnerarían en principio la neutralidad del Impuesto, y serían conformes con el Derecho de la Unión.

5. Tribunal de Justicia de la Unión Europea. Sentencia de 29 de febrero de 2024. Asunto C-676/22 (B2 Energy).

Artículo 138, apartado 1, Directiva del IVA — Exención de las entregas intracomunitarias de bienes — Denegación de la exención — Pruebas — Proveedor de los bienes que no acredita la entrega de los bienes al destinatario indicado en los documentos fiscales — Proveedor que presenta otra información que acredita la condición de empresario o profesional del destinatario efectivo.

La Administración tributaria checa abrió un procedimiento de comprobación a un empresario establecido en ese país en relación con las entregas intracomunitarias realizadas, al considerar que no había quedado demostrado que se cumplieran los requisitos necesarios para la aplicación de la exención. Así, se le denegó la exención del IVA respecto de las citadas entregas por entender que los bienes no se entregaron a los destinatarios declarados en los documentos fiscales, ni que hubieran sido entregadas a una persona registrada a efectos del IVA en otro Estado miembro

Finalmente, concluye el TJUE que es conforme con el Derecho de la Unión la denegación de la aplicación de la exención del IVA, en aquellos supuestos en los que un empresario haya entregado bienes con destino en otro Estado miembro de la Unión Europea, cuando este no haya demostrado que el destinatario de los bienes tenía la condición de empresario o profesional en este último Estado miembro, y que, de la información facilitada por el primero, no se disponga de los datos necesarios para comprobar que el destinatario tenía tal condición.

6. Tribunal Supremo. Sala de lo Contencioso. Sentencia de 29 de enero de 2024. Nº de recurso 5226/2022.

Cesión de vehículos por una empresa a determinados empleados — Cesión a título gratuito — Hecho imponible por autoconsumo de servicios — Deducibilidad por la compañía del IVA soportado en el renting de los vehículos cedidos a determinados empleados.

Una compañía adquirió unos vehículos en régimen de renting, siendo cedidos a determinados empleados para su uso mixto (profesional y privativo), imputándoles a los empleados ciertos importes en concepto de retribuciones en especie sobre los que practicó ingresos a cuenta en el RIPF. La compañía dedujo el 50% del IVA soportado en el renting de los vehículos.

Con motivo de un procedimiento de comprobación, la Inspección regularizó al alza el ingreso a cuenta realizado por la compañía, siendo este incremento también considerado por la Inspección en la regularización del IVA, incrementando el impuesto soportado deducible del 50% al 100%, y liquidando el IVA que se habría devengado con ocasión de las prestaciones de servicios realizadas a título oneroso con ocasión de las cesiones de los vehículos a los empleados.

Sin embargo, la AN en sentencia dictada (que fue objeto de recurso de casación por el abogado del Estado) argumentó, a la luz de la más reciente jurisprudencia del TJUE (sentencia de 20 de enero de 2021, asunto C-288/19, QM), a favor de que la cesión de los vehículos a favor de los empleados no suponía la realización de una prestación de servicios a título oneroso sujeta al IVA, sino una cesión gratuita de los vehículos, no sujeta al Impuesto si los empleados no pagaban cantidad alguna, ya sea porque no renuncian a parte de su salario dinerario o a otras retribuciones en el marco de un plan de retribución flexible.

El Abogado del Estado recurre la sentencia de instancia ante el TS y argumenta a favor de la liquidación de las cuotas del IVA repercutidas por la cesión de los vehículos a los empleados, pese a que dicha cesión se entendiese realizada a título gratuito, en calidad de autoconsumo de servicios, sujeto al Impuesto, de acuerdo con lo previsto en los artículos 7 y 12 de la LIVA.

Pues bien. el Tribunal Supremo en esta sentencia no admite la interpretación defendida por el Abogado del Estado, fallando expresamente que la cesión de vehículos a empleados a título gratuito (sin mediar contraprestación o pago alguno por parte de estos) para su uso particular, afectos en un 50% a la actividad empresarial -por la aplicación de la presunción establecida en el artículo 95.tres, regla 2ª, de la LIVA-, no es una operación sujeta al Impuesto que deba ser gravada, incluso en el porcentaje en que la compañía hubiera deducido el IVA soportado.

La doctrina jurisprudencial fijada por el Tribunal Supremo en esta sentencia parece clara: las cesiones gratuitas del uso de vehículos a empleados para fines particulares no están sujetas al Impuesto en concepto de autoconsumo de servicios.

Ahora bien, a nuestro juicio, la sentencia del Tribunal Supremo no entra a valorar la afectación del 50% del vehículo a la actividad empresarial, bajo la presunción prevista en el artículo 95.tres. 2ª de la LIVA, por lo que, respecto de esta problemática, la sentencia no fija criterio doctrinal alguno. Se limita a constatar que, en el caso enjuiciado, la presunción legal de afectación de los vehículos a la actividad empresarial en un 50% no había sido desvirtuada por la Inspección.

Persiste, por lo tanto, la incertidumbre, por ejemplo, de si un criterio estricto de disponibilidad del vehículo es adecuado a la hora de delimitar el porcentaje de uso empresarial /profesional y personal que deba atribuirse a los vehículos de empresa.

7. Audiencia Nacional. Sala de lo Contencioso. Sentencia de 20 de septiembre de 2023. Nº de recurso 1006/2021.

Concepto de subvenciones vinculadas al precio - Sujeción de la financiación de Sociedades participadas por capital público.

Se impugna ante la Audiencia Nacional (AN) la resolución del Tribunal Económico-Administrativo Central de 15 de diciembre de 2020, que estima parcialmente la reclamación formulada por la actora contra el acuerdo de 17 de julio de 2014, de la Unidad de Gestión de Grandes Empresas de la Delegación Especial de Valencia de la Agencia Estatal de Administración Tributaria. Dicho acuerdo desestimaba las solicitudes de rectificación de autoliquidaciones practicadas en concepto de Impuesto sobre el Valor Añadido (en adelante, "IVA") de los ejercicios 2009 a 2012. La cuestión objetivo de litigio era la determinación de la base imponible del IVA de las actividades realizadas por la demandante, que se trata de una Sociedad mercantil formada por capital íntegramente de un Ayuntamiento.

A este respecto, tanto la Administración como el TEAC consideraban que las actividades realizadas por la parte actora se encontraban sujetas al IVA dado que, a su juicio, la financiación que recibían era mediante subvenciones vinculadas al precio. Ello se sostenía en base a que las aportaciones, contrapartidas o abonos monetarios realizados por el Ayuntamiento a la sociedad, se correspondían con la contraprestación por los servicios que la Sociedad prestaba al Ayuntamiento. Añadía el TEAC que la prestación de servicios por parte de la Sociedad al Ayuntamiento era una actividad sujeta y no exenta del impuesto y que las transferencias realizadas por el Ayuntamiento, en la medida que constituían una contrapartida por el servicio prestado, constituían la base imponible del IVA.

Por su parte, la parte demandante alega que las cantidades percibidas de parte del Ayuntamiento eran subvenciones no vinculadas al precio, de acuerdo con una sentencia de la misma sala. Recalcaba además la AN en su sentencia anterior, que el TEAC había obviado que el capital social de la Sociedad pertenecía plenamente al Ayuntamiento, que ejercía pleno control y dirección de la Sociedad, cuyas actividades principales eran la recogida de basuras y limpieza de las vías públicas. Dicho esto, la Sala rechazaba que las cantidades provenientes del Ayuntamiento estuvieran vinculadas al precio.

En base a lo anterior, la AN sostiene que las cantidades que los entes públicos entregan a empresas públicas que prestan servicios públicos en régimen de gestión directa, no tienen la consideración de contraprestación a efectos del artículo 78 de la Ley del IVA, en tanto a subvención vinculada al precio sino que se trata de dotaciones presupuestarias destinadas a cubrir el déficit de explotación y que, por tanto, no suponen contraprestaciones como compensación del servicio prestado, por lo que no forman parte de la base imponible del IVA (con independencia de la denominación que se dé a esos fondos públicos, esto es, transferencia, compensación, subvención, etc.).

8. Audiencia Nacional. Sala de lo Contencioso. Sentencia de 20 de septiembre de 2023. Nº de recurso 938/2021.

IVA en la prestación de servicios de concesión de créditos entre sucursales - Derecho a la deducción - Prorrata.

Se impugna ante la Audiencia Nacional (AN) la resolución del Tribunal Económico-Administrativo Central de 19 de noviembre de 2020, que desestima la reclamación formulada por la actora contra las resoluciones de 18 de mayo de 2017 del Inspector Coordinador de la Delegación Especial de Madrid, desestimatorias de los recursos de reposición interpuestos frente a los acuerdos de liquidación y sancionadores relativos al Impuesto sobre el Valor Añadido de los ejercicios 2011 a 2014.

Dichos acuerdos de liquidación y sancionadores son consecuencia de que la Administración entiende que las operaciones financieras realizadas por la sucursal en España del Industrial and Commercial Bank of China (en adelante, "ICBC") con entidades fuera de la UE, no son operaciones que generen el derecho a la deducción y, por tanto, su inclusión en el numerador de la prorrata es errónea.

ICBC alega que las operaciones que realiza constituyen operaciones financieras que, en el supuesto de haberse realizado en el territorio de aplicación del IVA, estarían exentas de acuerdo con el artículo 20.Uno.18º de la Ley del Impuesto sobre el Valor Añadido (en adelante, "Ley del IVA"), por lo que generarían derecho a la deducción de acuerdo con lo dispuesto en el artículo 94.Uno.3º de la Ley del IVA.

En este sentido, la parte actora alega que su modelo de negocio cuyos destinatarios son entidades no establecidas en la Unión Europea consiste, por un lado, en la realización de operaciones de financiación a otras sucursales del grupo ICBC mediante préstamos interbancarios a corto plazo para que, a su vez, éstas puedan ofrecer financiación a sus clientes finales en China y, por otro lado, operaciones de financiación a terceros, consistentes en que clientes de ICBC China contratan operaciones internacionales con filiales o sucursales de ICBC China que interviene poniendo en contacto al cliente con ICBC, Sucursal en España y, actuando, en su caso, como garantes de la operación. En caso de incumplimiento, ICBC Sucursal en España ejecutaría la garantías de la sucursal o filial de ICBC China, siendo esta última quien repita contra el prestatario por el importe ejecutado.

Por su lado, la Administración entiende que las actividades realizadas por la actora no reunían las características de una actividad financiera de préstamo en base a que (i) no se realiza gestión alguna para su concesión, (ii) no hay evaluación de los riesgos y características del cliente, ni, sobre todo, asume ICBC sucursal en España riesgo alguno en la operación, (iii) ICBC China es quien realmente gestiona y concede dichas operaciones a sus clientes, (iv) el hecho de que los Tribunales Chinos y no los españoles sean los únicos competentes es un elemento de prueba más y (v) el porcentaje de la prorrata es extraordinariamente alto (30%), en relación con el sector financiero que no excede del 1%.

Por su lado, la AN entiende que no puede negarse la condición de concesión de crédito a la actividad realizada por ICBC sucursal en España dada la naturaleza del servicio profesional habitual prestado, en cuanto reúne los elementos de la puesta a disposición de un capital y el pago de una remuneración. En este sentido, la exigencia de gestión del crédito y la

evaluación de los riesgos no se incluye en la interpretación comunitaria del artículo 135.1.b) de la Directiva para que se califique la operación como de concesión de crédito exenta. En consecuencia, entiende que las operaciones financieras realizadas por ICBC, Sucursal en España, con entidades establecidas fuera de la Unión Europea están incluidas en la exención del artículo 20.Uno.18º de la Ley del IVA, cuya realización origina el derecho a la deducción.

9. Audiencia Nacional. Sala de lo Contencioso. Sentencia de 20 de septiembre de 2023. Nº de recurso 593/2021.

El IVA en relación con las facturas rectificativas.

Se impugna ante la Audiencia Nacional (AN) la resolución del Tribunal Económico-Administrativo Central de 19 de noviembre de 2020, que desestima la reclamación formulada por la actora contra el acuerdo de 30 de octubre de 2017 dictado por la Delegación Central de Grandes Contribuyentes, desestimatorio de los recursos de reposición deducidos en relación con las liquidaciones practicadas por el Impuesto sobre el Valor Añadido correspondiente a los periodos de agosto a diciembre de 2016, al no admitirse por la Administración las modificaciones de bases y cuotas de IVA devengado declaradas por la actora, al considerar la Administración que, en la medida en que la actora no había respondido a los requerimientos de información ni había formulado alegaciones a la propuesta de liquidación, no había quedado acreditada la existencia de dichas operaciones.

La actora alegó en los correspondientes recursos de reposición que, por diversos motivos, no tuvo conocimiento de las notificaciones de los requerimientos y propuestas de liquidación, por lo que aportó los libros registro de facturas expedidas y emitidas en el momento de la formulación del recurso de reposición. De igual forma, la actora alegó que la emisión de las facturas rectificativas vino motivado por la emisión errónea de facturas que correspondían a operaciones de otra entidad del grupo, debido a una operación de reestructuración. Por tanto, ante dicho error se vio obligada a expedir las correspondientes facturas rectificativas, de conformidad con lo previsto en el artículo 80.Dos de la Ley del IVA.

Por su lado, la AN consideró que las pruebas aportadas por la actora acreditan la realidad de las operaciones llevadas a cabo, así como las circunstancias que motivan la emisión de las facturas rectificativas y la consiguiente modificación de bases imponibles, rechazada inicialmente por la Administración. En este punto, la AN destaca que coinciden totalmente los conceptos, importes y destinatarios de las facturas originales y las respectivas facturas rectificativas. Asimismo, las bases y cuotas reflejadas en las facturas, tanto originales como rectificativas, coinciden con las declaradas como operaciones interiores en la autoliquidación presentada en el periodo correspondiente al mes de julio de 2016, así como en las reflejadas en el Libro registro de facturas expedidas, lo cual permite estimar las pretensiones de la parte actora.

10. Audiencia Nacional. Sala de lo Contencioso. Sentencia de 26 de diciembre de 2023. Nº de recurso 132/2019.

Actividad financiera consistente en la transmisión de participaciones y en la concesión de préstamos - Inclusión en el denominador de la prorrata de una venta de participaciones - Deducción del IVA soportado en la adquisición de vehículos.

Se impugna ante la Audiencia Nacional (AN) la resolución del Tribunal Económico-Administrativo Central de 20 de noviembre de 2018 en relación con el acuerdo de liquidación del IVA correspondiente a los períodos 4T 2007 a 4T 2008. La regularización llevada a cabo por la Administración Tributaria se centra en (i) improcedencia de la deducción del 100% de las cuotas soportadas de los vehículos propiedad de la empresa, (ii) existencia de actividad económica financiera de transmisión de participaciones y concesión de préstamos y (iii) existencia de sectores diferenciados de actividad.

En relación con las cuotas soportadas de los vehículos, el contribuyente sostiene la procedencia de la deducción del 100% de las cuotas soportadas por afectación exclusiva de los mismos a la actividad empresarial. En este caso, la inspección considera que solo procedía la deducción del 50% porque no se había probado un porcentaje superior de afectación a la actividad. En este punto, la AN afirma que el artículo 95 Tres, reglas 2ª y 4ª, de la Ley del IVA, resulta claramente respetuoso con lo dispuesto en el artículo 17 de la Sexta Directiva y que, que para que proceda una deducción del IVA soportado en un porcentaje superior a la presunción del 50%, se debe atender al grado efectivo de utilización de los bienes en el desarrollo de la actividad empresarial. No obstante, la AN considera que, en este caso, no se ha acreditado, por parte de la demandante, la efectiva y real utilización del vehículo en la actividad empresarial más allá del 50%.

Por lo que respecta a la realización de actividades diferenciadas, la Inspección considera que la compañía realizaba dos actividades diferenciadas, por un lado, la prestación de servicios de apoyo a la gestión a sociedades integrantes de su Grupo y, por otro, una actividad de carácter financiero mediante la concesión de préstamos y transmisión de participaciones. En este sentido, el contribuyente considera que no existía actividad económica en relación con estas actividades puesto que no constituían una práctica habitual en la operativa del Grupo ni estaba relacionada con la asistencia que prestaba. Asimismo, tampoco recibía contraprestación alguna. La AN se remite a la sentencia del Tribunal Supremo de fecha 25 de febrero de 2021, recurso 4859/2019, y entiende que las actividades financieras mencionadas son parte de decisiones estratégicas y de planificación económica de la propia empresa, siendo estas actividades una prolongación directa, permanente y necesaria de la actividad del Grupo, sin que los argumentos esgrimidos sean suficiente para descartar su existencia. Por lo tanto, la AN concluye que hay dos sectores diferenciados, la prestación de servicios de apoyo a la gestión de las empresas del Grupo, y la actividad financiera vinculada con esta prestación de servicios.

Sin embargo, en relación con la venta de participaciones realizada por la compañía, la AN considera que se trata de una operación de carácter accesoria no relacionada con la prestación de servicios de asistencia ni con los préstamos que la sociedad cabecera del Grupo prestaba a las filiales, en la medida que no era prolongación directa, permanente y necesaria de la actividad financiera del sujeto pasivo, ni comportaba un empleo muy

significativo de bienes y servicios en los términos que podrían excluir la accesoriedad. Por ello, la venta y los gastos que supuso esta operación no habitual, no pueden incluirse en el porcentaje para calcular la prorrata.

II. Doctrina Administrativa

1. Dirección General de Tributos. Contestación nº V3157-23, de 5 de diciembre de 2023.

Establecimiento permanente — Concepto de "establecimiento permanente de compra" — Lugar de realización del hecho imponible — Servicios de maquila prestados entre entidades de un mismo grupo empresarial.

Una entidad mercantil establecida en Francia, que no dispone en el territorio de aplicación del Impuesto de medios materiales ni humanos, se dedica a la producción de revestimientos anticorrosivos para piezas metálicas.

Esa entidad presta servicios a una sociedad mercantil española consistentes en la aplicación de dichos revestimientos en piezas de automóviles de esta sociedad en su centro de actividad en el territorio de aplicación del Impuesto, subcontratando para ello a una entidad mercantil española de su mismo grupo empresarial (entidad A). Para ello, el cliente final (entidad B) suministra las piezas que van a ser objeto del revestimiento a la entidad española sin perder la propiedad de las mismas; la entidad española compra a la entidad mercantil francesa los compuestos químicos para producir los revestimientos, que son enviados desde Francia a las instalaciones de la entidad española; por encargo de la entidad francesa, la entidad española produce los revestimientos utilizando los compuestos adquiridos a ella y los aplica sobre las piezas del cliente de la entidad francesa y se las remite a éste. Por este servicio de revestimiento, la sociedad española factura a la entidad francesa y esta factura al cliente final por los servicios de revestimiento prestados.

Señala la DGT que la mera contratación de un servicio de maquila y procesamiento de producto, con una entidad establecida en el territorio de aplicación del Impuesto, no determina necesariamente la existencia de un establecimiento permanente por parte de la entidad no establecida que contrate dichos servicios.

Es por ello por lo que, de acuerdo con la información suministrada, la DGT infiere que la entidad francesa únicamente sería receptora en el territorio de aplicación del Impuesto de unos servicios consistentes en la producción y aplicación de los revestimientos anticorrosivos en las piezas de su cliente final de manera que, en estas circunstancias, y a falta de otros elementos de prueba, ello no implicaría la existencia de un establecimiento permanente de la consultante en dicho territorio.

Cabe destacar que dicha conclusión se alcanza citando la reciente sentencia del TJUE de 29 de junio de 2023, asunto C-232/22, Cabot Plastics, relativa a un supuesto de hecho en el que una entidad establecida fuera de la Unión (Suiza) tenía suscrito un contrato de prestación de servicios con una entidad de su mismo grupo establecida en Bélgica en virtud del cual la entidad belga utilizaba de manera exclusiva sus propios equipos para transformar, en beneficio de la sociedad suiza y bajo su dirección, materias primas en productos utilizados en la fabricación de plásticos, que también almacenaba hasta que la entidad Suiza los vendía a sus clientes.

2. Dirección General de Tributos. Contestación nº V3172-23, de 11 de diciembre de 2023.

Derecho a la compensación — Cómputo de los plazos.

Una persona física adquirió, a finales de 2020, dos locales comerciales. Posteriormente, fueron reformados con el fin de adecuarlos a la actividad de arrendamiento y, a principios de 2022, dicha persona inició la actividad de arrendamiento de bienes inmuebles y lleva compensando las cuotas del Impuesto repercutido por los alquileres con las soportadas previamente desde la reforma.

Se cuestiona desde qué fecha se empieza a computar el plazo para la compensación de las cuotas del IVA y cuál es el plazo máximo para poder solicitar la devolución, en caso de que la mencionada compensación resultase a su favor.

Señala la DGT que, tal y como están configurados en la normativa, tanto la deducción de las cuotas soportadas como la compensación de los saldos derivados de los excesos de cuotas soportadas sobre las cuotas devengadas, constituyen derechos de los sujetos pasivos del Impuesto y, por tanto, su ejercicio tiene carácter potestativo.

Adicionalmente, el ejercicio efectivo del derecho a deducir y, en su caso, del derecho a compensar deben tener su correspondiente e inexcusable reflejo, como forma de exteriorización de esos derechos, en la debida cumplimentación de los modelos que, a efectos de la liquidación del Impuesto, han sido aprobados en virtud de lo previsto en el artículo 167.Uno de la Ley del Impuesto.

Por tanto, de conformidad con lo dispuesto en el artículo 99 y la interpretación que de dicho precepto efectúa el Tribunal Supremo y el Tribunal Económico-Administrativo Central, una vez ejercitado el derecho a deducir de las cuotas soportadas en la declaración-liquidación oportuna, cuando la cuantía de las deducciones procedentes superen el importe de las cuotas devengadas en el mismo periodo de liquidación, el exceso puede ser compensado en las declaraciones-liquidaciones posteriores, siempre que no hubiesen transcurrido cuatro años contados a partir de la presentación de la declaración-liquidación en que se origine dicho exceso.

Concluye la DGT que, transcurridos cuatro años sin que se haya podido compensar el exceso, y sin que se haya solicitado la devolución, se podrá solicitar la devolución durante el plazo señalado por la Ley General Tributaria para la prescripción de este derecho.

Este criterio administrativo ya había sido manifestado anteriormente en contestaciones vinculantes de 25 de octubre de 2016, número V4575-16 y de 20 de octubre de 2020, número V3121-20.

3. Dirección General de Tributos. Contestación nº V3174-23, de 11 de diciembre de 2023.

Casas modulares — Concepto de "edificación" — Entregas de casas modulares a consumidores finales con residencia habitual en Francia — Venta a distancia intracomunitaria de bienes — Régimen de la Unión.

Una sociedad mercantil española se dedica a la construcción de casas modulares que se entregan a sus destinatarios en la parcela donde se quieren instalar.

El destinatario de dichas casas puede ser un consumidor final no empresario o profesional establecido en Francia.

Sobre estos hechos, se pregunta acerca de la sujeción, en su caso, al IVA por las ventas realizadas.

Comienza recordando la DGT, que una casa prefabricada, que pueda ser objeto de traslado a otro lugar sin quebranto de la materia ni menoscabo del objeto, no tendrá en principio la consideración de edificación, a los efectos del Impuesto.

Por lo tanto, las casas modulares que sean transportadas y enviadas a otro Estado miembro (Francia) por parte de la sociedad mercantil no tendrían la consideración por sí mismas como edificación en el sentido indicado en dicho artículo 6 de la Ley del Impuesto, por ser objeto de traslado desde territorio de aplicación del Impuesto a otro Estado miembro.

Cuando sus destinatarios sean las personas previstas en el artículo 14 de la Ley o bien cualquier otra persona que no tenga la condición de empresario o profesional actuando como tal, y siempre que dicha sociedad no realice la instalación o montaje de las casas modulares, entonces esta última realizará ventas a distancia intracomunitarias de bienes.

De esta forma, la venta de casas modulares por la empresa española estará sujeta al Impuesto francés desde que el volumen de ventas hubiese superado el umbral de los 10.000 euros fijado en el artículo 73 de la Ley del IVA o incluso antes si la consultante hubiese optado por la tributación en destino.

En los supuestos de opción por tributación en destino o cuando se supere dicho umbral, la empresa podrá optar por registrarse en el régimen de la Unión previsto en la Sección 3ª del Capítulo XI del Título IX de la Ley del Impuesto.

4. Dirección General de Tributos. Contestación nº V3177-23, de 11 de diciembre de 2023.

Base imponible — Empresa que presta servicios de reclamación a particulares de indemnizaciones por incumplimiento de entidades — Cobro por parte de la empresa de los derechos sobre las costas y los intereses de demora que les serán cedidos por los clientes particulares — Modificación de la base imponible.

Una empresa presta servicios de reclamación de particulares de indemnizaciones por incumplimiento de entidades tales como aerolíneas. Los servicios jurídicos prestados por la empresa son retribuidos en un tanto por ciento de la cantidad reclamada en caso de éxito en la reclamación.

Adicionalmente, y en el caso de que se obtenga una sentencia favorable en donde se condene al pago de costas e intereses a la compañía reclamada, la empresa recibirá esa cuantía para cubrir sus gastos operativos, al serle cedidos estos derechos de crédito por los particulares.

Se consulta si la cesión al inicio del contrato de los derechos de las posibles costas e intereses de demora deben formar parte de la base imponible del Impuesto sobre el Valor Añadido y en tal caso su fecha de devengo y cuantificación.

Considera que la DGT que esta retribución variable tiene su origen en los servicios jurídicos y de reclamación prestados por la consultante por lo que, en consecuencia, la citada remuneración variable se consideraría un mayor importe de la contraprestación por los servicios jurídicos prestados por la consultante a sus clientes.

Por lo tanto, en el caso de que un juzgado condene al pago de costas e intereses de demora a la compañía reclamada a favor de los clientes finales, dicha condena implicará el importe de la retribución variable pactada, dando lugar a la modificación al alza de la base imponible a efectos del Impuesto sobre el Valor Añadido por parte de la empresa prestadora de los servicios jurídicos de reclamación.

5. Dirección General de Tributos. Contestación nº V3178-23, de 11 de diciembre de 2023.

Entrega de bienes — Ventas en cadena — Exención — Condición de entrega intracomunitaria de bienes.

Una empresa (A) establecida en el territorio de aplicación del Impuesto va a realizar ventas de mercancías a otra empresa (B) establecida también en dicho territorio si bien esta última le indica a la primera que la mercancía se remita directamente al domicilio de su cliente (C) en Portugal, indicándole en el pedido, el Número de Identificación Fiscal a efectos del Impuesto sobre el Valor Añadido (NIF-IVA) de la entidad portuguesa que va a recibir la mercancía.

En la operación objeto de consulta, aunque se producen ventas en cadena, parece deducirse que la primera de las entregas, efectuada por la empresa A a su cliente establecido en el territorio de aplicación del impuesto no estaría exenta del Impuesto sobre el Valor Añadido, ni constituye una entrega intracomunitaria de bienes, en la medida en que la empresa adquirente B no le comunica a la empresa A un número de identificación fiscal a efectos del Impuesto sobre el Valor Añadido (NIF-IVA) suministrado a dicho adquirente por otro Estado miembro. Por otra parte, el transporte intracomunitario no se vincula a dicha entrega, sin que, a estos efectos, tenga relevancia el hecho de que suministre el NIF-IVA portugués del destinatario final, puesto que la empresa A realiza la entrega de bienes a favor de su cliente, no del ulterior destinatario.

Debe concluirse que la entrega de mercancías efectuada por la empresa A a la empresa B, establecida en el territorio de aplicación del impuesto, constituye una entrega sujeta y no exenta al IVA, debiendo repercutir en factura el Impuesto correspondiente con ocasión de su realización.

En consecuencia, la venta efectuada por la empresa A a su cliente, en la medida que no se trata de una operación intracomunitaria (en concreto, entrega intracomunitaria de bienes), no debe ser objeto de inclusión en la declaración recapitulativa de operaciones intracomunitarias (modelo 349).

6. Dirección General de Tributos. Contestación nº V3255-23, de 19 de diciembre de 2023.

Ventas a distancia intracomunitarias de bienes — Lugar de realización — Ventas realizadas por una compañía española desde otro Estado miembro.

Una empresa establecida únicamente en el territorio de aplicación del IVA (TIVA-ES) se dedica a la importación de productos de fuera de la Unión Europea. Estos productos se reciben en Alemania donde son despachados a la importación en la Aduana abonando el IVA alemán.

Una vez producido el despacho a la importación, los productos serán vendidos a particulares de la Unión Europea que los soliciten desde Alemania.

La DGT comienza por asumir que el destinatario de dichas importaciones de bienes es la propia empresa, y no los particulares. Por lo tanto, no estaríamos ante la realización de operaciones de ventas a distancia de bienes importados de terceros países o territorios, al no cumplirse el requisito del destinatario previsto en el artículo 8.Tres de la LIVA, por lo que la empresa deberá abonar el IVA alemán en la aduana, tal y como está realizando.

Ahora bien, dado que la empresa española, una vez una vez realizada la importación en Alemania y el pago del IVA alemán, efectúa entregas de bienes desde Alemania a particulares de la Unión Europea, realizará ventas a distancia intracomunitarias de bienes cuando sus destinatarios sean las personas previstas en el artículo 14 de la Ley o bien cualquier otra persona que no tenga la condición de empresario o profesional actuando como tal.

En cuanto al lugar de realización de estas últimas operaciones, subraya la DGT que las ventas a distancia intracomunitarias de bienes realizadas por la empresa, cuyo inicio o expedición se realice desde Alemania, tributarán en el Estado miembro de llegada de la expedición o transporte. En particular, tributarán en territorio de aplicación del Impuesto las ventas a distancia intracomunitarias realizadas por la consultante desde Alemania a España.

En este sentido, recuerda la DGT que el artículo 73 de la Ley recoge el umbral máximo de ventas a distancia intracomunitarias de bienes que permite mantener la tributación en origen, si bien dicho límite no será de aplicación cuando las ventas a distancia intracomunitarias de bienes sean efectuadas, total o parcialmente, desde un Estado miembro distinto del de establecimiento, como sería el caso.

De esta forma, todas las ventas a distancia intracomunitarias realizadas por la empresa desde Alemania tributarían en destino, lugar de llegada de la expedición o transporte de las mercancías.

Para la tributación de estas ventas en destino la empresa española podrá optar por registrarse en el régimen de la Unión previsto en la Sección 3ª del Capítulo XI del Título IX de la LIVA. En otro caso, deberá darse de alta y abonar el Impuesto en cado uno de los Estados miembros en los que se entiendan realizadas dichas ventas a distancia intracomunitarias de bienes.

En caso de optarse por el Régimen de la Unión, España deberá ser el Estado miembro de identificación.

7. Dirección General de Tributos. Contestación nº V3292-23, de 26 de diciembre de 2023.

Prestación de servicios — Lugar de realización — Servicios de intermediación en nombre y por cuenta ajena respecto de unos servicios de arrendamiento de viviendas con fines vacacionales, en los que el arrendador no presta servicios complementarios propios de la industria hotelera.

Una sociedad mercantil se dedica a captar clientes propietarios de viviendas con fines vacacionales y les gestiona el alquiler de dichas viviendas a través de plataformas de alquiler turístico. Como consecuencia de su actividad, la sociedad mercantil percibe una comisión por cada operación realizada. En los alquileres de viviendas vacacionales no se prestan servicios complementarios propios de la industria hotelera.

Comienza la DGT por señalar que, a efectos de determinar la forma de actuar de los intermediarios, es importante analizar si estos son los que mantienen una comunicación y relación directa con los arrendatarios, son quienes fijan las reglas y condiciones de la prestación del servicio de arrendamiento y quienes ordenan la forma de hacer efectivo el cobro de la contraprestación y reciben la misma, o si por el contrario, es el propietario del inmueble quien establece las condiciones del servicio, tiene conocimiento y relación directa con los arrendatarios y recibe el cobro de la contraprestación.

En el segundo caso, se considerará que el intermediario actúa en nombre y por cuenta de los clientes prestando un servicio de mediación, siendo los arrendadores los que prestarían directamente a los arrendatarios el servicio de arrendamiento propiamente dicho.

En el primero de los casos, el intermediario prestaría los servicios de arrendamiento en nombre propio a los arrendatarios a la vez que sería la destinataria de los servicios de arrendamiento prestados por los titulares de los inmuebles.

Pues bien, de la información facilitada parece deducirse que la sociedad mercantil intermedia en nombre y por cuenta de los propietarios, por lo que el servicio de arrendamiento sería prestado directamente por los propietarios de los inmuebles a los arrendatarios, mientras que la consultante prestaría un servicio de intermediación.

A continuación, y respecto del lugar de realización de dichos servicios de intermediación, considera la DGT que la intermediación en el arrendamiento de bienes inmuebles, ya sea que el mediador actúe en nombre y por cuenta propia, prestando, por tanto, un servicio de arrendamiento, o bien actúe en nombre y por cuenta del destinatario del servicio, tiene la consideración, a efectos del IVA, de un servicio relacionado con bienes inmuebles, con la excepción de los servicios de mediación en aquellos servicios de alojamiento hotelero o equivalentes en el que el intermediario actúe en nombre y por cuenta del cliente que no tendrán la consideración de servicios relacionados con bienes inmuebles tal y como señala el artículo 31 bis, apartado 3, letra b) del Reglamento nº 282/2011.

A estos efectos, debe asimilarse a servicios de alojamiento hotelero o equivalentes el arrendamiento de viviendas cuando se presten por el arrendador, empresario o profesional, los servicios complementarios propios de la industria hotelera, tal y como se definen en esa contestación.

Por lo tanto, teniendo en cuenta que, en el caso objeto de consulta, parece deducirse que la sociedad mercantil intermediará en nombre y por cuenta de los propietarios de los inmuebles, que estos van a prestar un servicio de mero arrendamiento, sin incluir servicios propios de la industria hotelera, y que los inmuebles radican en el territorio de aplicación del Impuesto, dichos servicios de intermediación se entenderán realizados en dicho territorio y, por tanto, estarán sujetos al Impuesto debiendo tributar al tipo general del 21 por ciento.

Por último, y respecto de la condición de sujeto pasivo, la DGT recuerda la nueva redacción dada al artículo 84,uno,2º, a), e') de la LIVA, vigente desde el 1 de enero de 2023, por la cual se excluye de la aplicación de la regla de inversión del sujeto pasivo a las prestaciones de servicios de intermediación en el arrendamiento de inmuebles efectuados por un empresario o profesional, siempre que éste no estuviera establecido en el territorio de aplicación del Impuesto (TIVA-ES).

8. Dirección General de Tributos. Contestación nº V3294-23, de 26 de diciembre de 2023.

Base imponible — Recuperación IVA impagados — Créditos definitivamente incobrables — Declaración de fallido a los clientes deudores, cesando definitivamente el empresario o profesional de las acciones de cobro — Modificación a la baja de la base imponible del IVA — Artículo 80.Dos LIVA.

Sociedades suministradoras de energía eléctrica y gas, tanto a particulares como a empresarios y profesionales que, ante el impago de sus clientes, inician un proceso de reclamación de deuda que incluye actuaciones de información, así como un proceso adicional de recuperación de deuda mediante empresas colaboradoras externas especializadas en acciones de recobro amistoso y judicial. Las deudas que no han sido cobradas en fase amistosa pasan a ser reclamadas judicialmente o son declaradas fallidas.

Cuando los contratos lo permiten, según las restricciones legales, ante el impago de los mismos son suspendidos, interrumpidos o resueltos y tras gestionar activamente el cobro son declarados fallidos y se cesa definitivamente en las acciones de cobro incluyendo una comunicación sobre el cese definitivo en las acciones de cobro y la declaración de fallido a los clientes en la última dirección conocida.

El artículo 80.Dos de la LIVA dispone lo siguiente:

"Cuando por resolución firme, judicial o administrativa o con arreglo a Derecho o a los usos de comercio queden sin efecto total o parcialmente las operaciones gravadas o se altere el precio después del momento en que la operación se haya efectuado, la base imponible se modificará en la cuantía correspondiente".

Pues bien, si como consecuencia del impago, éste adquiere carácter definitivo, de tal manera que se extingue una parte del crédito, considera la DGT que el reclamante podrá en ese momento proceder a modificar la base imponible conforme al artículo 80.Dos de la LIVA en la parte que corresponda.

De esta forma, cuando el cliente de un suministro de energía no realiza el pago de la contraprestación del suministro, habiéndose devengado las cuotas del Impuesto correspondiente a dicho suministro y produciéndose, por dicho motivo, el impago definitivo y la extinción de la deuda, las sociedades suministradoras podrán proceder a modificar la base imponible conforme al artículo 80.Dos de la LIVA en la parte que corresponda.

Continúa señalando la DGT que, de acuerdo con lo previsto en el artículo 89.Uno de la LIVA, la rectificación de las referidas cuotas del Impuesto como consecuencia de la extinción definitiva de los créditos impagados deberá producirse en un plazo máximo de cuatro años desde el momento en el que se produjo dicha circunstancia.

En este sentido, es importante destacar que la DGT considera que ese momento se produciría con la notificación al deudor de que la deuda queda extinguida como consecuencia del cese definitivo de las acciones de cobro.

Por último, teniendo en cuenta que el ingreso de las cuotas devengadas del Impuesto, correspondientes a los suministros de energía originarios, no se habría producido de manera indebida sino conforme a derecho y a las circunstancias concurrentes en el momento del pago de dichas cuotas, la rectificación sólo se podrá realizar por el procedimiento establecido en la letra b) del apartado cinco del artículo 89 de la Ley del Impuesto (regularización en la autoliquidación del IVA correspondiente).

9. Dirección General de Tributos. Contestación nº V3296-23, de 26 de diciembre de 2023.

Tipo de gravamen reducido — Servicio de acceso a discoteca — Actuación de disc-jockey — Posibilidad de solicitar la devolución de ingresos indebidos.

En esta contestación vinculante a consulta, la DGT ha venido a considerar que el servicio de acceso a una discoteca, en la que actúa de manera diaria un disc-jockey, cobrando para ello el empresario un precio por la entrada a la misma, tiene la consideración de espectáculo cultural en vivo, por lo que dicho servicio de acceso a discotecas, cuando se ofrezca dicha actuación, estará gravado al tipo impositivo reducido del 10 por ciento, de acuerdo con lo previsto en el artículo 91.uno.2, 6º, de la LIVA.

Más interesante aún es la contestación ofrecida por ese Centro directivo a la pregunta de si, en el caso de que se hubiese repercutido de manera indebida el tipo impositivo general del Impuesto del 21 por ciento, el empresario pudiera percibir directamente la devolución de los ingresos indebidamente efectuados en caso de iniciar un procedimiento de rectificación de autoliquidación conforme al artículo 120.3 de la Ley General Tributaria.

En este sentido, la DGT entiende que, si el empresario desconociese la identidad de los destinatarios del servicio de acceso a discoteca en el que ha repercutido en exceso el IVA, porque no fue exigible consignar su identidad al documentar la operación, no le sería posible obtener la devolución de los ingresos indebidamente efectuados.

Tampoco sería posible, a su juicio, efectuar la rectificación de la cuotas del IVA inicialmente repercutidas sobre la base de lo previsto en el artículo 89, apartado uno de la LIVA, ni tampoco en el artículo 89, apartado cinco, letra b), de la LIVA, sobre regularización de la situación tributaria a través de las declaraciones-liquidaciones, dado que no es posible la rectificación de facturas emitidas donde el destinatario no está identificado, al no ser posible el reintegro de las cuotas repercutidas en exceso.

10. Dirección General de Tributos. Contestación nº V3299-23, de 26 de diciembre de 2023.

Base imponible — Modificación a la baja de la base imponible — Entrega de inmueble con condición resolutoria para el caso de impago de los vencimientos — Ejercicio de la condición resolutoria mediante acta notarial de resolución con oposición del comprador.

Una entidad mercantil, dedicada a la promoción y a la gestión de activos inmobiliarios transmitió a otra entidad mercantil una parcela acordando el pago del precio mediante un calendario de pagos y estableciendo una condición resolutoria para el caso de impago de cualquiera de los vencimientos. En dicha entrega se repercutió el IVA.

Posteriormente, la entidad compradora no atendió al pago aplazado, de manera que la entidad mercantil le requirió notarialmente para el pago en el plazo de veinte días. Transcurrido dicho plazo sin que la entidad compradora efectuase el pago, la entidad mercantil vendedora ejercitó la condición resolutoria mediante otorgamiento de Acta Notarial de Resolución, que fue notificada a la adquirente.

No obstante, la entidad compradora se opuso al Acta Notarial de Resolución y la inscripción registral de la misma fue denegada por el registrador correspondiente por dos defectos subsanables. Esta calificación negativa fue objeto de diversos recursos por la entidad mercantil vendedora sin que hayan sido estimados y se encuentra pendiente de resolución un recurso de casación, de manera que el dominio de la parcela no ha vuelto a la entidad consultante.

De acuerdo con estos hechos se consulta sobre la posibilidad de modificar a la baja la base imponible del Impuesto, al amparo del art. 80.Dos de la LIVA. Este precepto dispone lo siguiente: "*Cuando por resolución firme, judicial o administrativa o con arreglo a Derecho o a los usos de comercio queden sin efecto total o parcialmente las operaciones gravadas o se altere el precio después del momento en que la operación se haya efectuado, la base imponible se modificará en la cuantía correspondiente*.".

Señala la DGT que en aquellos supuestos en los que el comprador formule su oposición al ejercicio unilateral de la condición resolutoria por parte del vendedor, como sucede en el supuesto objeto de consulta, será este último el que deba acreditar en el correspondiente proceso judicial los presupuestos de la resolución.

Ahora bien, cabe entender que esta última circunstancia no se llega a producir si los distintos recursos que ha presentado la entidad mercantil vendedora han sido desestimados por los distintos órganos judiciales, encontrándose únicamente pendiente de resolución un recurso de casación.

Es por ello por lo que, a juicio de la DGT, no cabe entender que, tal y como exige para la modificación de la base imponible del Impuesto el artículo 80.Dos de la LIVA, la operación gravada haya quedado sin efecto con arreglo a Derecho o a los usos de comercio ni por resolución firme, judicial o administrativa.

Por lo tanto, no procedería en estos momentos la modificación de la base imponible del Impuesto que gravó la entrega de la parcela, sin perjuicio de que, en su caso, resulte procedente en el futuro si la operación quedase sin efecto mediante resolución judicial firme.

11. Dirección General de Tributos. Contestación nº V3342-23, de 29 de diciembre de 2023.

Repercusión del Impuesto — Condición de destinatario de la operación — Servicios prestados a empleados de una empresa (consumidores finales) que son abonados parcialmente al proveedor por esta última — Derecho a la deducción de las cuotas del IVA soportadas por la empresa.

En esta contestación vinculante, la DGT responde en realidad a dos cuestiones sobre la base de los siguientes hechos:

Una entidad mercantil, que tiene por actividad el comercio de electrodomésticos, ha contratado a un proveedor de servicios de catering para prestarle a sus empleados el servicio de cantina comedor. Este servicio es prestado por dicho proveedor directamente en nombre propio a los empleados que voluntariamente decidan hacer uso del mismo. La entidad mercantil (empleador) financia una parte del precio de estos menús a sus trabajadores de manera que la misma satisface dicho importe a la entidad proveedora y ésta le expide una factura mensual a la misma por el importe financiado, repercutiéndole la cuota del Impuesto sobre el Valor Añadido sobre dicho importe.

La primera cuestión que resuelve la DGT es la correcta repercusión o no del Impuesto que ha realizado el proveedor a la entidad mercantil. Argumenta ese Centro directivo que el destinatario de los servicios de comedor que va a prestar el proveedor será cada uno de los empleados, con independencia de que el pago de cada menú lo realice parcialmente un tercero (la entidad mercantil consultante).

Ahora bien, a raíz del criterio mantenido por el TEAC, en su resolución de 21 de febrero de 2023 (nº 0221/2022), considera la DGT que la entidad prestadora del servicio de catering, cuya contraprestación es satisfecha en parte directamente por la entidad mercantil, deberá repercutir a esta última, mediante factura, la cuota del IVA correspondiente al importe que ésta le satisface por los menús de sus trabajadores, consumidores finales, en concepto de pago realizado por un tercero.

En segundo lugar, la DGT responde sobre la posibilidad de que la entidad mercantil deduzca las cuotas del IVA soportadas en las facturas que expida el proveedor. Posibilidad que es rechazada, al considerar que la entidad mercantil no es la destinataria de los servicios de catering objeto de consulta lo que determina que no podrá deducir el IVA correspondiente por los mismos; la DGT señala además que, por estos pagos que realiza a favor de sus empleados, estaría actuando, al igual que estos, como un consumidor final, sin que en ningún caso pueda deducir cuota alguna del Impuesto soportado como consecuencia de aquellos servicios.

III. Country Summaries

Featured articles

Australia

GST: Commissioner's appeal dismissed in Hannover Life case

On 4 March 2024, the Full Court of the Federal Court of Australia unanimously dismissed the Commissioner of Taxation's ("the Commissioner") appeal against the judgment of Stewart J (primary judgment) in the Hannover Life case.

The primary judgment and subsequent orders were published on 22 June 2023 and 7 July 2023, respectively.

The Commissioner's appeal to the Full Court concerned findings of Stewart J in relation to the allocation of "overhead" costs and the design of apportionment methodologies relevant to the recovery of goods and services tax (GST) input tax credits.

The primary judgment addressed foundational issues of GST recovery and apportionment. The principles considered are particularly relevant to taxpayers in the financial services and property sectors, and to taxpayers more generally that make both input taxed and non-input taxed supplies. For these taxpayers, the Hannover Life case serves to highlight the importance of:

- Reviewing their cost allocation approaches to ensure they are appropriate for GST purposes;
- Reviewing the appropriateness of their apportionment methodology(ies) design (rather than simply refreshing existing methodologies with current year data) to ensure they are fit for purpose and documented appropriately; and
- For insurers in particular, having regard to all their activities, including investment activities, in determining their apportionment methodology(ies).

Key takeaways

The Hannover Life case provides several important takeaways for taxpayers in the financial services and insurance sector.

Cost allocation

- The Commissioner is increasingly scrutinizing cost allocations for GST purposes as a gateway to GST recovery and a prerequisite step to apportionment. Determining whether an acquisition "relates to making supplies that would be input taxed" requires consideration of contractual frameworks and not just commercial context which can be misleading for GST purposes. Taxpayers also need to ensure that identified relationships arising "by and through" initial input taxed supplies are reviewed and considered, consistent with the principles outlined in the Rio Tinto case (i.e., Rio Tinto Services Ltd v Federal Commissioner of Taxation [2015] FCAFC 117; and Rio Tinto Services Ltd v Federal Commissioner of Taxation [2015] FCA 94).

- The Commissioner was unsuccessful in the Hannover Life case in arguing that costs should only be allocated to supplies if they relate to making those supplies. Taxpayers should clearly document the basis of any identified relationships between acquisitions and supplies, including how acquisitions relate to making relevant supplies.
- Cost allocation methods should be reviewed to ensure they consider all supplies being made by the enterprise. Where direct allocation of acquisitions to a single supply is not possible, it may be necessary to establish multiple "overhead" cost pools where overhead costs may relate to supplies differently. Further, a single overhead cost pool may not be appropriate.

Reliance on statutory (or similar non-tax) cost allocation methodologies

- Cost allocation methodologies used for accounting, statutory, or regulatory purposes can provide a useful starting point to determine GST recovery but may require modification to address GST-specific considerations. For example, supplies made for no consideration or financial acquisition-supplies may not be captured by revenue or capital adequacy-based cost allocation approaches used for statutory or accounting purposes.
- Departures from business-accepted cost allocation methodologies can give rise to additional considerations that need to be managed, such as tax coding/mapping in systems and ownership of additional GST costs/recoveries as part of internal reporting.

Apportionment methodologies

- Apportionment methodologies must reflect consumption of relevant acquisitions/cost pools and incorporate all relevant supplies for GST purposes, not just transactions driving profitability. The design of a methodology should therefore carefully consider and document the existence of intermediate transactions that are relevant to overall commercial outcomes.
- Taxpayers should carefully consider and seek specialist guidance before amending apportionment methodologies in response to the Hannover Life case.
- Commonly used apportionment drivers such as revenue or time should be reviewed to ensure they are appropriate to the costs and operations of the relevant area. When using proxies such as revenue, Deloitte Australia suggests ensuring that all supplies made (in a GST context) are being considered. Any updates or changes to the cost allocation and apportionment processes should be sufficiently documented in terms of the connection to supplies of the enterprise.
- The Full Court decision presents significant opportunities for taxpayers with cross-border arrangements to revisit their cost allocation and apportionment methodologies, as the risk allocation concept (between offshore and onshore entities) is also applied more broadly in commercial arrangements (beyond life insurance).

Summary of background facts and GST issues

As outlined in the primary judgment, Hannover Life Re of Australasia Ltd (Hannover) is a GST-registered life insurance company regulated by the Australian Prudential Regulation Authority. Its main revenue generating activities comprise:

- Underwriting life insurance policies to resident policyholders in Australia, which were distributed by Greenstone Financial Services Pty Ltd (Greenstone);

- Providing reinsurance for life insurance policies to other Australian life insurers; and
- Providing reinsurance to its New Zealand branch for life insurance policies.

For capital adequacy reasons, 75% of all risk insured/reinsured by Hannover, together with corresponding net premiums received in relation to the risk, was transferred to Hannover Rück SE (Hannover Rück), a related, non-resident entity, under a separate agreement with Hannover. Without the reinsurance arrangement with Hannover Rück, Hannover would not have been able to write relevant insurance or reinsurance policies. However, the respective insureds or primary insurers had no contractual rights against Hannover Rück as their primary contracts were solely with Hannover.

For GST purposes:

- The underwriting of life insurance policies and provision of life risk reinsurance to Australian policyholders/insurers is an input taxed supply, which generally prevents the recovery of GST incurred on associated expenses;
- The provision of life risk reinsurance to the New Zealand branch was a GST-free supply. The reinsurance arrangement with Hannover Rück was agreed between the parties to be a GST-free "acquisition-supply" by Hannover—i.e., the **acquisition** of a financial supply is also treated as a **supply** for GST purposes in accordance with division 40 of the GST Regulations. GST-registered entities making GST-free supplies (including acquisition-supplies) are entitled to recover in full any GST incurred on associated expenses; and
- An entity must first attempt to allocate acquisitions between the input taxed and non-input taxed supplies it makes. Only if an acquisition does not wholly relate to a particular input taxed supply or a non-input taxed supply does the entity then need to determine the appropriate GST recovery with reference to a fair and reasonable apportionment methodology.

The key issues addressed in the primary judgment were:

- Whether the cost allocation approaches used by Hannover were appropriate in determining whether GST could be recovered in respect of the following expenses:
  - Commissions paid to Greenstone; and
  - Overhead expenses relating to Hannover’s overall operations.
- Where Hannover’s acquisitions related to making both input taxed and non-input taxed supplies, whether the apportionment methodology used by Hannover to determine GST recovery was fair and reasonable.

In his appeal, the Commissioner submitted that Hannover was not entitled to recover any GST in respect of its overhead expenses relating to the overall operations. The two issues as summarized by the Full Federal Court were:

- Whether the overhead acquisitions related solely to making input taxed supplies (as any relationship to a non-input taxed supply was "by and through" an input taxed supply), such that Hannover was not entitled to the associated input tax credits; and
- If the overhead acquisitions did not relate only to making input taxed supplies, the extent to which the overhead acquisitions were for a creditable purpose.

Summary of submissions and outcomes

Distribution arrangement

The taxpayer submitted that the distribution services acquired from Greenstone had a "real and substantial relationship" to both the provision of life insurance policies and the corresponding reinsurance arrangement with Hannover Rück, such that 75% of the GST incurred should be recoverable as relating to the Hannover Rück reinsurance acquisition-supply. As justification for this position, Hannover observed that without the reinsurance support it would have had insufficient capital, and therefore would not have been able to comply with its prudential requirements, to issue relevant risk policies. As such, the initial provision of life insurance and the subsequent reinsurance arrangement were closely linked.

This was not accepted in the primary judgment, where Stewart J agreed with the Commissioner's reliance on principles established by the Rio Tinto case. Namely, the "necessity" of an acquisition to the making of a supply is not the test in determining creditable purpose. Further, the connection between an acquisition and an input taxed supply is "not reduced" by a relationship between the acquisition and a subsequent non-input taxed supply, where the non-input taxed supply is made by and through the input taxed supply.

Stewart J concluded that there was no connection between the acquisition of the distribution services and supplies made as part of the reinsurance arrangement, as the reinsurance arrangement was made by and through the input taxed supplies of issuing relevant life risk policies. Emphasis was placed on the contractual relationships between Greenstone, Hannover, and Hannover Rück to determine the existence and cascading of any relationship between relevant acquisitions and supplies. On this basis, Stewart J ruled that the Greenstone services related solely to Hannover's input taxed supplies of life insurance policies and therefore were wholly not made for a creditable purpose. This finding was not appealed to the Full Court.

Overheads—primary judgment

While the Commissioner agreed with Hannover's allocation of overhead costs to both its supplies of life insurance and reinsurance, he disagreed that the overheads also related to Hannover's reinsurance arrangement with Hannover Rück. Specifically, the Commissioner considered the costs did not relate to making the relevant acquisition-supplies and if they did, the basis of cost allocation was not appropriate.

As part of his initial submission, the Commissioner submitted that the overheads should be assessed as two distinct categories:

- Acquisitions that allow employees to perform their work (e.g., rent, information technology, office supplies, telephone, and office expenses), and
- Other acquisitions relevant to operations that did not assist the employees perform their work (e.g., audit, consulting, and advertising).

For the first category, the Commissioner submitted that work done by an employee in relation to the reinsurance arrangement was by and through the life insurance and reinsurance policies issued by Hannover and did not relate to activities undertaken by employees in making supplies as part of the reinsurance arrangement. Accordingly, the reinsurance arrangement with Hannover Rück should not be included in any relevant apportionment methodology.

However, this was rejected by Stewart J, who determined that the overheads did not have any immediacy of connection to initial life insurance or reinsurance policies issued, and so by their overhead nature should indifferently relate to all relevant supplies as contended by Hannover.

Where the Commissioner sought to argue there was no positive relationship between the acquisitions and the GST-free reinsurance arrangement to warrant its inclusion in a cost allocation methodology, Stewart J contended there was no sufficiency of nexus to identified input taxed supplies to limit allocation to all supplies made.

The Commissioner also submitted that if a relationship were established between the first category of acquisitions and the reinsurance arrangement with Hannover Rück, the apportionment methodology was not appropriate as there was insufficient evidence to identify how much work was done by the employees in relation to the reinsurance arrangement.

This argument was rejected by Stewart J notwithstanding the scarcity of evidence, but he observed that the use of undifferentiated time spent may not be an appropriate basis of apportionment for GST purposes, despite being an accepted method for statutory allocation. Stewart J commented:

> "…the statutory expense allocation is done using employee hours as the relevant proxy... that does not make it the necessary proxy for the creditable acquisition allocation when the supplies with Hannover Rück are concerned. The key difference between the statutory expense allocation exercise and the exercise of apportioning partly creditable acquisitions is that the former takes into account only the revenue earning output of the enterprise as expressed in its statutory funds... [the] latter exercise – apportioning partly creditable acquisitions – must take into account all supplies, which include the acquisition supplies from/to Hannover Rück which do not find expression in a statutory fund and which are undertaken at a net expense to the enterprise."

The Commissioner also submitted that the second category of overheads acquisitions did not have a relationship with the reinsurance arrangement other than by and through the life risk and reinsurance policies issued (as contended for the first category). This was rejected by Stewart J based on the evidence provided. However, Stewart J expressed surprise that this characterization of advertising was not challenged under cross-examination by the Commissioner, observing that the advertising expenses were unlikely to be incurred in relation to the reinsurance arrangement.

In summary, Stewart J agreed that Hannover was entitled to allocate a portion of its overhead costs to the reinsurance arrangement with Hannover Rück. Although agreed facts regarding overhead costs related to policies written by Hannover, the decision lends support to the approach that where overhead costs are accepted as overheads for business and commercial purposes, it is reasonable to conclude that overhead acquisitions require apportionment in respect of the relevant department or business.

Overheads—on appeal

On appeal, the Commissioner sought to extend Stewart J's findings regarding the distribution arrangement and submitted that relevant overhead acquisitions did not relate to GST-free supplies of reinsurance as those supplies were made "by and through" the underlying input taxed supplies of life insurance, as supported by the contractual arrangements for reinsurance between Hannover and Hannover Rück. If this argument were successful, Hannover would not have been entitled to recover GST on overhead acquisitions on the basis they related to its GST-free supplies of reinsurance.

This proposition was dismissed by the Full Court on the basis that it is neither mandated nor authorized by the statutory language, and the primary judge's factual findings about the nature of overhead acquisitions were not found to be incorrect.

The Full Court held that the Commissioner's reliance on the by and through analysis distracts from the legislative requirements and that a factual enquiry of any relationship between an acquisition and supply must be made. That is, it does not matter whether a supply is revenue-generating or whether it is only made because of another input taxed supply. If a factual enquiry found that relevant acquisitions related to **both** the input taxed supply of life insurance and the GST-free supply of reinsurance, it was not necessary under the legislation to consider whether the GST-free supply only arose by and through the input taxed supply.

This approach was held to be consistent with the Rio Tinto case, which concluded that GST recovery was only available to the extent acquisitions had a real and substantial relationship to non-input taxed supplies (i.e., GST was not recoverable for acquisitions that only related to the provision of input taxed residential accommodation, even if they served a broader purpose).

Since the evidence indicated that certain overhead expenses (administrative, legal, and financial resources) were applied to reinsurance arrangements, the Full Court held that the Commissioner did not identify any error in Stewart J's finding that the acquisitions related to both input taxed and GST-free supplies. Accordingly, the appeal on this issue was dismissed.

Apportionment—primary judgment

Hannover's apportionment methodology, a combination of statutory expense allocation and premiums paid/received, was challenged on the following three bases submitted by the Commissioner as part of the proceedings before Stewart J:

- The methodology did not appropriately reflect the totality of input taxed and non-input taxed supplies made. However, Stewart J accepted that the methodology proposed by Hannover was reflective of the business risk;
- The methodology did not consider "investment-related input taxed supplies" made by Hannover of net premiums retained. This was accepted by Hannover, and the parties were directed to reach agreement on a revised methodology, which they did as confirmed by the orders Stewart J made on 7 July 2023; and
- Prior year, rather than current year, data should have been used given current year data would not have been available to Hannover on a real-time basis.

To illustrate his primary argument (as well as in his appeal as set out below), the Commissioner observed that if 100% of the risk insured by Hannover were reinsured by Hannover Rück, Hannover's methodology would not produce a fair and reasonable outcome, as Hannover would be entitled to recover GST in full on related overhead costs. Stewart J disagreed, finding that the outcome would be fair and reasonable as it would align with the enterprise's revenue outcomes if 100% of the risk was reinsured by a nonresident counterparty.

It is arguable that this approach is inconsistent with the preceding analysis relating to the Greenstone commissions where Stewart J observed that it is necessary to identify the contractual framework in which supplies were made and that all relevant supplies should be considered. However, the methodology

accepted has the effect of disregarding the primary input taxed supply made when taken to an extreme. Stewart J's findings are also inconsistent with common industry practice where a "value of supplies" approach had been adopted, which determined input taxed supplies as a proportion of all supplies made.

The Commissioner also challenged Hannover's use of current year data when performing calculations for historical periods. The Commissioner contended that a relevant year's data would only become available the following year (assuming an annual refresh), and so it would not be appropriate to use current year data when undertaking a historical exercise. Stewart J disagreed with this, noting it was intended to be a proxy and if the data were available then it could be used. In Deloitte Australia's view, his Honor's conclusion is reasonable and should not come as a surprise to taxpayers that have undertaken historical apportionment adjustments.

Apportionment—on appeal

In his appeal, the Commissioner again sought to demonstrate that even though Hannover cedes a portion of its risk to Hannover Rück, the proposed apportionment methodology based on risk allocation did not adequately reflect the input taxed life insurance policies issued and therefore overstated Hannover's entitlement to input tax credits.

The Commissioner again relied on the example of a notional 100% reinsurance arrangement to extrapolate the findings of the primary judge as a means of highlighting his concerns. However, Stewart J had rejected this line of argument and limited the appeal to the particular facts before the court (i.e., Hannover's Global Underwriting Guidelines).

On appeal, the Full Court held that the primary judgment was not proven to be factually incorrect and that Hannover's position that its apportionment methodology was fair and reasonable should be upheld, and that the Commissioner did not show that the primary Judge erred in relation to his evaluation of Hannover's apportionment methodology.

Deloitte Australia observations

The Commissioner has until 2 April 2024 if he wishes to apply for special leave from the High Court to appeal against the Full Court's decision.

In Deloitte Australia's view, the Full Court's affirmation of Stewart J's factual findings significantly reduces the likelihood of an appeal. Accordingly, it is anticipated that for GST administration purposes the Commissioner will seek to confine the application of the findings in the Hannover Life case to a limited fact pattern.

Nonetheless, Deloitte Australia considers that the judicial findings present significant opportunities for taxpayers with cross-border arrangements to revisit their cost allocation and apportionment methodologies, because the risk allocation concept examined in the Hannover Life case is applied in a broader range of commercial models beyond just life insurance.

The findings also challenge the Commissioner's authority to determine that a taxpayer's methodology is not fair and reasonable where the approach can be supported by specific circumstances. The findings arguably challenge the Commissioner's published guidance (for example, practical compliance guidelines) on acceptable approaches for methodologies in relation to specific commercial arrangements and taxpayers should review their arrangements in light of them.

Further, the decision indicates that even if the Commissioner disagrees with the outcome of a taxpayer's apportionment methodology and proposes an alternative fair and reasonable methodology, the taxpayer's position might still be fair and reasonable and, therefore, defendable.

Japan

Changes to the taxation of online platforms proposed

On 1 April 2025, Japan intends to introduce changes to the taxation of online platforms, as announced by the Ministry of Finance in the 2024 tax reform proposals. The draft law was submitted to parliament on 2 February 2024.

As the digital platform economy has boomed in recent years, online platforms have increasingly been acting as intermediaries between foreign suppliers of digital services and end consumers. In Japan, the growth of the digital market is so strong that in-app sales are expected to surpass JPY 5 trillion in 2024. This sales channel is the preferred method for foreign digital services providers entering the Japanese consumer market for the first time.

Under the current Japanese consumption tax (JCT) rules, the underlying foreign suppliers of digital services are generally obliged to collect and remit any JCT on their transactions to the Japanese tax authority (the National Tax Agency (NTA)). However, many underlying foreign suppliers are unaware of their obligations regarding JCT, and even when they recognize the requirements, it can be difficult in practice for them to become JCT taxpayers and to comply with their JCT responsibilities. The result is a perceived inequality in the application of JCT, which the proposed new platform taxation rules aim to redress.

Platform taxation

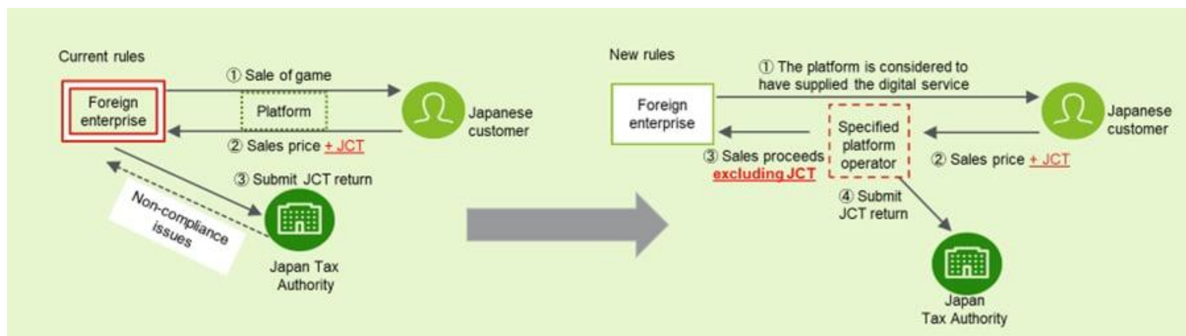
Overview

Under the new rules, the provision of business-to-consumer (B2C) digital services by a foreign business via a digital platform, for which consideration is received through a platform operator designated as such by the commissioner of the NTA (a "specified platform operator") would be considered to be the provision of services by that specified platform operator.

Other jurisdictions that have introduced platform taxation have adopted the "deemed supplier" model, under which the platform operator is deemed to have purchased the service from the underlying service provider and is required to collect and remit indirect tax on the deemed onward supply to a final customer. This approach would also be adopted in Japan; however, the draft law does not mention how the platform operators must treat the deemed input JCT on the purchase side. It is likely that they would not be required to recognize deemed purchases of digital services from the underlying service provider.

Specified platform operators would only be required to charge and remit JCT on B2C digital services provided by foreign suppliers via the platform. Business-to-business (B2B) digital services provided by a foreign supplier, even if made via a specified platform operator, would continue to be treated as nontaxable, and accounted for under the reverse charge mechanism by the recipient.

The following diagram illustrates the current and proposed new rules:



Designation as a specified platform operator

If the total sales by all underlying foreign service providers through an online platform ("facilitated sales") exceed JPY 5 billion in the last tax period ending on or before 31 July 2024, the platform operator would have to submit a notification to the commissioner of the NTA by 30 September 2024. The platform would then be designated as a specified platform operator by 31 December 2024, with an effective date of 1 April 2025, which is the date on which a specified platform operator must start collecting and remitting JCT on facilitated sales. If a platform operator's tax period is shorter than 12 months, the facilitated sales amount must be pro-rated and the 12-month equivalent amount calculated. For subsequent tax periods, platform operators would have to assess whether their facilitated sales exceed JPY 5 billion in the tax period and notify the NTA before the filing deadline of their relevant JCT return, which is usually two months after the end of the tax period. The designation would take effect six months after the notification submission deadline.

Obligations imposed on specified platform operators

A list of all designated specified platform operators would be published by the NTA. Specified platform operators would be required to notify foreign digital service suppliers of their status.

Only those facilitated sales on which the specified platform operator collects the consideration from the customer are in scope for the new rules, regardless of how payment is actually made (i.e., credit card, direct debit, etc.).

Once a specified platform operator has been designated as such, it would remain so unless its facilitated sales fall below JPY 5 billion for three consecutive tax periods.

Key points

- Platform operators should assess their status based on their facilitated sales amounts in the last tax period ending on or before 31 July 2024, to determine whether they are likely to be designated as a specified platform operator. If the threshold is exceeded, a notification should be submitted to the NTA by 30 September 2024.
- If the threshold is exceeded in a subsequent tax period, the platform operator would be required to submit the notification by the submission deadline for the JCT return for the tax period (i.e., two months after the end of the tax period).
- Generally, the designation would take effect six months after submission of the notification; however, if the designation is made by 31 December 2024, it would be effective as from 1 April 2025.

- Platform operators would be obliged to remit JCT on their own sales as well as facilitated sales. They also would be required to disclose the underlying foreign supplier's information in the JCT return.
- To prevent platform operators from restructuring to avoid being designated as a specified platform operator, special measures for mergers and demergers are proposed.

New Zealand

It's in the cards: Offshore gambling duty to apply as from 1 July 2024

On 14 March 2024, the New Zealand parliament introduced Amendment Paper No. 20 to the Taxation (Annual Rates for 2023-24, Multinational Tax, and Remedial Matters) Bill. Among other proposals, the paper substantiates a proposal of the National party's election campaign to tax offshore online gambling by introducing an offshore gambling duty with effect as from 1 July 2024.

National, the largest player in the new coalition government, described the new duty in its tax plan as "closing a tax loophole" and "ensuring offshore operators delivering online gambling to New Zealanders, pay tax." The loophole likely refers to offshore operators being only required to pay GST in New Zealand, while operators located in New Zealand are also required to pay company tax, casino duties, gaming machine duty, problem gambling levies, and employment taxes.

While National's estimates claimed the tax would raise NZD 716 million in revenue over four years, the regulatory impact statement prepared by Inland Revenue predicted it would only bring in NZD 145 million.

How would it work?

The offshore gambling duty has been designed to align with the GST rules for the supply of remote services to allow existing systems to be used. Remote gambling operators are currently required to register and file GST returns in New Zealand if they provide more than NZD 60,000 of gambling services to New Zealand residents in a 12-month period.

The duty would apply for services provided on or after 1 July 2024, at a rate of 12% of offshore gambling profits. Profits are calculated after subtracting any "offshore betting amounts," which are already subject to consumption charges of 10% (being betting and sports and racing by New Zealand residents conducted through offshore operators). Amounts paid back to New Zealand residents (i.e., prize money) are also subtracted. This specific definition of profits is included in the draft legislation. If a negative amount of revenue is recorded, then the operator would be able to carry the loss forward to the next quarter and offset it against future profits.

Operators must determine whether the user is physically located in New Zealand by using at least two pieces of evidence (as also required by the current GST remote services rules), which may include any commercially relevant information such as billing address, IP address, bank details, and mobile country code.

Reporting information must be filed with Inland Revenue for each quarter, by the 28th day of the month following the end of the quarter (and by 7 May for the quarter ending 31 March). Payment must also be made by the same date. Therefore the first filing and payment date would be 28 October 2024, for the July—September quarter.

The existing disputes and penalties process outlined in the Tax Administration Act 1994 would also apply, as would the "use of money" interest (interest charged by Inland Revenue for late payments to incentivize paying tax on time) on unpaid amounts.

How do New Zealand's rules compare to those in other countries?

Revenue Minister, Hon. Simon Watts, noted that "New Zealand is one of only a handful of developed countries that does not regulate online casinos." This was supported by policy officials who warned New Zealand "is one of the last countries in the OECD with an unregulated online gambling market, which makes it a target for offshore operators."

In Australia, Canada, Singapore, and the US, offshore gambling is illegal. However, banning or blocking websites can be difficult to enforce, leading other countries, mainly in Europe, to introduce gaming duties. The rules proposed in New Zealand follow this model.

The 12% duty will bring the approximate amount of tax paid by offshore operators to 25%, once GST is factored in. GST amounts to around 13% (or 3/23rds) of gross betting revenue as GST on gambling is applied to the GST-inclusive amount. This brings New Zealand into the mid-range of other countries that have introduced similar regimes, with Denmark, Italy, the Netherlands, Spain, Sweden, and the UK all applying gaming duty rates on online gambling ranging between 20% and 29%.

What now?

While National publicized the proposal during the election campaign in October 2023, the proposals were introduced in the later legislative stages and therefore will not be subject to public consultation and select committee scrutiny.

However, policy officials relied on information from other government departments "who have insights about these stakeholders and information provided through previous consultation or public comment," including a public consultation by the Department of Internal Affairs, which regulates most gambling in New Zealand, in 2019.

The minister of revenue also confirmed that the cabinet "made an in-principle decision to regulate online casino gambling" to "support tax collection, minimise harm and provide consumer protections to New Zealanders." What this might look like is yet to be seen.

The bill legislating these changes must pass through the final parliamentary stages before 31 March 2024.

United Kingdom

Further consultation on carbon border adjustment mechanism launched

On 21 March 2024, HM Treasury and HM Revenue and Customs opened a new joint consultation on the design and administration of the future UK carbon border adjustment mechanism (CBAM). This follows on from the government's announcement of 18 December 2023 that it intends to introduce a UK CBAM,

to take effect from 1 January 2027, that would apply a charge on importers based on the emissions embodied in imports of certain carbon-intensive goods in seven sectors: aluminium; cement, ceramics, fertilizers, glass, hydrogen, and iron and steel.

The consultation sets out how the government proposes to structure the UK CBAM and includes questions on determining which goods are in scope, how CBAM liabilities will be calculated, how the applicable CBAM rate for each of the sectors will be determined, and how the rules will be administered. The consultation is open until 13 June 2024. The government is also inviting stakeholders interested in participating in roundtable discussions on the proposals and/or who would like to be added to its CBAM mailing list, to contact it atcbampolicyteam@hmrc.gov.uk.

Other news

OECD

IFCMA paper published on product-level carbon intensity metrics

An OECD Inclusive Forum on Carbon Mitigation Approaches (IFCMA) paper (a "scoping note") published on 9 February 2024 provides "a high-level overview of the main approaches to, and challenges faced when, calculating product-level carbon intensity metrics, including those applicable to collecting and verifying information across the supply chain." Product-level carbon intensity metrics are relevant for purposes of policy making and the provision of information, and may be used in determining the level of a tax or subsidy for a given product. A full report providing a more detailed analysis is expected to be published in the second half of 2024.

The IFCMA's work involves taking stock of different carbon mitigation approaches and estimating their effect on greenhouse gas emissions. The IFCMA brings together delegates representing the climate, tax, and structural economic policy communities from more than 55 IFCMA members.

Australia

Draft ruling: When are fuel tax and GST credits taken into account in an assessment?

On 21 February 2024, the Australian Taxation Office (ATO) published draft miscellaneous tax ruling, MT 2024/D1.

MT 2024/D1 sets out the ATO's "preliminary" view about the operation of the four-year time limit that applies to taxpayers claiming goods and services tax (GST) input tax credits and fuel tax credits (collectively, tax credits), as prescribed by section 93-5(1) of the GST law and section 47-5(1) of the fuel tax law (collectively, the limiting provisions).

The limiting provisions provide that a taxpayer's entitlement to a tax credit ceases (unless an exception applies) "... to the extent that the … tax credit has not been taken into account, in an assessment …" during the four-year entitlement period.

Key aspects of the draft ruling

According to the draft ruling, the limiting provisions operate as follows:

When is a tax credit taken into account in an assessment?

- A tax credit is taken into account in an assessment to the extent that the credit has formed part of the calculation of the amount that became the assessed amount for the relevant GST tax period or fuel tax return period ("tax period").

- There is a distinction between the calculation that produces the assessed amount and a taxpayer's preliminary considerations and computations which inform its decisions about what amounts to include in that calculation.
- A tax credit forms part of the calculation that produced the assessed amount to the extent that the amount of the credit forms part of the amount of total tax credits that is used in calculating the taxpayer's assessed amount:
  - For GST, the amount of an input tax credit that is included in the calculation of total input tax credits is the amount the taxpayer determined it was entitled to for the tax period, either as a fully creditable acquisition or a partly creditable acquisition; and
  - For fuel tax, the amount of a fuel tax credit that is included in the calculation of total fuel tax credits is the amount which the taxpayer determined it was entitled to for the tax period, before any reduction for the road user charge (RUC);
- If the amount of a tax credit that formed part of the calculation that produced the assessed amount is less than the amount of the taxpayer's entitlement under the GST law or fuel tax law, the tax credit is only taken into account to the extent of the amount actually included in the calculation—and the balance of the tax credit has not been taken into account in the assessment.
- Merely identifying or considering an acquisition or a tax credit without including any specific amount in the calculation that produced the assessed amount does not result in any amount forming part of the calculation that produced the assessed amount. In these circumstances such tax credits cannot be said to have been taken into account in the assessment.

Four-year entitlement period

- The four-year entitlement period is the period of four years starting after the day on which a taxpayer is required to give the ATO return for the tax period to which the tax credit would be attributable under the GST law or fuel tax law.
- The four-year entitlement period is only altered if, before it ends, the ATO grants a formal extension to the due date for the return for the tax period to which the tax credit would be attributable.
- Entitlement to a tax credit ceases immediately on the expiry of the four-year entitlement period, and subsequent actions cannot revive entitlement to the tax credit.

Impact of objections, requests for amendment, and ruling requests

- A taxpayer does not take a tax credit into account in an assessment merely by lodging an objection, requesting an amendment to an assessment, or applying for a private ruling—none of these actions form part of the calculation that produces the assessed amount.
- However, the limiting provisions do not apply to disentitle a taxpayer to a tax credit for a tax period to the extent that entitlement is specified in the grounds of a valid objection lodged within the four-year entitlement period. To the extent that the ATO's objection decision or any subsequent review or appeal process finds that the taxpayer was entitled to the tax credit and it is attributable to the period in dispute, the taxpayer's entitlement will not cease.

MT 2024/D1 includes seven examples illustrating the application of the limiting provisions, in accordance with the ATO view, in a variety of fuel tax and GST tax credit scenarios.

Other matters

The publication of MT 2024/D1 follows, and is informed by several Federal Court and Administrative Appeals Tribunal decisions in which the limiting provisions have been considered, including the Linfox case and the Coles Supermarkets case both decided in 2019.

MT 2024/D1 has been long awaited by taxpayers. An earlier draft ruling about the ATO's view on time limits applying to entitlements to claim tax credits, MT 2018/D1, was withdrawn in late 2019 to enable the ATO to consider the impact of the above decisions, with the ATO revising its inital view.

The ATO has invited stakeholder feedback on MT 2024/D1 by 22 March 2024.

Australia

Tariff removals to streamline compliance and reduce costs for business

On 11 March 2024, the Australian government announced plans to permanently abolish import duty on a wide range of goods from 1 July 2024.

The measure will involve replacing the 5% rate of duty with the "free" rate for "almost 500" tariff lines in the Australian customs tariff.

Reduced compliance burden for importers

The affected goods have been selected because they are mostly eligible for importation free of duty—either under Australia's free trade agreements (FTAs) or because tariff concession orders (TCOs) have been made for certain tariff lines—but with importing businesses currently bearing the compliance burden of proving or checking that they are not required to pay 5% duty on them.

Changing the tariff rate to free for the affected goods is expected to simplify compliance and reduce costs for importers. In particular, the measure will remove the need for importers/customs brokers to:

- Identify whether an imported item is eligible for duty free entry under one or more FTAs, verify that the goods meet the relevant rules of origin for the relevant tariff line under the applicable/selected FTA, and obtain or prepare the required origin documentation for the goods (i.e., a certificate of origin or declaration of origin);
- Identify whether a TCO has been made for goods of the same eight-digit tariff classification (i.e., tariff line), and if so, whether the imported goods fall precisely within the description set out in the TCO; or
- Determine whether to apply for a TCO in respect of the imported goods (if no current TCO exists), including verifying that the statutory requirement that there are no known Australian manufacturers of goods that are substitutable for the imported goods is met.

The government estimates that the measure will mean collective savings for businesses of more than AUD 30 million in compliance costs each year.

Minor cost of living relief

The government anticipates that the tariff reductions measure will also have a minor secondary benefit in the form of some limited cost of living relief for consumers, particularly in relation to a range of imported household items included in the measure, such as washing machines, fridge-freezers, dishwashers, toasters, electric blankets, certain clothing items, menstrual/sanitary products, and toothbrushes.

Goods covered by the measure

Half of the 96 chapters making up the Australian customs tariff include tariff lines that will be affected by the tariff abolition measure.

The chapters with 10 or more affected tariff lines are as follows:

Import tariff chapter	Number of tariff lines affected
Ch. 48: Paper and paperboard; articles of paper pulp, of paper or of paperboard	72
Ch. 84: Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	66
Ch. 52: Cotton	57
Ch. 44: Wood and articles of wood; wood charcoal	47
Ch. 85: Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	20
Ch. 95: Toys, games and sports requisites; parts and accessories thereof	16
Ch. 37: Photographic or cinematographic goods	14
Ch. 41: Raw hides and skins (other than furskins) and leather	13
Ch. 96: Miscellaneous manufactured articles	13
Ch. 60: Knitted or crocheted fabrics	12
Ch. 82: Tools, implements, cutlery, spoons and forks, of base metal; parts thereof of base metal	11
Ch. 70: Glass and glassware	10

Although the government has indicated that about 500 tariff lines will have their duty rate reduced to the "free" rate, the consultation materials published to date only list about 450 tariff lines in scope:

- A summary list of the 447 tariff lines covered by the proposed duty removal measure; and
- A more detailed list of 457 so-called ‘‘nuisance tariffs.”

The finalized list of tariff items will be provided in the 2024-25 Budget, which is scheduled for release on 14 May 2024.

Stakeholders are invited to provide feedback on the proposed measure by 1 April 2024.

Belgium

Agreement to reinstate 6% VAT rate on demolition—reconstruction of rental properties

On 20 March 2024, the Belgian minister of finance reached a political agreement within the government on a new measure to reinstate the reduced 6% VAT rate for the construction of rental housing. Parliamentary approval of the proposal is required, and once obtained, the intention is for the new measure to enter into force on the first day of the month after publication of the relevant legislation in the Belgian official gazette.

Background

As from 1 January 2024, the demolition and reconstruction scheme in 32 Belgian cities which allowed developers to apply the reduced 6% VAT rate when building private homes (e.g., single-family homes, apartments, student housing) for their own use or for rental, was abolished. The scheme did not contain any restriction on the maximum habitable area of the dwelling and applied both to private builders and to developers or institutional investors.

Given that the unanticipated abolition of this successful measure was contrary to the challenges of the real estate sector (such as the provision of affordable housing, compliance with the green deal, etc.) and the government had only provided a transitional one-year period for current projects, consultations were initiated with the minister of finance's cabinet, in close cooperation with a number of investors. The purpose of the consultations was to draw the minister's attention to the negative social impact of the removal of the scheme, and to look for alternatives.

On 20 March 2024, it was announced in a press release (Dutch | French) that the minister of finance had reached a political agreement within the government on a new measure to reinstate the reduced VAT rate for the construction of rental housing. The scheme, which is still pending approval by parliament, would have a broader application than the previous scheme, as it would be valid throughout the Belgian territory and not limited to the 32 cities. On the other hand, a new restriction requires the fulfilment of three social conditions, namely:

- The property must have a maximum habitable area of 200 square metres;
- The property must be the tenant's main residence, meaning that registration of the lease agreement is mandatory; and
- The landlord must lease the property for at least 15 years to one or more successive tenants as their main residence.

Observations

The proposed expansion to the scheme is in response to the real estate sector's concerns, and offers potential opportunities. Due to the abolition of the previous scheme, the sector was confronted with additional VAT costs that could not be recovered from tenants, as a result of which various projects were no longer financially feasible and the supply of new (energy-efficient), affordable, rental homes would have been expected to decrease. The new measure would make it possible to increase the supply of rental housing for tenants who do not have access to social housing and are currently unable to buy a home.

During the consultation, the minister was also requested to clarify or expand the demolition and reconstruction scheme to include investors, and to make the 6% VAT rate available for other forms of social housing, such as budget or subsidized rent, cooperative housing, etc. This expansion and clarification is included in the text of the agreement.

Regarding the maximum habitable area condition, the existing administrative comments for the calculation would be considered, and an additional confirmation was requested on the application of the expansion to multi-family dwellings. With regard to the obligation to rent for 15 years, the regulation explains that the investor must demonstrate this intention, and a correction to any VAT benefit received must be made if this condition is no longer met (i.e., a correction at a rate of 1/15th of the unpaid VAT per remaining year of the 15-year term).

For the sake of completeness, it is important to note that the condition regarding the establishment of the tenant's main residence implicitly excludes the construction of student housing from the scheme. In addition, the sale of houses within the scheme for rental by the buyer would not benefit from the reduced VAT rate, as this extension only applies to the demolition and reconstruction by a builder who subsequently rents out the completed homes themselves. A request to annul the decision to remove the scheme as from 1 January 2024 has been set before the Constitutional Court, and further information will be provided when available.

The proposed entry into force of the extension is the first day of the month after its publication in the Belgian official gazette. The measure is expected to be voted on quickly.

Deloitte Belgium comments

The extension of the demolition and reconstruction scheme for rental housing is an important step in the right direction for affordable housing. The measure also shows that politicians are fully aware of the crucial importance of the real estate sector for the provision of affordable (rental) housing and the required approach to address the sector’s challenges. From a tax perspective, this scheme offers opportunities for investors and alternative forms of housing such as cooperatives, and figures such as budgeted rent can be reviewed with renewed attention.

China

Government updates various export control catalogues

In December 2023, the Chinese government updated the following catalogues regarding export controls:

- The catalogue of technologies prohibited or restricted from export (Technology Catalogue);
- The catalogue of dual-use items subject to import/export license requirements (Dual-use Items Catalogue); and
- The catalogue of goods subject to export license requirements (Goods Catalogue).

This article aims to highlight the developments and to share Deloitte China’s observations of the potential impact on businesses.

The catalogue of technologies prohibited or restricted from export

On 21 December 2023, the Ministry of Commerce (MOFCOM) and Ministry of Science and Technology (MOST) jointly announced the publication of the updated Technology Catalogue, which supersedes the last version released in 2020 and is effective as from 21 December 2023.

Under China's export regime, both an outright sale of technology and a license of a right to use technology can be considered an export of technology. The Technology Catalogue contains a list of technologies prohibited or restricted from being exported and provides "control points" to describe the relevant content for each technology item on the list. An export license is required for any export of technology that is restricted from export.

The updated Technology Catalogue includes a total of 134 technology items (i.e., 24 prohibited items and 110 items restricted from export).

Compared with the prior version, the updated Technology Catalogue includes the following revisions:

- Addition of four new technology items
  - "Cloning human cells and gene editing," which may bring ethical concerns, has been added to the technologies prohibited from export; and
  - "Crop hybrid advantage utilization technology," "bulk materials loading and transportation technology," and "laser radar systems" have been added to the technologies restricted from export. Laser radar systems are widely used in driverless vehicles for which China has been one of the leading countries in technology development.

Photovoltaic-related technology, which was included as a restricted item from export in a draft catalogue issued at the end of 2022, has not been included in the updated version. It has been speculated this was to avoid a potentially negative impact on outbound investments by Chinese businesses.

- Removal of 34 technology items
  - Six items, which include technology related to mining, meat processing, and manufacturing of green plant growth regulators, have been removed from the technologies prohibited from export; and
  - 28 items, which include technology related to manufacturing of medical diagnostic instruments and equipment and target feature extraction and recognition, have been removed from the technologies restricted from export.
- Revisions to the "control points" for 37 technology items impact six items, which include technology related to the production of traditional Chinese medicine and the refining/processing/utilization of rare-earth elements, under the category of technologies prohibited from export; and 31 items under the category of technologies restricted from export (e.g., "control points" for certain items related to information transmission and processing have been modified to reduce the effective scope of the restricted technology).
- All items have been re-coded and re-ordered according to the new industrial classification code (i.e., Classification of National Economic Industry (GB/T 4754-2017)).

The catalogue of dual-use items subject to import/export license requirements

On 29 December 2023, the MOFCOM and the General Administration of Customs (GAC) jointly announced the publication of the updated Dual-use Items Catalogue, which supersedes the last version of the catalogue released in 2022 and is effective as from 1 January 2024. The Dual-use Items Catalogue contains the names and descriptions of each controlled dual-use item, as well as the relevant Harmonized System (HS) codes for tangible goods.

Compared with the prior version, the updated Dual-use Items Catalogue includes the following revisions:

- Addition of 24 new items, reflecting certain adjustments already announced and implemented during 2023, including:
  - 14 items related to gallium and germanium, where the relevant export control has been effective since 1 August 2023;
  - Eight items related to drones, where the relevant export control has been effective since 1 September 2023; and
  - Two items related to highly sensitive graphite, where the relevant export control has been effective since 1 December 2023;
- Removal of eight items related to graphite, where the relevant export control has been removed since 1 September 2023;
- Revisions to the names and descriptions of more than 10 items (e.g., certain nuclear-related items, chemicals, and biological items); and
- Revisions to the HS codes for more than 20 items (e.g., certain nuclear-related items, chemicals, biological and missile-related items) according to the China's 2024 tariff adjustment plan.

It is worth noting that the HS codes listed in the catalogue are provided for reference purposes. Determining whether such goods fall within the scope of the catalogue still needs careful review of the actual goods against the names and descriptions of the items listed.

The catalogue of goods subject to export license requirements

On 29 December 2023, the MOFCOM and GAC also jointly announced the publication of the 2024 Good Catalogue, which supersedes the 2023 version and is effective as from 1 January 2024. The Goods Catalogue contains a list of named tangible goods and descriptions, as well as the relevant HS codes. For exports of any goods on the list, an exporter must apply for an export license, which then must be submitted to the Chinese customs authorities for verification when the relevant goods are exported.

Like the Dual-use Item Catalogue, the HS codes listed in the Goods Catalogue are provided for reference purposes. Businesses cannot simply rely on the relevant HS codes to determine whether the goods in question fall within the scope of the Goods Catalogue. Certain goods may be listed on both the Dual-use Items Catalogue and Goods Catalogue. In this situation, the goods should be considered as a dual-use item for export license application purposes.

The Goods Catalogues includes 43 categories of goods with few updates since the 2023 version and with only a small number of items' descriptions and HS codes adjusted (e.g., certain goods in relation to fluorite, titanium, platinum, and vanadium).

Further observations

As the catalogues have been updated, affected exporters should re-assess whether their business arrangements have or will include any technologies or goods that are prohibited or restricted from export. For any item newly added to the catalogues, businesses should update their trade compliance management accordingly and apply for export licenses in a timely manner.

MOFCOM has been encouraging businesses to establish and maintain a robust internal control system in regard to their trade compliance management by providing relevant efficiency incentives (i.e., granting general export licenses that allows multiple exports of multiple specified types of dual-use items to multiple destination countries/regions or end-users within the valid period of the license). Exporters should consider how they may continuously enhance their compliance management performing a regular review and assessment of the internal control system to identify any weakness, and utilization of digital tools to improve the management efficiency.

Egypt

Law introduces incentives for green hydrogen production projects

Law No. 2 of 2024 was published in Egypt's official gazette on 27 January 2024 and went into effect the following day. The law outlines various incentives for green hydrogen production projects and their derivatives, including a green hydrogen cash incentive, a value added tax (VAT) exemption, and several other tax exemptions.

Primary incentives

Under the green hydrogen incentive, the government will refund 33% to 55% of the tax paid on income realized from activities related to a clean hydrogen project or its expansion. The refund should not be considered taxable income and income should be adjusted accordingly for local tax purposes.

From an OECD "Pillar Two" perspective, until the relevant authorities release further clarifications, taxpayers should analyze carefully how this cash incentive could affect the calculation of their effective tax rate (i.e., adjusted covered taxes/adjusted GloBE income, which should be at least 15%) since, based on the OECD's model rules and administrative guidance, taxpayers should refer only to financial statements and disregard any tax adjustments.

The law also includes a VAT exemption. Necessary machines, tools, devices, raw materials, and transport methods required to carry out the licensed activity for green hydrogen production projects and their derivatives (excluding passenger vehicles) are exempt from VAT. Moreover, exports from these projects will be subject to VAT at a rate of 0%.

Furthermore, the government provides several other tax exemptions, including an exemption from property tax on properties used in the projects, stamp tax, and documentation fees. Also included in the law are exemptions from taxes tied to contracts establishing companies and facilities, contracts for credit

facilities and associated mortgages, and contracts for land registration necessary for setting up the projects. The projects are also exempt from customs duty on all imports needed for their establishment, apart from passenger cars.

Other incentives

- **Regulatory approval:** Project companies will receive a one-time regulatory approval in accordance with the Investment Law guidelines.
- **Import and export rights:** Project companies will be able to directly import the necessary raw materials, production inputs, machinery, spare parts, and suitable means of transportation for their activities. They also will be able to export their products without the need to register in the importers and exporters registry.
- **Employment of foreign workers:** Companies will be allowed to employ foreign workers up to a limit of 30% of their total workforce for the first 10 years from the date the project agreements are signed.
- **Special customs zones:** Permission may be granted to establish exclusive customs zones for projects' exports or imports, as agreed with the Minister of Finance.
- **Port use fee reduction:** A 30% reduction in the fees for using seaports, marine transport, and various marine services may be granted to project companies.
- **Land use fees reduction:** The value of the usufructuary rights of industrial land allocated for the establishment of a green hydrogen production plant and its derivatives may be reduced by 25% and fees for the usufructuary rights of land used for storage at ports may be reduced by 20%.
- **Grace period for fees:** A grace period may be provided for the payment of land use fees for industrial and storage land specific to a project and its expansion. Payment should start when the activity begins.
- **License tenure:** The license term required for the implementation of green hydrogen production projects and their derivatives should be the same as the land use term specified in the project.

Criteria to qualify for the incentives

- **Project operation:** The project should commence commercial operation within five years from the date the project agreements are signed.
- **Project finance:** Foreign cash financing the project or its expansion should constitute at least 70% of the project's investment cost.
- **Use of domestic components:** The project should use domestically-manufactured components for its execution whenever available, making up a minimum of 20% of the project components.
- **Technology transfer and labor skills enhancement:** The project must contribute to the transfer and localization of modern and advanced technology into Egypt while creating and implementing training programs for the Egyptian workforce.
- **Community responsibility:** The project company should commit to a plan that enhances local areas through community responsibility rules based on article 15 of the Investment Law.

The competent minister or his authorized representative will issue to each qualifying project company the certificate necessary to be granted the incentives. This certificate will be considered final and self-executing without the need for the approval of other authorities and all entities will be required to work in accordance with its terms.

Finland

New CESOP guidance issued by tax authorities

The Finnish Tax Administration issued official guidance in February 2024 relating to the EU's Central Electronic System of Payment Information (CESOP), which requires payment service providers (for example, banks) to report information on certain cross-border payment transactions. The guidance is in line with the EU payment service providers directive (Council Directive (EU) 2020/284), which aims to combat VAT fraud. The guidance includes detailed information on, for example, which parties are required to submit reports and which transactions should be reported. The reporting obligation is effective as from 1 January 2024 and reporting must be carried out on a quarterly basis, by the end of the month following the relevant quarter.

Germany

Upper house of parliament approves business tax reform bill

The upper house of the German parliament on 22 March 2024 approved the business tax reform bill ("Growth Opportunity Act"), which includes amendments to the transfer pricing rules for cross-border financing arrangements and to the minimum taxation rules regarding the use of net operating loss (NOL) carryforwards. The original bill had been approved by the lower house of parliament on 17 November 2023 but later was rejected by the upper house of parliament on 24 November 2023. The bill then was sent to the conference committee of the upper and lower houses of parliament for further negotiations. The conference committee approved an updated bill on 21 February 2024, which then was approved by the lower house of parliament on 23 February and now by the upper house of parliament. The bill is now heading to the president for signature and publication in the federal gazette.

Certain technical amendments with regard to the interest deduction limitation rules and real estate transfer tax (RETT), which were part of the original business tax reform bill, were already approved in December 2023 by both houses of parliament as part of an omnibus bill ("Secondary Credit Market Promotion Act").

The aim of the Growth Opportunity Act is to introduce additional tax incentives in order to strengthen the competitiveness of Germany as a business location. The final version of the bill should provide for tax relief for taxpayers of approximately EUR 3.2 billion.

The most notable tax measures introduced by the Growth Opportunity Act are set forth below.

Amendments to transfer pricing rules for cross-border financing arrangements

Instead of the originally planned introduction of a "maximum interest barrier rule," the approved version of the bill now includes amended and tightened transfer pricing rules for cross-border financing arrangements under the Foreign Tax Act. The rules include a three-prong test based on the arm's length principle:

- Debt capacity test: The taxpayer must provide plausible evidence as to the ability of the taxpayer to service the debt (both interest and principal) during the entire term of the debt;
- Business purpose test: The taxpayer must provide plausible evidence as to the taxpayer's need for financing and the business purpose for the loan; and
- Maximum interest rate test: The interest rate generally must be established based on refinancing conditions that would apply to an unrelated third party and must be based on the credit rating for the entire multinational enterprise group. An escape clause allows the taxpayer to argue that, based on the relevant facts, an interest rate higher than the one based on the group's credit rating could be at arm's length (a derivative group credit rating).

The intercompany provision of financing services, back-to-back financing arrangements, and treasury functions generally are deemed to be low-function risk services for purposes of the arm's length principle and for calculating an arm's length remuneration. The taxpayer may prove the contrary, i.e., that a higher remuneration would be justified based on the taxpayer actually bearing a higher risk.

The amended rules are not limited to situations where the lender does not have sufficient substance and activities, which was originally proposed as part of the maximum interest barrier rule. The amended rules are limited to cross-border financing arrangements and do not affect purely domestic financing arrangements. The amended rules are effective as from fiscal year 2024.

Amendments to minimum taxation rules regarding use of NOL carryforwards

The minimum taxation rules limiting the offset of NOL carryforwards against current year profits has been relaxed for the period 2024 to 2027. During this period, a taxpayer is allowed to offset 70% (up from 60%) of current year income exceeding EUR 1 million against NOL carryforwards. After 2027, the 60% limitation for the offset of any remaining current year profits will be reinstated. The amended rules apply for individual and corporate income tax purposes only (i.e., there are no changes for local trade tax purposes, i.e., the 60% limitation applies for local trade tax purposes).

Other notable tax measures

- Changes to certain rules for the taxation of partnerships and their individual partners are effective as from 2024 and not as from 2025 as originally proposed.
- The approved bill includes the (re-)introduction of a declining balance depreciation for moveable assets that are acquired between 1 April 2024 and 1 January 2025 (this had been temporarily introduced in the past as a COVID-19 support measure). The maximum amount of the declining balance depreciation is limited to twice the applicable straight line depreciation rate, with a maximum of 20% annually.
- In addition, a declining balance depreciation for residential buildings within the EU/EEA acquired or built between 1 October 2023 and 30 September 2029 has been introduced. The applicable annual depreciation rate for the declining balance depreciation for real estate is 5%.
- The cost basis for calculating the research and development (R&D) tax incentive will be increased from EUR 4 million to EUR 10 million without any time limitation (originally an increase to EUR 12 million was proposed), the portion of eligible costs for contract research will be increased from 60% to 70%.

For small and medium-sized companies, a 10% increase of the R&D tax incentive will be available (i.e., 35% of qualifying expenses instead of the general 25% rate). The updated R&D tax incentive will be available starting from the day of the promulgation of the bill.

- The rules in section 15 of the Reorganization Tax Code (RTC) for tax-neutral demerger transactions have been updated and tightened. Indirect share transfers in one of the companies that is involved in the demerger transaction to a third party now explicitly qualifies as a harmful transaction for purposes of the tax-neutral demerger. The amended section 15 RTC becomes applicable for transactions where the required application with the commercial register is filed after 14 July 2023.

- The dual consolidated loss rules for tax consolidated groups (section 14 (1) number 5 of the Corporate Income Tax Code) has been abolished with effect as from 2024. The cancellation of the highly controversial rules is a reaction to the introduction of the general anti-hybrid rules/double deduction rule in section 4k of the Income Tax Code as from 1 January 2020.

- The transition period for the introduction of mandatory electronic invoicing for VAT purposes is two years (1 January 2025 through 31 December 2026) for business-to-business transactions and three years (1 January 2025 through 31 December 2027) for small companies (i.e., companies with revenue of up to EUR 800,000 in the preceding fiscal year). The general starting date for the introduction of mandatory electronic invoicing is 1 January 2025.

Measures not included in final version

Notable measures that were included in the original version of the Growth Opportunity Act that did not make it into the final version of the bill:

- The originally proposed climate investment grant in a maximum amount of EUR 30 million per qualifying applicant for the investment period (i.e., 2023 through 2027) did not make it into the final version. The original proposal included a cash grant calculated based on 15% of the qualifying expenses for climate protection measures during the investment period with a maximum amount of EUR 200 million of qualifying expenses. The financing of the climate investment grant could no longer be secured after a 15 November 2023 decision of the federal constitutional court ruled that a EUR 60 billion reallocation of unused debt unlocked during the COVID-19 pandemic by the federal government violated constitutional principles.

- The increase of the loss carryback period for individual and corporate income tax purposes from the current two-year period to three years and the increased maximum amount of EUR 10 million for a loss carryback for corporate taxpayers did not make it into the final version.

- The planned introduction of a “maximum interest barrier rule” (as previously mentioned) and a “de-fragmentation rule” was taken out of the bill in December 2023.

- The highly criticized plan to introduce mandatory disclosure and reporting requirement for certain purely domestic tax planning arrangements as set forth in the original draft bill was taken out and did not make it into the final version.

- The introduction of a tax-free allowance for income from rental activities in an amount of EUR 1,000 did not make it into the final version.

- The increase of the amount for qualifying low-value assets for immediate expensing from EUR 800 to EUR 1,000 did not make it into the final version.

Comments

The approved version of the bill is a result of the budget pressure facing the current government. As compared to the original tax relief for taxpayers of approximately EUR 7 billion, the approved version now has approximately EUR 3.2 billion of such tax relief. Whether the measures are significant enough to provide for sizeable tax relief for businesses and to initiate growth remains to be seen. The government already has announced additional proposed initiatives aimed to reduce the tax burden for businesses.

Ghana

Emissions levy introduced on specified business sectors and motor vehicles

The Ghana Revenue Authority (GRA) has announced that an emissions levy applicable to taxpayers operating in specified business sectors and internal combustion engine vehicles (motor vehicles) is in force as from 1 February 2024. Following the 2024 budget statement, Ghana's parliament passed the Emissions Levy Act, 2023 (Act 1112), which received presidential assent on 29 December 2023. The GRA is developing guidelines for businesses in the relevant sectors regarding implementation of the levy.

This article provides an overview of the levy and the compliance obligations for affected taxpayers.

Scope and applicable rates

Specified sectors

Act 1112 imposes tax on the carbon dioxide equivalent emissions of taxpayers in specified sectors, including:

- Construction;
- Manufacturing;
- Mining;
- Oil and gas; and
- Electricity and heating.

The rate of the levy is Ghana Cedi (GHS) 100 per metric ton of emissions per month.

Motor vehicles

The rates applicable to the various categories of motor vehicles are as follows:

Category	Rate per year (GHS)
Motorcycles and tricycles	75
Motor vehicles, buses, and coaches up to 3,000cc	150
Motor vehicles, buses, coaches above 3,000cc, cargo trucks, and articulated trucks	300

Compliance obligations

Under Act 1112, taxpayers in affected sectors are required to:

- File an annual estimate of the levy payable for the year of assessment by the end of the first month of the taxpayer's financial year;
- Submit a monthly return showing the quantity of emissions and the levy payable for each month not later than the last working day of the subsequent month; and
- Pay the levy each month by the deadline for submitting the monthly return.

A person subject to the levy based on motor vehicle use is required to make payment on or before the renewal of a road use certificate.

Act 1112 authorizes the GRA to collect the levy, and provides for the Revenue Administration Act, 2019 (Act 917) to govern the administration of the levy.

Deloitte Ghana comments

The introduction of the emissions levy, a specific excise tax, provides the government with the opportunity to raise domestic revenue and at the same time incentivize taxpayers to transition to the use of clean energy. Ghana has, through this legislation, opted to impose a tax on carbon emissions at both the downstream level (on vehicles in households and businesses), as well as the upstream level (on the production and extractive sectors).

The primary objective of any emissions tax is to encourage consumers to move away from the use of fossil fuels and adopt cleaner alternatives. This initiative is in line with the environmental fiscal reforms outlined in the government's medium-term revenue strategy, published in 2023; however, questions have been raised over whether this objective has been achieved to date, even with the current import regime which penalizes older, imported vehicles by imposing higher duty rates as compared to newly manufactured vehicles.

Therefore, simply amending tax policy is unlikely to be enough to persuade consumers to adopt clean fuels. For the government to fully achieve the twin objectives of a carbon tax (revenue mobilization and encouraging the transition to clean energy) it is also important to develop the required infrastructure, including the provision of charging stations for electric vehicles and ensuring the availability of cleaner sources of energy for industrial use.

Act 1112 does not provide a detailed mechanism for the implementation of the levy, and the measurement of carbon dioxide emissions will be critical as this tax relies on self-assessment by in-scope businesses. Therefore, some level of investment is likely to be necessary to provide an accurate and reliable scientific basis for measurements, and to ensure entities that have already invested in clean technology do not end up paying the same levies as those using outdated machinery.

The business community in Ghana has already raised concerns over the high level of taxation and this emissions levy could be seen as creating another increase in the tax burden for businesses in the affected sectors.

Guatemala

SAT introduces suggested prepopulated VAT returns for small taxpayers

Recently (as at January 2024) Guatemala's Superintendency of Tax Administration (SAT) has introduced "suggested pre-prepared tax returns" for small taxpayers, i.e., prepopulated monthly VAT returns that are available to taxpayers (including legal entities and individuals) that are registered under the following regimes:

- Small taxpayer regime;
- Electronic regime for small taxpayers;
- Special agricultural taxpayer regime; or
- Special electronic regime for agricultural taxpayers.

The suggested pre-prepared tax returns are generated automatically through the SAT's FEL app. The prepopulated information includes information on the taxpayer, the tax period, and the income obtained from the information that the SAT already has within its system, based on online electronic invoicing. The purpose is to simplify tax compliance and reduce mistakes in the preparation of tax returns.

In a case where there is no tax payable in relation to the return, the suggested pre-prepared tax return may be submitted to the SAT directly using the FEL app; where tax is payable, the filing and payment must be carried out through Guatemala's banking system.

The introduction of suggested pre-prepared tax returns is an example of how the SAT continues to innovate in the areas of compliance and oversight through the use of electronic tools.

Guatemala

Changes to procedures for exporters to request electronic VAT credit refunds

On 15 February 2024, the division of Guatemala's Superintendency of Tax Administration (SAT) responsible for the oversight of taxpayers (the "Intendency of Oversight") announced on the SAT's website changes to the procedures for requesting VAT credit refunds under the special electronic regime for exporters. These measures are in effect for requests submitted as from February 2024.

The changes made to the procedures are as follows:

- The invoices for purchases and the information on their forms of payment that are attached to the refund request in PDF format must be presented in chronological order, with the information on the form of payment immediately following each invoice.
- The invoices for exports must be attached to the refund request in chronological order, with their supporting documentation (e.g., export clearance documents, support for the negotiation of foreign currency).

The changes made by the Intendency of Oversight merely affect aspects of the presentation of VAT credit refund files and are not expected to make it more difficult to request a VAT credit refund under the special electronic regime.

Guatemala

Requirement introduced for importers to register alternate addresses

Guatemala's Superintendency of Tax Administration (SAT) recently enabled in its online branch the "Registration of alternate addresses in the Registry of Importers" applicable to companies registered in the Registry of Importers. The alternate addresses that must be reported are those of any locations (other than the primary address) at which imported goods are stored, so this requirement is particularly relevant for companies in the consumer industry (i.e., those that sell goods and services directly to consumers). The deadline for updating this information in the SAT's online branch is 28 March 2024.

Failure to update this information could result in a company's registration as an importer being deactivated, and thus the company would not be able to transmit final declarations of the importation of goods in its name.

To assist companies with updating the information, the SAT has made available on its website the "Manual for updating alternate addresses in the Registry of Importers" (in the Spanish language only).

It is important that companies in the consumer industry timely and accurately update their information and register alternate addresses, so that the SAT does not deactivate them as an importer.

Hong Kong

Key tax measures in 2024-25 Budget

The Financial Secretary of the Hong Kong Special Administrative Region (Hong Kong SAR), Paul Chan Mo-po, delivered the 2024-25 Budget Speech on 28 February 2024. This is the second budget he has prepared for the current-term government led by Hong Kong SAR Chief Executive John Lee Ka-chiu.

The financial secretary announced a fiscal deficit of HKD 101.6 billion for the 2023-24 financial year, down slightly from HKD 122.3 billion for the 2022-23 financial year, but much higher than the original estimated deficit of HKD 54.4 billion in the last year's budget speech. This was due to a slower than expected post-pandemic recovery and reduced revenue from stamp duties and land premiums. Fiscal reserves are expected to have declined to HKD 733.2 billion by 31 March 2024.

In preparing the 2024-25 Budget, the government focused on consolidating public finances and gradually restoring fiscal balance by controlling expenditure and increasing revenue. There are also measures intended to increase Hong Kong SAR's competitiveness by enhancing the profits tax system and existing tax incentives.

This article provides an overview of the key tax-related proposals in the budget. More detailed analysis and commentary is available from Deloitte Hong Kong SAR's dedicated 2024-25 Budget webpage.

Businesses

Tax relief for businesses

The budget proposes to retain the 100% reduction in profits tax for 2023-24, subject to a ceiling of HKD 3,000 (lower than the ceiling of HKD 6,000 for 2022-23) to ease the burden of profits tax payers. The reduction would be reflected in the final tax payable for the year of assessment 2023-24. This is a welcome measure to relieve the financial burden on businesses.

Tax deduction for reinstatement costs

It is proposed to allow a tax deduction for expenses incurred in reinstating leased premises to their original condition. The new deduction would take effect as from the year of assessment 2024-25. This would be good news for businesses operating in leased properties as they are generally required to reinstate the properties after the lease term and although the reinstatement costs may be significant, they are currently not tax deductible. The proposed new deduction is welcome and would enhance the profits tax system in Hong Kong SAR and increase the jurisdiction's competitiveness as reinstatement costs are currently deductible in some neighboring jurisdictions.

Commercial/industrial building allowances

The budget proposals would remove the time limit for claiming commercial building allowance (CBA) and industrial building allowance (IBA) as from the year of assessment 2024-25. Currently, there is a 25-year time limit for claiming CBA and IBA. For example, when an old commercial building (before 1998-99) is sold after it has been in use for 25 years, the buyer is not entitled to any CBA while the seller is subject to a balancing charge; in other words, no capital expenditure may be deducted for a commercial/industrial building or structure that has been in use for over 25 years. The industry has previously raised this concern to the government and requested the removal of the time limit, and it is pleasing that the suggestion has been heard and adopted.

Assets and wealth management

The government has continued to drive development of the asset and wealth management industry in this budget. It proposes to extend the Grant Scheme for Open-ended Fund Companies and Real Estate Investment Trusts for three years and set up a task force to discuss industry measures for further developing the asset and wealth management industry.

From the tax perspective, there are proposals to further enhance the preferential tax regimes for funds, single family offices, and carried interest, including reviewing the scope of the tax concession regimes, increasing the types of qualifying transactions, and enhancing flexibility in handling incidental transactions. These are welcome steps and more detailed proposals are awaited.

The financial secretary also confirmed that applications under the new Capital Investment Entrant Scheme introduced in last year's budget will be invited shortly.

Taken together, these measures would assist in attracting more investments and talents to further develop the asset and wealth management industry in Hong Kong SAR.

Maritime services

The financial secretary mentioned in the budget that the government will commence studies on further enhancements to the tax concession for the maritime industry. Since 2020, the government has enacted legislation to provide tax concessions for ship leasing, marine insurance, shipping agencies, ship management, and ship broking. Additional enhancements should help consolidate Hong Kong SAR's position as an international maritime center.

Stamp duty for real estate investment trust (REIT) and jobbing business of option market-makers

To further enhance market competitiveness, the budget proposes to waive stamp duties payable on the transfer of REIT units and the jobbing business of option market-makers.

Hotel accommodation tax

With a view to increasing government revenue, the budget proposes to resume the collection of the hotel accommodation tax (HAT) at a rate of 3% as from 1 January 2025. HAT is imposed on hotel and guesthouse accommodation and has been waived since 1 July 2008.

Individuals

One-time relief measures

The budget proposes a 100% reduction in salaries tax and tax under personal assessment for 2023-24, subject to a ceiling of HKD 3,000 (lower than the ceiling of HKD 6,000 for 2022-23). The reduction would be reflected in the final tax payable for the year of assessment 2023-24. The tax rebate ceiling is the lowest in recent years but is understandable in view of the fiscal deficit.

Two-tiered standard salaries tax rate regime

Salaries tax and tax under personal assessment are currently calculated at progressive rates from 2% to 17% on a taxpayer's net chargeable income or at a standard rate of 15% on net income (before deduction of personal allowances), whichever is lower. With a view to increasing government revenue, the budget includes a proposal to implement a two-tiered standard rate regime for salaries tax and tax under personal assessment starting from the year of assessment 2024-25. The first HKD 5 million of net income would continue to be subject to the standard rate of 15%, while the portion of net income exceeding HKD 5 million would be subject to a standard rate of 16%. In accordance with the "affordable users pay" principle, this measure would only affect about 12,000 taxpayers with exceptionally high incomes, providing the government with an additional revenue stream with limited impact for most individuals.

Stamp duty for residential properties

Following the adjustments announced in the 2023 Policy Address, the budget includes proposals to remove with immediate effect all demand-side management measures for residential properties, including buyer's stamp duty (applicable to non-Hong Kong SAR permanent resident buyers), new residential stamp duty (generally applicable to buyers that own other residential property in Hong Kong SAR), and special stamp duty (applicable to those who dispose of their residential property within two years after acquisition). This would bring to an end the demand-side management measures for residential properties which have lasted for over 13 years and mean that the sale of immovable property in Hong Kong SAR would only be subject to ad valorem stamp duty ranging from HKD 100 to 4.25% of the consideration or value of the property, irrespective of whether the buyer is a Hong Kong SAR resident or owns another residential property.

It is hoped that the removal of these measures may encourage more investors to purchase residential properties and potentially help to stabilize the downward trend of property prices and number of transactions. The property market would continue to be significantly affected by other factors, such as high mortgage interest rates.

Tobacco duty

To safeguard public health, the budget proposes to further increase tobacco duty by 80 cents per stick with immediate effect. Duties on other tobacco products would be increased by the same proportion. This is the second consecutive year that the government has increased tobacco duty which demonstrates its determination to reduce smoking rates.

First registration tax concessions for electric vehicles

The budget proposes to extend for two years the first registration tax concessions for electric vehicles due to terminate at the end of March 2024. However, the concessions would be made less generous, including a 40% reduction in the amount of the concessions. For electric private cars, the maximum concessions granted under the “One-for-One Replacement” Scheme and for electric private cars generally would be reduced to HKD 172,500 (previously HKD 287,500) and HKD 58,500 (previously HKD 97,500) respectively. No concessions would be available for electric private cars valued at more than HKD 500,000 before tax. The first registration tax for other types of electric vehicles would continue to be waived in full for the next two years.

Deloitte Hong Kong SAR comments

In the 2024-25 Budget, the financial secretary has presented a cautious plan to control government expenditure and increase revenue with a view to maintaining healthy public finances and achieving a fiscal balance. In the face of the budget deficit, fewer incentives are offered to businesses and individuals compared to budgets of recent years. At the same time, the government has formulated measures to boost economic development and attract enterprises and talent, e.g., enhancing the profits tax system and existing tax incentives.

Indonesia

VAT facility on sale of certain qualifying battery-based electric vehicles extended

On 15 February 2024, Indonesia’s Minister of Finance issued Regulation Number 8 of 2024 (PMK-8) to extend the existing VAT facility whereby the government would bear a portion of VAT due on the sale of qualifying battery-based electric vehicles (*Kendaraan Bermotor Listrik Berbasis Baterai* or BEVs). The qualifying BEVs are BEVs that are newly registered and meet the domestic requirements.

PMK-8 extends this government-borne VAT facility, which otherwise would have ended on 31 December 2023, through 31 December 2024. Consequently, as from 1 January 2024, the government continues to bear a portion of the VAT due on the sale of certain qualifying electric four-wheeled vehicles and electric buses, as follows:

Type of BEV	Domestic content	Portion of VAT borne by the government
Four-wheeled vehicle	Minimum 40%	10% of the selling price
Bus	Minimum 40%	10% of the selling price
	Minimum 20% but less than 40%	5% of the selling price

In addition, the VAT-able entrepreneur (*Pengusaha Kena Pajak* (PKP)) delivering the qualifying BEVs mentioned above is provided with low-risk PKP status and thus eligible for a preliminary VAT refund.

Indonesia

LST facility introduced for qualifying battery-based electric vehicles

On 8 December 2023, the Indonesian president issued Regulation Number 79 of 2023 amending Presidential Regulation Number 55 of 2019 that provided various fiscal and nonfiscal incentives to

accelerate the program for battery-based electric vehicles (*kendaraan bermotor listrik berbasis baterai* or BEVs) (Perpres-55). In response to Perpres-55, on 15 February 2024, the minister of finance issued Regulation Number 9 of 2024 (PMK-9) to introduce a government-borne luxury-goods sales tax (LST) facility that is granted for import and/or delivery of certain qualifying electric four-wheeled vehicles by certain VAT-able entrepreneurs (*Pengusaha Kena Pajak* (PKPs)). The eligible PKPs are companies that have met the criteria stipulated by Minister of Investment (MoI) Regulation Number 6 of 2023 (PMI-6). The facility will be provided between January and December 2024.

BEVs eligible for this facility, up to a certain quantity as stipulated in PMI-6, comprise:

- BEVs that are completely built-up (CBU BEVs), i.e., motorized vehicles imported completely built-up as four-wheeled BEVs; and
- BEVs that are completely knocked-down (CKD BEVs), i.e., motorized vehicles imported completely knocked-down (delivered in parts and assembled in Indonesia) as four-wheeled BEVs.

Under PMK-9, the government will bear 100% of the LST payable on imports of CBU BEVs as well as deliveries of certain CKD BEVs meeting the domestic content requirement, i.e., 20% to 40% of components used to build the vehicle are produced domestically. The facility is applicable upon obtaining a letter of approval for the use of this facility from the MoI.

For imports of CBU BEVs, the PKPs must issue import declarations in accordance with the provisions in the Customs Law. For delivery of CKD BEVs, the PKPs must issue VAT invoices using the transaction code "01" containing certain information required by PMK-9.

These import declarations and VAT invoices must be reported in the issuing PKPs' monthly VAT returns (including amendments) for the fiscal periods of January to December 2024. These VAT returns serve as facility realization reports, provided they are submitted by 31 January 2025.

LST that has been borne by the government must be repaid if the tax authorities discover that:

- The PKPs do not have the approval letter from the MoI for the use of this LST facility, and/or the requirements related to CBU BEVs or CKD BEVs are not met;
- The LST period is not between January and December 2024;
- The PKPs do not issue import declarations and/or VAT invoices in accordance with the prevailing regulations; or
- The import declarations and VAT invoices issued for imports and/or deliveries of four-wheeled BEVs that are subject to this LST facility are not reported in the facility realization reports.

Japan

Podcast: Preparing for changes to the taxation of online platforms

In the 2024 tax reform proposals, Japan's Ministry of Finance announced its intention to introduce changes to the taxation of online platforms as from 1 April 2025.

In this episode of *The Japan Perspective,* Deloitte's tax professionals Joanna Hazel and Nicole Baxter discuss the new tax and explore the significant changes set to take effect in 2025. The discussion offers an insight into the necessary compliance requirements and highlights the impact that the new tax will have on both platform operators and foreign digital service providers.

The Japan Perspective is Deloitte Japan's podcast series committed to communicating the latest Japanese tax developments and their potential impact on foreign multinational companies operating in Japan.

Malaysia

Amendments to sales tax regulations affect certain applications and submissions

Malaysia's Sales Tax (Amendment) (No.2) Regulations 2023 and Sales Tax (Customs Ruling) (Amendment) Regulations 2023 were gazetted on 29 December 2023 and are effective as from 1 January 2024. Many of the amendments reflect changes that allow the Director General of the Royal Malaysian Customs Department ("Director General of the RMCD" or "Director General") to determine the form and manner of applications and submissions to the RMCD. The notable amendments made to the Sales Tax Regulations 2018 and the Sales Tax (Customs Ruling) Regulations 2018 ("principal regulations") are described below.

Sales Tax (Amendment) (No.2) Regulations 2023

The Sales Tax Regulations 2018 have been amended as follows:

- The definition of "Form JKDM No. 2" (relating to claims for a refund or drawback of duty, tax, etc.) in regulation 2 (interpretation) has been deleted.
- The following amendments have been made to regulation 3 ((application for registration); the references to "the Act" refer to the Sales Tax Act 2018):
    - In subregulation (1):
        - In relation to paragraph (a), the wording "shall apply" has been added after the wording "section 12 of the Act";
        - In relation to paragraph (b), the wording "may apply" has been added after the wording "section 20 of the Act"; and
        - The wording "shall apply in Form SST-01" has been replaced with "to be registered in the form and manner as determined by the Director General."
    - In subregulation (2), the wording has been replaced with "(2) Upon receipt of the application referred to in subregulation (1), the Director General shall assign a registration number to the manufacturer whose registration has been approved by a notification in writing."
- Regulations 4 (notification of registration), 10 (furnishing of return), 31 (information to Sessions Court), 32 (application for review), 33 (sales tax administration offices), and 36 (forms) have been deleted, as well as the second schedule to the regulations (which set forth certain forms).
- The following amendments have been made to regulation 8 (issuance of credit note and debit note):

- The wording of subregulation 8(1) has been replaced with the following: “Any registered manufacturer who sells taxable goods shall issue a credit note or debit note where, after the return for the taxable goods has been furnished to the Director General, there is a reduction of, or addition to, the amount of sales tax which has been charged on the taxable goods—

    a. due to a change in the rate of sales tax under section 10 of the Act; or

    b. due to any adjustment in the course of business.”

- Subregulation (2) has been deleted.

- The wording of regulation 9 (manner of furnishing return) has been replaced with the following: “A taxable person shall furnish a return for each taxable period as required under section 26 of the Act in the form and manner as determined by the Director General.”

- The wording of regulation 11 (correction of errors) has been replaced with the following: "If a taxable person makes an error in any return furnished under the Act, the taxable person may correct the error in the form and manner as determined by the Director General.”

- In regulation 14 (manner of claiming refund under paragraph 39(1)(a) or subsection 35(6) or 41(3) of the Act), the wording of subregulation 14(1) has been replaced with the following: “Any person who is eligible to claim for a refund under paragraph 39(1)(a), subsection 35(6) or subsection 41(3) of the Act may apply to the Director General.”

- The wording of regulation 15 (manner of claiming refund of sales tax in relation to bad debt) has been replaced with the following: “Any person who is eligible to claim for a refund of sales tax in relation to bad debt under section 36 of the Act may apply to the Director General in the form and manner as determined by the Director General.”

- In regulation 17 (drawback), the following amendments have been made:

    - In subregulation (2)(a), the wording “JKDM Form No. 2” has been replaced with “the form and manner as determined by the Director General”; and

    - In subregulation (2)(b), the wording “Customs Form No. 1, Customs Form No. 9” and “Customs Form No. 2” has been replaced with “a declaration in the form and manner as determined by the Director General under the Customs Regulations 2019.”

- In regulation 26B (application for approval), the wording “prescribed form” has been replaced with “form and manner as determined by the Director General.”

Sales Tax (Customs Ruling) (Amendment) Regulations 2023

The Sales Tax (Customs Ruling) Regulations 2018 have been amended as follows:

- In regulation 2 (application for customs ruling), the wording of subregulation 2(1) that stated, “An application for a customs ruling shall be made in the form prescribed in the First Schedule and…” has been replaced with the following: “Any person may apply for a customs ruling under section 43 of the Act to the Director General and the application shall be…”

- In regulation 3 (analysis by any party determined by Director General) and regulation 4 (issuance of customs ruling), the wording “a duly completed form prescribed in the First Schedule” has been replaced with “the application for a customs ruling referred to in subregulation 2(1)” in subregulations 3(a) and 4(1)(a).
- In regulation 4 and regulation 7 (renewal of customs ruling), the wording “the form and manner as determined by the Director General” has replaced the following previous wording:
    - In subregulation 4(3): “the form prescribed in the Second Schedule”; and
    - In subregulation 7(1): “in the form prescribed in the Third Schedule.”
- The first, second, and third schedules (which set forth certain forms) have been deleted.

Deloitte Malaysia’s comments

For any applications and declarations made to the RMCD, it appears that the Director General of the RMCD may determine or change the required format of the form and the required information, without amending the relevant regulations (as opposed to the previous practice). Where the relevant provision of the regulations requires completion of a specific form, the Director General of the RMCD ideally should issue clear public guidelines to identify the type of the required form and how it should be completed. This would assist businesses in matters pertaining to sales tax returns and customs rulings, among other topics. Where necessary, businesses and individuals should seek clarification from the RMCD before making any form of application or submission.

Malaysia

Sales tax legislative amendments affect certain exemptions

Two orders relating to goods and persons that may be exempt from sales tax in Malaysia were gazetted on 28 and 29 December 2023, respectively, and are effective as from 1 January 2024; namely, the Sales Tax (Goods Exempted from Tax) (Amendment) (No. 2) Order 2023 and the Sales Tax (Persons Exempted from Payment of Tax) (Amendment) (No. 3) Order 2023. The amendments affect the treatment of manufacturing aids, cleanroom equipment, and packing materials, among other things. The notable amendments made by the orders are described below.

Sales Tax (Goods Exempted from Tax) (Amendment) (No. 2) Order 2023

This order amends the Sales Tax (Goods Exempted from Tax) Order 2022. The following amendments are made to the descriptions in column (3) of tariff subheading 9025.19 (relating to certain instruments) in schedule A:

- The deletion of the words “---Electrically operated” in column (3); and
- The addition of new subheading 9025.19.20 00, with the description “---Not electrically operated” in column (3).

Sales Tax (Persons Exempted from Payment of Tax) (Amendment) (No. 3) Order 2023

This order amends schedules B and C of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018. The columns of these schedules relevant to the amendments include column (2) (relating to exempt persons), column (3) (relating to exempt goods), column (4) (relating to the conditions for an exemption), and column (5) (relating to the certificate to be signed by specified persons).

Amendments to schedule B

The following noteworthy amendments are made to schedule B:

- Deletion of the words "(including packing materials)" in column (3) of items 1 to 3 (relating to certain goods to be used by an approved manufacturer solely for the manufacturing of specified goods);
- Addition of the words "or transported from a licensed warehouse under section 65 of the Customs Act 1967, a licensed manufacturing warehouse under section 65A of the Customs Act 1967 or a free zone established under the Free Zones Act 1990" after the words "registered manufacturer" in column (4) of items 1, 2, and 4 (item 4 relates to certain goods to be used by an approved manufacturer solely for the manufacturing of exempt goods for export);
- Replacement of the words of "The person approved by the Director General" with the words "The manufacturer in column (2)" in column (5) of items 1, 2, and 4; and
- The following notable changes that relate specifically to item 4:
    - Column (3): The wording "Taxable raw materials and components (including packing materials)" is replaced with "Raw materials, components, manufacturing aids, cleanroom equipment and, packing and packaging materials"; and
    - Column (4):
        - Addition of subitem (aa) on manufacturing aids and cleanroom equipment;
        - Addition of subitem (ba), requiring the exempted goods produced to be exported within 12 months from the date of import or purchase, or such further period as approved by the Director General of the RMCD;
        - Deletion of subitem (d); and
        - Replacement of the wording "raw materials and components" in subitem (e) with "goods in column (3)."

Amendments to schedule C

The following amendments are made to schedule C:

- Replacement of the words "and packaging materials" with the words "…manufacturing aids, cleanroom equipment and, packing and packaging materials" in column (3) of items 1 to 4 (relating to certain exempt goods for registered manufacturers and persons acting behalf of registered manufacturers); and
- Insertion of new subitems under column 4 of items 1 to 4 to address the following:
    - The manufacturing aids and cleanroom equipment as specified by the Director General of the RMCD; and
    - Situations where the manufacturing aids, cleanroom equipment, or packing and packaging materials are damaged, destroyed due to unavoidable accident, or fail to meet a specific quality, in which case the exempt person may apply in writing to the Director General of the RMCD to export, transport, or return the goods to the supplier, with no sales tax charged.

Deloitte Malaysia's comments

The orders have resulted in noteworthy amendments relating to the exemption of manufacturing aids and cleanroom equipment. These additions to the list of exempt goods present additional opportunities for businesses and individuals to qualify for a sales tax exemption. However, it is necessary for businesses and individuals to be aware of the conditions outlined in the orders before seeking an exemption from the tax authorities.

Malaysia

Legislative and regulatory updates relating to sales tax on low-value goods

Malaysian legislation and regulations relating to the introduction of sales tax on certain low-value goods (LVG) sold online were gazetted on 28 and 29 December 2023 and are effective from 1 January 2024; namely, the Sales Tax (Low Value Goods) (Amendment) Regulations 2023, the Sales Tax (Rate of Tax for Low Value Goods) Order 2023, and the Sales Tax (Determination of Low Value Goods) Order 2023. The measures are in line with the revised guide on sales tax on LVG released by the Royal Malaysian Customs Department (RMCD) on 3 November 2023.

Sales Tax (Low Value Goods) (Amendment) Regulations 2023

These regulations amend the Sales Tax (Low Value Goods) Regulations 2022.

Issuance of credit notes and debit notes

The introduction of new regulation 6A allows a registered seller (RS) that sells LVG to issue credit notes or debit notes if there is a reduction or addition to the amount of sales tax payable on LVG after the sales tax on LVG return (Form LVG-02) has been submitted to the RMCD. The regulation also specifies the details required to be included in the credit note or debit note issued by the RS.

Manner of submitting returns

The wording of regulation 7 has been replaced with wording that requires an RS to submit a return for each taxable period, as required under section 26 of the Sales Tax Act 2018, in the form and manner determined by the Director General of the RMCD.

Sales Tax (Rate of Tax for Low Value Goods) Order 2023

This order revokes the Sales Tax (Rate of Tax for Low Value Goods) Order 2022. While the rate of sales tax for LVG is maintained at 10%, the effective date for charging sales tax on LVG has been updated to 1 January 2024.

Sales Tax (Determination of Low Value Goods) Order 2023

This order revokes the Sales Tax (Determination of Low Value Goods) Order 2022. The threshold of a price not exceeding MYR 500 is maintained for the determination of LVG and applies to goods brought into Malaysia by land, air, or sea. The order also excludes certain items from the category of LVG, such as cigarettes, tobacco products, intoxicating liquors, smoking pipes, electronic cigarettes, and preparations used for smoking through electronic cigarettes.

Deloitte Malaysia's comments

As noted above, the amendments, effective as from 1 January 2024, are in line with the revised guide on LVG released by the RMCD on 3 November 2023. Given that the sales tax on LVG went live on 1 January 2024, affected businesses should ensure measures are put in place to ensure compliance and to reduce the likelihood of disruptions in importing LVG into Malaysia. In the case of uncertainty, businesses should seek clarification from the RMCD to evaluate the potential implications of the tax.

Malaysia

IRB issues software development kit and updated guidelines relating to e-invoicing

Electronic invoicing ("e-invoicing") is being implemented in phases in Malaysia and will be mandatory for the first group of taxpayers as from 1 August 2024 (previously, the proposed implementation date was 1 June 2024) and for all taxpayers (including for certain non-business transactions) as from 1 July 2025 (previously, the proposed implementation date was 1 January 2027). On 9 February 2024, the Inland Revenue Board (IRB) of Malaysia issued additional guidance on its e-Invoice webpage, including the beta version of an "e-Invoice software development kit" (SDK) and updated versions of the "e-Invoice Guideline" and the "e-Invoice Specific Guideline." The highlights of the new guidance are summarized below, along with certain points to note based on conversations between the IRB and Deloitte Malaysia.

e-Invoice SDK

The e-Invoice SDK is a collection of tools, libraries, and resources providing a set of functionalities, application programming interfaces (APIs), and development guidelines to assist businesses in integrating their existing systems with the MyInvois system via APIs. The SDK specifically addresses the following topics:

- APIs;
- Standard inputs and outputs;
- Standard error codes;
- Document type descriptions;
- Validation logic;
- Code tables;
- Integration guidelines; and
- Frequently asked questions (FAQs).

e-Invoice Guideline

This guideline aims to address the scope of implementation of e-invoicing, covering the concept of an e-invoice and providing step-by-step guidance on the e-invoice workflow. The "version 2.2" e-Invoice Guideline replaces the "version 2.1" e-Invoice Guideline issued on 28 October 2023. A summary of the changes is provided on page 3 of the version 2.2 e-Invoice Guideline; amendments were mainly made for clarification purposes.

e-Invoice Specific Guideline

The "version 2.0" e-Invoice Specific Guideline replaces the "version 1.1" e-Invoice Specific Guideline issued on 28 October 2023. A summary of the changes is provided on page 5 of the version 2.0 e-Invoice Specific Guideline. The main amendments were made for clarification purposes, including clarification of the application of the e-invoice rules for e-commerce transactions. This guideline aims to specifically address the following transactions and topics:

- Transactions with buyers;
- Statements or bills on a periodic basis;
- Disbursements and reimbursements;
- Employment perquisites and benefits;
- Certain expenses incurred by the employee on behalf of the employer;
- Self-billed e-invoices;
- Transactions that involve payments in monetary form to agents, dealers, or distributors;
- Cross-border transactions;
- Profit distributions;
- Foreign income;
- Currency exchange rates;
- API overview; and
- Cybersecurity.

Comments

The SDK provides significant insight into what is to be expected of the MyInvois system. However, the SDK is a beta version and many points are still to be confirmed, such as the URLs to the registration portals and identity service, as well as how taxpayers will be able to retrieve their identification number and confidential information used for authentication.

In addition, there are certain points to note from Deloitte Malaysia's conversations with the IRB:

- The necessity of certain data fields (e.g., reference number of Customs Form No. 1, Customs Form No. 9, etc., which is described as optional in the SDK but as mandatory in the guidelines) is to be updated so that the SDK follows the guidelines.
- The MyInvois portal is still in development and batch uploads of transaction data will be permissible. However, batch uploads are unlikely to work with an Excel or CSV file and likely would require an XML or JSON file, due to the complex structure involved.

- The IRB will be considering certain alternatives, such as allowing a validation link to be embedded into the physical representation of an invoice or allowing the attachment of a validated e-invoice (retrieved through the portal) to a physical representation of the invoice, as many taxpayers have raised concerns regarding translating the validation link into a QR code.
- Credit notes may reference multiple invoices, as per Universal Business Language version 2.1 standards.

Netherlands

Alert - Indirect Tax - VAT AG Kokott considers pension funds not comparable to investment funds

Following our news report about the hearing at the Court of Justice of the European Union ("ECJ") in Luxembourg regarding the application of the VAT exemption to management services, provided to Dutch pension funds implementing a conditional average salary scheme (DB scheme without additional payment obligation or CDC scheme), the Advocate General ("A-G") has presented an opinion in this case. The VAT exemption on the management services can be applied if the Dutch pension funds qualify as a common investment fund. The AG concludes that for this purpose, the Dutch pension funds must have the same characteristics as a UCITS, but doubts whether this is the case. The pension commitment mainly provides guaranteed benefits or benefits that depend on the performance of the invested capital.

Background

In 2016 the Dutch Supreme Court ruled that participants in a Dutch pension fund that implements a conditional average salary scheme (‘voorwaardelijke middelloonregeling’) do not run a sufficiently significant risk. As a result, such pension funds do not qualify as common investment funds and the management of these pension funds is not exempt from VAT.

According to several stakeholders, the Supreme Court's requirement that the investment risk must be of sufficient significance does not follow from earlier case law of the ECJ. In six cases, the Gelderland District Court has asked the ECJ to provide clarity about this by making use of the option to ask preliminary questions.

In essence, the referring Court asks whether the investment risk can also be borne by the collectivity of participants and whether it is relevant that the amount of the pension benefit partly depends on factors such as the number of years of pension accrual, the amount of the salary and the actuarial interest rate.

Opinion AG Kokott March 14, 2023

Dutch pension funds are not UCITS, but they can qualify as a common investment fund if they exhibit the same characteristics and thus perform the same actions, or at least are sufficiently comparable to such institutions so that they compete with them. For this, the ECJ has set a number of conditions, the only one in dispute being the requirement that participants must bear the investment risk. It is noteworthy, however, that the AG assesses all conditions again and seems to attach significant importance to the following two characteristics of a UCITS:

1. the fund must be open to an unlimited number of investors; and

2. there is a redeem or repurchase obligation.

AG Kokott concludes that a Dutch pension fund, due to its compulsory nature, is not accessible to the public but only to a limited group of investors. In addition, the AG suggests that there seems to be no redemption or repurchase obligation for the Dutch pension funds. For this reason, Dutch pension funds are not in a situation of competition with a UCITS, and are presumably not comparable to a UCITS. However, this is subject to the assessment of the referring court

Regarding the investment risk borne by the participants in a Dutch pension fund, the AG states that if the pension commitment is primarily dependent on the number of years of service and the level of employment income, the investment risk is not comparable to a UCITS. However, if the pension commitment is primarily dependent on the performance of the invested capital, the investment risk is comparable to a UCITS. In conclusion, the AG suggests that the pension funds in question likely do not meet enough conditions to qualify for the application of the exemption

The AG also addresses the question whether fiscal neutrality obliges the Dutch pension funds in this procedure to be treated equally to funds that implement an individual defined contribution (DC) scheme (third pillar). Pension funds with such a scheme are regarded as common investment funds. Since the individual DC pension scheme of the third pillar is a voluntary scheme, supplementing the mandatory participation in the schemes in question (second pillar), the AG also doubts in this regard whether the comparability requirement has been met. This is also the case because competition between the various pillars of the Dutch pension provision seems to be limited.

Practical implications

If the ECJ follows the opinion of the AG, it is up to the Dutch court to determine whether the pension commitment in the pension schemes of the pension funds in question, primarily depends on the number of years of service and the level of employment income or on the performance of the invested capital. Since in practice many pension schemes are comparable to the ones in this case, this ruling will be of great importance for practical applications. We do note, however, that in our opinion, the AG does not substantiate whether there is a comparable investment risk, leaving the outcome a factual matter.

Beyond pension funds, the opinion of the AG broadens the assessment framework with respect to access and redemption or repurchase obligations, which emphasizesrelevance for other funds that are not a UCITS.

Finally

In our view, the opinion of the AG is remarkable, in the sense that the AG does not or hardly address the actual question submitted to the ECJ, namely whether participants in a Dutch pension fund bear an investment risk comparable to that of a UCITS. Dutch pension schemes are based on the principle of solidarity and it is characteristic that the investment risk is borne collectively. The fact that the A-G does not take this into account in her assessment is, in our opinion, a missed opportunity. Hopefully, the ECJ will take these elements into account in its judgment, which might lead to a different outcome. Of course, we will keep you informed of the continuation of this procedure.

If you have any questions, please contact your usual Deloitte advisor or one of the contact persons included in the alert

Tax policy guide for 2024: What to expect and when

With the new year well and truly underway, it is time to have another look at New Zealand's expected tax changes for 2024. A new government means a range of potential tax changes to monitor.

What is the current state of play?

Currently, two tax bills are passing through the House. The Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill is still in the select committee stage with the final report from the Finance and Expenditure Committee (FEC) due back in March. Two notable items in the bill are the increase of the trustee tax rate to 39%, and the introduction of the OECD's global anti-base erosion (GloBE) rules (which only apply to multinationals with revenue over EUR 750 million).

The other is the digital services tax bill which, at the time of writing, was still awaiting its first reading. The bill is an alternative to the OECD's Pillar One solution to the tax challenges that arise from the digitization of the economy. Pillar One is intended to help countries tax large multinationals with no "taxable presence" in a jurisdiction, but who still generate revenue from that jurisdiction, by reallocating taxing rights. However, Pillar One has not yet been implemented and the timetable has been extended, with the proposed signing ceremony now pushed out to June 2024.

The proposed digital services tax (DST) exists to provide an alternative for New Zealand if Pillar One does not progress in a timely fashion. The DST bill was tabled in the final days of the previous government, and while it has been reinstated by the new government, it is unclear what its current position is.

Other notable tax-adjacent changes from the government are the discontinuation of the clean car discount as from 31 December 2023 and the announcement that the government will repeal the Business Payment Practices Act 2023 before many of its provisions come into force on 1 May 2024.

So that is the current state of play, but these are by no means the only items in the works. Here is a sample of what else to expect and when to expect it.

Income tax rates

Finance Minister Hon. Nicola Willis has reiterated the government's intention to adjust the individual income tax thresholds to reduce the effects of bracket creep. These are expected to come into force as from 1 July 2024. The National party has proposed the following brackets during the election:

Existing tax thresholds (NZD)	Possible tax thresholds (NZD)	Tax rates (%)
Up to 14,000	Up to 15,600	10.5
14,001-48,000	15,601-53,500	17.5
48,001-70,000	53,501-78,100	30
70,001-180,000	78,101-180,000	33
Over 180,000	Over 180,000	39

But these changes are by no means a certainty. The National/ACT coalition agreement also states: “Ensure the concepts of ACT’s income tax policy are considered as a pathway to delivering National’s promised tax relief, subject to no earner being worse off than they would be under National’s plan.”

The ACT income tax policy includes removing the 10.5% rate and instead having the 17.5% rate apply from NZD 0 to NZD 60,000, a 30% rate from NZD 60,001 to NZD 70,000, and the existing 33% and 39% rates left unchanged and applying from NZD 70,001 and NZD 180,001, respectively. The ACT party also proposed a low- and middle-income tax credit to compensate those who previously were taxed at a lower marginal rate.

As any bracket change is likely to only be confirmed when the budget is announced on 30 May 2024, clarity on what these new brackets will look like is probably still a while away. A change in tax rates with effect as from 1 July 2024, while likely to be welcomed by workers, will result in employers and payroll software developers (and Inland Revenue) having to make changes to payroll systems in a very short timeframe. Having a "composite" tax year will bring a sizeable number of complications for calculating tax across the whole income year.

Finally, a change to be aware of is the impact that changes to income tax rate thresholds have on other taxes. These include fringe benefit tax (FBT), employer superannuation contribution tax (ESCT), resident withholding tax (RWT), and prescribed investor rates (PIR). Any change to the income tax thresholds will also result in corresponding changes to the thresholds for these taxes.

Trustee tax rate increase

One of the big announcements out of Budget 2023 was the then Labour government’s proposal to align the trustee tax rate with the top personal tax rate of 39% from the 2024/25 income year. The National government had stated it would be progressing with the trustee tax rate increase during the election, albeit this was not an overtly highlighted part of its election tax policy.

The end of the story? Not quite.

In late February, the finance minister was reported as saying the government was considering “carve-outs” and a “de-minimis rate.” The suspicion is that a two-rate system may be in the works. This would see high-income earning trusts paying a 39% rate, while low-income earning trusts continue to pay a 33% rate.

Interest deductibility

The trustee tax rate is not the only area facing uncertainty. Under the National/ACT coalition agreement, there is a commitment to restore residential rental property interest deductibility, starting at 60% in the 2023/24 tax year, 80% in 2024/25, and 100% in 2025/26. The problem is that the proposed change to the 60% deduction amount would start in the current tax year, meaning retroactive tax cuts could be on the cards for many taxpayers (depending on their balance date). Retroactive law changes are generally considered poor lawmaking. In a release during the December 2023 "mini-budget," it was stated that interest deductibility would change as from 1 April 2024—indicating that potentially the retroactive change will not be included in the National/ACT coalition agreement.

Building depreciation

The ability to claim commercial building depreciation deductions is to be removed, likely from the start of the 2024/25 income year (1 April 2024 for standard balance date taxpayers). While the exact details of

the removal are still uncertain, that does not mean it should be ignored. When the previous removal of building depreciation occurred in 2010, the cost to businesses was very high, especially in the initial stages. Similar teething issues may be expected while the finer details of this policy are ironed out.

Bright-line test

Late in 2023, the finance minister confirmed that the residential property bright-line test is to be reduced from 10 years to two years on all properties as from 1 July 2024. There is uncertainty on the specifics of this change (e.g., whether it will apply to all disposals after 1 July 2024).

App tax

Despite National and ACT arguing against its introduction while in opposition, the "app tax" is now here to stay and will be introduced as from 1 April 2024. The effect of the change is that online platforms that offer ridesharing, food delivery, or short-term accommodation services will now need to charge GST, even if the underlying owner/driver is not GST registered and makes under NZD 60,000 per year.

Budget 2024

Budget day in 2024 is 30 May. As highlighted above, this is likely to be the day that the new personal tax rate thresholds are revealed, as well as the day when the direction in which the new government wants to take taxes is understood. Each budget includes a "revenue statement" which sets out the intended approach to tax. Shortly after the release of the revenue strategy, the release of the tax and social policy work program could be expected. The work program will set the scene for the focus of the tax policy development over this parliamentary term.

It is understood that Inland Revenue has received direction to focus on enforcement of tax laws and reducing compliance costs.

New Zealand

Proposed amendments to the 2023-24 tax bill released

On 14 March 2024, proposed amendments to New Zealand's Taxation (Annual Rates for 2023-24, Multinational Tax and Remedial Matters) Bill were published (Amendment Paper No 20). Expected and highly publicized, changes include reducing the bright-line test for residential property to two years, restoring interest deductions on residential property, and removing commercial building depreciation deductions.

Other welcome changes include a simplification of the main home exclusion to the bright-line test, a transitional rule for digital platforms, and changes to the rules around disposals of trading stock at or below market value.

National's campaign suggestion of "closing gambling loopholes" as a revenue-raising measure has also been included, in the form of a new tax on offshore gambling profits.

There are also a number of technical and remedial amendments. These changes will not be subject to public consultation but will be debated by the House before being passed later in March.

Removal of commercial building depreciation

The amendment paper contains the anticipated removal of commercial building depreciation with an estimated useful life of more than 50 years with effect as from the 2024/25 income year. Special depreciation rates will no longer be available.

A new fit-out provision will be added in section DB 65B of the Income Tax Act 2007—this rule should allow the fitout previously quantified under section DB 65 to be depreciable again (subject to reconciling all amounts claimed). The depreciation rate under this will be 1.5%, rather than the 2% previously available under section DB 65.

Taxpayers subject to IFRS that are affected by this change will need to consider whether any deferred tax disclosures will be required due to this change.

Interest deductibility for residential investment property

A key promise of the ACT party's campaign has been included, albeit pared back to ensure refunds are not issued for the 2023-24 tax year. As from 1 April 2024, 80% of interest will be deductible on mortgages of residential investment properties, and interest will be fully deductible as from 1 April 2025.

Bright-line test reverts to two years

As promised by National, the bright-line test has been reduced from 10 years (and five years for new builds) to two years when an agreement to sell a property is entered on or after 1 July 2024. Other policy settings are also being adjusted, such as applying a main home exemption on a predominate use basis and extending rollover relief to all transfers between associated persons, provided they have been associated for at least two years before the transfer.

Offshore gambling profits taxed

National's promise during the election to raise revenue through taxing offshore casinos led some to question whether such a tax could be effective, and how it would be enforced.

Minister of Revenue Hon. Simon Watts noted that "New Zealand is one of only a handful of developed countries that does not regulate online casinos," and the cabinet had also made an in-principle decision to regulate online casino gambling. He also cited unfairness that "casinos physically present in New Zealand face significantly higher taxes than offshore online casinos" that currently only pay GST (by contrast, New Zealand-based casinos will also be paying company tax and gambling levies).

National announced this policy prior to the 2023 election, estimating it would raise on average NZD 179 million per year. There was scepticism around whether such a tax would actually raise that much revenue, with the regulatory impact assessment estimating the additional revenue to be NZD 35 million per year, increasing by 5% per annum.

In proposing an offshore gambling duty, the amendment paper sheds more light on what this will look like. The duty, as drafted:

- Proposes a 12% levy on offshore gambling profits;
- Applies to GST-registered persons located outside New Zealand to the extent they make supplies of remote gambling services to New Zealand residents; and

- Applies as from 1 July 2024.

Disposals of trading stock at below market value

The amendment paper narrows the application of existing market value rules to mitigate the over-taxation of trading stock disposed of at below market value. This change will replace a temporary rule which has existed for several years to ensure that businesses that have donated trading stock (whether for COVID-19 or other reasons) are not subject to punitive tax outcomes.

The new proposed section deems trading stock to be disposed of at market value only when a person disposes of trading stock to themselves for their own consumption, where it is not disposed of in the course of carrying on a business for the purpose of deriving income, or when disposed of to an associated person.

An additional new section will also address the issue of gifted trading stock to donee organizations, which is currently disincentivized by the tax rules. There is a drafted exclusion for donated trading stock, trading stock disposed of under a relationship agreement, trading stock disposed of to a person in a farming, agricultural, or fishing business affected by a self-assessed adverse event, or under a share-lending agreement.

These changes will apply as from 1 April 2024.

Contracts entered into prior to 1 April 2024 on digital platforms

The amendment paper proposes to exclude contracts entered into on digital platforms prior to 1 April 2024, but performed after 1 April 2024, from the new GST requirements.

Digital platforms providing accommodation or ride-sharing or food delivery services will be required to collect GST on the services provided by the underlying suppliers as from 1 April 2024. Bookings of accommodation made prior to 1 April 2024 will be excluded from these rules, i.e., if a customer made an accommodation reservation in January 2024 for a holiday in May 2024, the platform will not be required to pay GST. This ensures that marketplace operators do not have unfunded and unanticipated GST liabilities that were not factored into the initial reservation cost.

Poland

Zero VAT rate for food products will not be extended

The Polish Ministry of Finance has proposed several changes to certain reduced VAT rate items, as discussed below.

Removal of 0% VAT rate on basic foods

On 12 March 2024, the Polish Ministry of Finance announced that the temporary reduction of the VAT rate from 5% to 0% on basic food products listed in items 1 to 18 of annex 10 to the Polish VAT Act, such as fruit, vegetables, cereal products, dairy products, and meat, will end on 31 March 2024.

The temporary reduction has been in force since 1 February 2022, and was introduced as part of the anti-inflation policy. It was originally intended to be effective until the end of 2023, but was extended for another three months.

The decision to remove the temporary rate is based on the downward trend in inflation and the favorable forecasts for food price dynamics. As a result, as from 1 April 2024, the 5% VAT rate will be reinstated on these food products.

Taxpayers trading in the affected goods will need to make adjustments in their financial systems (and cash registers) to reflect these changes. In addition, any binding VAT rate information (WIS) rulings that cover the goods affected by the rate change will expire. As a result, taxpayers may wish to apply for new WIS rulings to ensure continuity.

Reduced 8% VAT rate for beauty-related services proposed

On 1 March 2024, the Ministry of Finance published a draft amendment bill to the decree governing the application of reduced VAT rates, which provides that, as from 1 April 2024, the 8% VAT rate would apply to beauty-related services (as specified in the appendix to the decree). These services are currently subject to the 23% VAT rate.

Doubts remain as to whether such a decrease is permitted under EU regulations; appendix III to the EU VAT Directive (on reduced VAT rate items) does not cover beauty-related services, instead specifying hairdressing services, which are already subject to the 8% VAT rate in Poland. If the proposal is not in line with the EU legislation, the European Commission may launch infringement proceedings.

The bill has been signed and published in the official journal.

Poland

Further details on proposed changes to KSeF

Following consultations regarding the National e-Invoice System (KSeF), on 21 March 2024 the Polish Ministry of Finance provided taxpayers with an overview of proposed changes. Draft implementing legislation will be published for consultation on 3 April 2024. The date of entry into force for mandatory use of the KSeF, and the final versions of the legislative drafts, will be made public by the end of May 2024.

The Ministry of Finance hopes that the legislative process will be completed by 1 July 2024. Taking into account the promise of a delay of at least six months from the publication of the final legislation to implementation, the mandatory phase of the KSeF could be launched as early as the beginning of 2025.

A summary of the most important proposed changes is below.

- Business-to-consumer invoices may be issued using the KSeF on a voluntary basis. The buyer would be able to access the invoice in the system using a QR code.
- VAT taxpayers, including exempt taxpayers, would be required to provide a tax identification number whenever they make a purchase for business purposes. Without an invoice issued in the KSeF, they would not be entitled to deduct these costs for corporate income tax purposes.
- Mandatory use of the KSeF would be launched simultaneously for all entities, including exempt taxpayers. Previously, a six-month delay for exempt taxpayers was envisaged.

- The requirement to indicate an e-invoice's KSeF identification number at the time of payment (both within and outside the split payment mechanism) as well as the abolition of fiscal invoices and invoice-equivalent fiscal receipts, would be postponed. The postponement period could last longer than the previously anticipated six months, and is still under consideration by the Ministry of Finance.
- The offline mode would be available in all circumstances, for at least the initial period after mandatory implementation, provided that the invoice is sent to the KSeF no later than the next business day.
- Clarification on the identification of a fixed establishment for VAT in Poland would be published.
- For invoices documenting the supply of utilities, telecommunications services, as well as other collective invoices, the Ministry of Finance will prepare a logical structure for an invoice attachment, which will be made available to the buyer via KSeF.
- Documentation for providers of IT solutions integrated with KSeF will be made available for consultation, and the Ministry of Finance is also planning to organize meetings with IT developers.
- Certificates used to generate QR codes for offline invoices would be available during the voluntary period.

Portugal

Summary of clarifications relating to VAT rates for food and beverage services

Portugal's state budget law for 2024 (Law No. 82/2023, available in the Portuguese language only) was published on 29 December 2023 and entered into force on 1 January 2024, and its measures generally are effective as from the same date. These include a measure amending item 3.1 of list II annexed to the VAT Code to apply the intermediate VAT rate (rather than the standard rate) to the supply of food and beverage services, other than services relating to the supply of alcoholic beverages and soft drinks. Subsequently, Circular Letter No. 25019 (available in the Portuguese language only) was published on 17 January 2024, which aims to clarify the application of the intermediate VAT rate following the amendments. This article summarizes the clarifications provided in the circular letter.

The circular letter provides the following clarifications regarding the application of the intermediate VAT rate:

- Food and beverage services detailed in a commercial invoice (e.g., a main course, dessert, juice, coffee) that does not include a supply of alcoholic beverages or soft drinks are subject to the intermediate VAT rate (currently, 13% in mainland Portugal, 12% in Madeira, and 9% in the Azores).
- If food and beverage services are detailed in a commercial invoice (e.g., a main course, dessert, juice, coffee) that includes a supply of alcoholic beverages or soft drinks, the intermediate VAT rate will be applicable to the supply of food and beverages other than alcoholic beverages and soft drinks, and the standard VAT rate (currently, 23% in mainland Portugal, 22% in Madeira, and 16% in the Azores) will be applicable to the supply of alcoholic beverages and soft drinks.
- If the services/goods supplied are not duly specified in a commercial invoice and are covered only by a reference to the "menu" (i.e., where food and beverages are consumed, but without the detail of the tax rate for each item), the standard VAT rate is applicable.

In addition, the circular letter clarifies that if a commercial invoice includes services subject to different tax rates, the following elements must be indicated separately, according to the applicable rate:

- Quantity and usual denomination of the goods transferred or services provided;
- Net price of the services/goods provided, the applicable tax rates, and the amount of tax due; and
- Price of the services/goods provided, including tax at the applicable rates.

Portugal

Additional guidance provided on CESOP obligations, application of reduced VAT rate

Portuguese legislation that entered into force on 1 January 2024 introduces certain record keeping and reporting obligations for payment service providers and applies the reduced VAT rate to certain supplies, among other things. An ordinance (No. 81/2024/1, available in the Portuguese language only) published on 5 March 2024 provides additional guidance on the obligations of payment service providers; in particular, the ordinance provides instructions regarding the structure, content, and submission of reporting files. In addition, a circular letter (No. 25025, available in the Portuguese language only) published on 8 March 2024 provides additional guidance on the application of the reduced VAT rate to equipment for the collection and use of alternative forms of energy.

Ordinance No. 81/2024/1

On 1 January 2024, Law No. 81/2023 (available in the Portuguese language only) entered into force, which transposed into the Portuguese legislation the provisions of Council Directive (EU) 2020/284 regarding the introduction of certain obligations applicable to payment service providers, with the aim of combating VAT fraud in e-commerce. Payment service providers are required to keep records and report details relating to certain cross-border payments, which will be stored in the Central Electronic System of Payment information (CESOP).

For the purpose of regulating specific aspects of the new legislation, Ordinance No. 81/2024/1 entered into force on 6 March 2024. The ordinance approves the structure and content for reporting files and the conditions for their submission by electronic means, for the purposes of complying with the obligations to communicate records provided for in article 7(1) of Law No. 81/2023.

The ordinance establishes that payment service providers covered by the reporting obligations, prior to the first submission of reporting files, must provide their identification details on a registration form available on the Portuguese tax authorities' website. After the registration, the tax authorities will make available to payment service providers that do not have a national tax identification number the necessary elements to enable the submission.

Payment service providers must communicate to the tax authorities the information covered by the reporting obligation, using a standardized XML format, namely, by submitting the file through the tax authorities' portal or via a web service, in accordance with the following: (i) the technical specifications made available on the portal; (ii) Commission Implementing Regulation (EU) 2022/1504; and (iii) the relevant validation schema (XSD). Reporting must be carried out on a quarterly basis, by the end of the month following the relevant quarter.

Circular No. 25025

The state budget law for 2024 (Law No. 82/2023, available in the Portuguese language only), which includes provisions applying the reduced VAT rate to certain supplies, was published on 29 December 2023 and entered into force on 1 January 2024. The reduced VAT rate currently is 6% in mainland Portugal, 5% in Madeira, and 4% in the Azores.

Circular Letter No. 25025, published on 8 March 2024, aims to clarify the application of the reduced VAT rate to item 2.37 of list I annexed to the VAT Code, which was amended by the state budget law to include the acquisition, delivery and installation, maintenance, and repair of devices, machines, and other equipment intended exclusively or mainly for the capture and use of solar, wind, and geothermal energy and other alternative forms of energy (previously, the reduced rate was applicable only to the delivery and installation of thermal and photovoltaic solar panels).

The circular letter discusses some of the goods (for example, heat pumps) that may be covered by the reduced VAT rate and clarifies that the reduced VAT rate applies to intracommunity acquisitions, local supplies of these goods with and without installation, and to the mere installation/maintenance and repair of these goods.

The reduced rate may also apply to the supply of components, parts, and accessories, unless these items are acquired separately.

Taiwan

MOF ruling confirms qualified late payment interest not sales amount for VAT purposes

The Ministry of Finance (MOF) of Taiwan (China) released tax ruling No. 11204662230 on 6 December 2023, concerning interest paid by buyers due to delayed payment in accordance with paragraph 1, article 233 of the Civil Law ("qualified late payment interest"). The MOF confirmed that such interest is not considered as sales revenue for VAT purposes and thus is not subject to 5% VAT; however, buyers should fulfill withholding and/or reporting obligations for the payment of interest. The ruling is effective as from the date of issuance.

Previously, late payment interest arising from a buyer's failure to pay for purchases of goods or services on a timely basis constituted a "sales amount" for VAT purposes. Sellers were liable to 5% VAT on the amount and issued government uniform invoices to buyers for late payment interest. However, this tax treatment did not distinguish qualified late payment interest from consideration for the exchange of goods or services.

The MOF further explains in the ruling that, according to the VAT Act, sales amount refers to the total consideration received by a business entity for sales of goods or services, including all other fees charged by sellers in addition to the sales price of the goods or services sold; however, the term sales amount for VAT purposes does not go beyond the consideration for the exchange of goods or services. Furthermore, as both the buyer and seller cannot foresee whether the buyer will fail to make payment on a timely basis, the qualified late payment interest should not be considered as sales amount for VAT purposes and, therefore, does not fall within the scope of VAT.

As from 10 December 2023, the date of issuance of the tax ruling, the withholders are required to withhold income tax from qualified late payment interest in compliance with their withholding obligation. Business entities may consider amending VAT returns to claim the overpaid VAT due to the qualified late payment interest if they have not been assessed. The new tax ruling does not apply to transactions to which non-value added tax (GST) applies and cases which involve tax avoidance.

United States

State Tax Matters (1 March 2024)

The 1 March 2024 edition of *State Tax Matters* includes coverage of the following US state tax developments:

- Income/Franchise:
    - **Alabama:** "Subject to tax" exception to intercompany intangible expense addback statute deemed to apply
    - **Missouri:** Department of Revenue proposes various rule updates involving net operating loss computation
    - **New Hampshire:** Proposed rule updates apportionment factor computation for financial institutions
    - **New York:** Administrative law judge says company is a qualified New York manufacturer despite engaging subcontractor for production
    - **Texas:** Labor costs for repairing customer-owned parts not includable within cost of goods sold
    - **Wisconsin:** Tax Appeals Commission says individual had nexus from out-of-state single member LLC's software licensing
- Gross receipts:
    - **Washington:** Department of Revenue explains business and occupation (B&O) and sales taxation of digital entertainment subscriptions
    - **Washington:** Department of Revenue explains B&O and sales tax situsing of periodic lease payments on certain aircraft
- Sales/Use/Indirect:
    - **California:** Appellate court reverses lower court's invalidation of regulation on bundled sales of cell phones
    - **California:** Appellate court affirms that streaming companies do not owe local franchise fees
    - **Illinois:** Department of Revenue adopts rule addressing bad debt deductions on installment contracts for cash basis retailers
    - **Minnesota:** Department of Revenue explains imposition of retail delivery fee on some deliveries to in-state customers

The newsletter also features a recent Multistate Tax Alert: "California court denies FTB's motion to modify judgment declaring P.L. 86-272 guidance invalid"

United States

State Tax Matters (8 March 2024)

The 8 March 2024 edition of *State Tax Matters* includes coverage of the following US state tax developments:

- Administrative:
  - **Illinois:** Proposed rule changes involve Informal Conference Board review requests and jurisdiction on audit
- Income/Franchise:
  - **California:** Franchise Tax Board (FTB) issues new notice on elections involving changes in accounting periods or methods
  - **California:** Updated FTB guidance addresses credit assignments among combined group members
  - **Florida:** State limitation for net operating loss carryforwards subject to Internal Revenue Code section 382 deemed the same as federal amount
  - **Indiana:** Indiana Tax Court reaffirms broader scope of addition adjustment for income taxes paid to other states
  - **Mississippi:** Department of Revenue issues updated guidance on elective entity-level taxation for passthrough entities
  - **New Jersey:** Governor's proposed budget includes new corporate transit fee in the wake of expired 2.5% surtax
  - **New Mexico:** New law provides flat corporate income tax rate and includes subpart F income in tax base
  - **Virginia:** Department of Taxation issues guidance on passthrough entity tax election for tax year 2021
- Sales/Use/Indirect:
  - **Illinois:** Appellate court says expanded temporary storage exemption does not apply due to partial in-state use
  - **New Jersey:** US Court of Appeals affirms dismissal of lawsuit against streaming entertainment companies
  - **New York:** Appellate court agrees that certain taxable information services do not fall under statutory exclusion

- Property:
  - Florida: Owner's transfer of property to LLC deemed a change of ownership resulting in loss of cap benefit
- Other/Miscellaneous:
  - Tennessee: Department of Revenue issues reminder on business tax law changes and increased filing threshold

United States

State Tax Matters (15 March 2024)

The 15 March 2024 edition of *State Tax Matters* includes coverage of the following US state tax developments:

- Income/Franchise:
  - New Jersey: Division of Taxation says some S corporations must submit proof of federal S corporation status with corporation business tax return
  - Ohio: Release addresses legislative changes on municipal net profit tax and remote workers
  - South Carolina: New law addresses alternative apportionment and includes arm's length standards on forced combination
- Sales/Use/Indirect:
  - Washington: Washington Supreme Court holds that tax on federally subsidized wireless services violates supremacy clause
  - Wyoming: New law removes 200-transaction threshold from *Wayfair* economic nexus statute
- Property:
  - Utah: Utah Supreme Court says pandemic was not an access interruption event that triggered reduced valuation

The newsletter also features a recent Multistate Tax Alert: "New Mexico enacts flat corporate income tax rate and taxes Subpart F income"

United States

State Tax Matters (22 March 2024)

The 22 March 2024 edition of *State Tax Matters* includes coverage of the following US state tax developments:

- Income/Franchise:
  - Arizona: New law updates state conformity to Internal Revenue Code
  - Idaho: New law adds supporting documentation requirements for claiming deductions and credits

- **Louisiana:** Department of Revenue adopts rule changes reflecting passthrough entity tax revisions
- **Oregon:** Department of Revenue posts guidance for foreign corporations on doing business, nexus, and P.L. 86-272
- **Utah:** New law lowers corporate and personal income tax rates from 4.65% to 4.55%

- Sales/Use/Indirect:
  - **Indiana:** New law removes 200-transaction threshold from *Wayfair* economic nexus statute
  - **Louisiana:** Board of Tax Appeals says pay-per-view and video-on-demand TV services are not taxable

The newsletter also features a recent Multistate Tax Alert: "South Carolina limits Department of Revenue use of combined reporting as alternative apportionment method"

United States

State Tax Matters (29 March 2024)

The 29 March 2024 edition of *State Tax Matters* includes coverage of the following US state tax developments:

- Sales/Use/Indirect:
  - **South Carolina:** Department of Revenue says digital books sold to college students qualify for textbook exemption
- Property:
  - **Ohio:** Board of Tax Appeals says pandemic significantly affected hotel valuation for tax year 2020

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