WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international Financial Services industry

Dear Madam/Sir,

We hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from nine countries with a focus on the international Financial Services industry.

The following participants in the WTS Global network contributed with a diverse range of FS tax topics, e.g. the consequences of the cum-ex-trades on WHT refund and relief in Austria, the regulations on VAT and income taxes on mining activity in Italy or the amendments on banking tax in Poland:

- Austria – ICON
- Belgium – Tiberghien
- China – WTS China
- Czech Republic – WTS Alfery
- Germany – WTS Germany
- Italy – WTS R&A Studio Tributario
- Poland – WTS Saja
- Spain – ARCO Abogados y Asesores Tributarios
- United Kingdom – Hansuke

Thank you very much for your interest.

Wishing you all the best for the upcoming holiday season and for 2023.

Frankfurt, 15 December 2022

With best regards,

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For details on WTS Global Financial Services:
https://wts.com/global/services/financial-services

1 The editors would very much like to thank their WTS colleague **Jonas Carstensen** for the valuable support.

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Contents

Please find the complete list of contacts at the end of the newsletter.

EU VAT and Financial Services

Sub-participations in loans – ECJ judgement of 6 October 2022 (C-250/21)

In its ruling of 06.10.2022 (C-250/21), the ECJ had to deal with the VAT exemption of sub-participations in loans. Sub-participations make it possible to pass on the income and risks of a loan to other parties who are not involved in the underlying loan. In the case at hand, an investment fund from Poland planned to participate as a sub-participant in loans granted by various financial institutions (originators). For this purpose, the sub-participant (the investment fund) and the respective originator were to enter into the following mutual obligations: The sub-participant should provide financing to the originator, and the originator should remit the proceeds of the loan receivables to the sub-participant, with the originator continuing to hold the debt instruments in its assets. If the debtor defaulted, the sub-participant would have no recourse against it. The sub-participant would only be entitled to the income that the originator could obtain by realizing collateral granted to it by the debtor.

According to the question referred for a preliminary ruling, the ECJ should clarify whether such a sub-participation is to be regarded as the granting of a loan exempt from VAT pursuant to Section 135 (1) (b) of the VAT Directive (corresponds to Section 4 No. 8 (a) of the German VAT Act).

According to the ECJ, the sub-participant provides a service for consideration to the originator, which already results from the mutual contractual obligations to provide the financing (service of the sub-participant) and the payment of a fee for this (revenue distribution by the originator). This already shows the proximity of the sub-participation to the "classic" granting of a loan, since the ECJ – in contrast to the position previously taken by the Advocate General – considers the question to be irrelevant, whose default risk the sub-participant actually bears economically: The bearing of a credit risk is inherent in any granting of credit, regardless of whether it is the risk of default by the original borrower or the originator. Ultimately, the other conditions, such as the absence of guarantees in favor of the sub-participant or the retention of the debt instrument by the originator, are not relevant to the ECJ's decision, which is why it considers sub-participations through which capital is provided in return for payment to be a VAT-exempt granting of credit within the meaning of 135 (1) (b) of the VAT Directive. The ECJ also considers such an interpretation to be in line with the principle of neutrality and the purpose of the VAT-exemption, inter alia, not to increase the cost of consumer credit.

The decision is particularly pleasing for entrepreneurs from the credit industry, as the ECJ precisely did not follow the Advocate General's thoughts. These could have led to the fact that the services within the scope of the sub-participation would have had to be treated as subject to VAT. For companies with a possibly limited right to deduct input tax, this would inevitably have led to additional costs in the amount of the non-deductible input VAT amounts.

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Austria

Consequences of the Cum-Ex-Trades on WHT refund and relief in Austria

On November 15, 2022 the Austrian Ministry of Finance (MoF) published an information letter on the attribution of dividends for income tax purposes. The letter follows the decision of the Austrian Supreme Administrative Court (Verwaltungsgerichtshof – VwGH) of 28 June 2022 (Ro 2022/13/0002) concerning short-term Cum-Ex-Trades and withholding tax refunds. The MoF details under which requirements a shareholder of an Austrian stock listed corporation is entitled to a WHT refund or an exemption at source.

For tax purposes a dividend shall be attributed to the economic owner of the respective shares on the dividend resolution date. For this purpose, the acquired shares must have been deposited in the taxpayer's (the customer's) securities account prior to the day on which the resolution on the distribution of profits is adopted (Annual General Meeting); the relevant date is therefore the securities account balance at the end of the day preceding the Annual General Meeting (AGM day minus one). The date of deposit is generally the date on which the purchase order is executed. Therefore, if the acquired shares were not deposited in the securities account at the latest at the end of the last trading day before the Annual General Meeting (AGM day minus one), it must be assumed that the seller of the shares still has beneficial ownership.

The MoF expressly states that a refund request will have to be substantiated by documentation detailing the above requirements. Proof of the date of deposit must be provided by means of corresponding bank confirmations (in particular annual custody account statements that contain additions and disposals comparable to a journal), whereby the tax office reserves the right to verify their authenticity (also by way of administrative assistance) or to request further documents.

If, in the past, WHT was refunded on the basis of the securities account balance at the end of the cum date, this refund can be cancelled and remitted within a one-year period from the date of delivery of the notification about the refund. In all other cases, a cancellation of previous WHT refunds can only be made where the requirements for a reopening are met. This would be the case where the competent tax authority, at the time of issuing the notice, had no knowledge of whether the applicant was the beneficial owner of the shares on the day of the resolution on the distribution of profits (Annual General Meeting) and thus the subject of the dividend payment and the debtor of the WHT refunded.

Based on above mentioned VwGH-jurisprudence, the WHT exemption at source must also be based on the beneficial ownership on the dividend resolution date. If the distributing company cannot prove that the requirements for relief were met at the latest at the end of the last trading day prior to the Annual General Meeting, it will be liable for WHT not levied.

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Belgium

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The Belgian Constitutional Court decides on the annual tax on securities accounts (ATSA)

On Thursday the 27th of October 2022, the Belgian Constitutional Court has delivered its long-awaited judgment on the constitutionality of the annual tax on securities accounts introduced by the Act of February 17, 2021 (hereafter "ATSA").

As a reminder, the ATSA is applicable, in principle, on all securities accounts held in Belgium if the average value in the reference period (01/10/20XX – 30/09/20XX) exceeds 1 million EUR. The tax rate is 0,15% and calculated on the average value held on the securities account.

Already from the start, several objections could be raised concerning certain constitutional principles, for example regarding the principle of equal treatment (non-discrimination), the tax legality principle, the prohibition of double taxation (ne bis in idem principle) and certain aspects of European law.

A total of 7 separate annulment appeals were filed, causing a broad group of taxpayers to await with interest the outcome of the procedure before the Court.

Although there was hope for several fundamental corrections to or even the full annulment of the ATSA, the Court apparently sees far fewer problems regarding the ATSA.

The Court decides to annul the specific anti-abuse provisions regarding the splitting of a securities account into several securities accounts held with the same financial intermediary and the anti-abuse provision regarding the conversion of financial instruments held in a securities account into registered financial instruments (not held on a securities account).

In addition, the Court ruled that the retroactive effect of the general anti-abuse provision regarding the period prior to the entry into force of the law, i.e. from 30 October 2020 to 26 February 2021, was not permissible and should therefore be annulled.

Action can therefore be taken regarding any application of the specific or general anti-abuse measures prior to the 26th of February 2021. Any application of any anti-abuse measure before this date (the date of entry into force of the law) is invalid and can therefore be contested in a straightforward manner. In principle, this has to lead to a full reimbursement of the ATSA that was paid as a consequence of the application of said anti-abuse measures.

Any application of the specific anti-abuse measures as from the 26th of February 2021 can also be targeted, however, taken into account that the general anti-abuse measure still applies.

This means that if any wealth were to be transferred to a second securities account held by the same financial intermediary this cannot be considered to be tax abuse, unless the tax administrations proves this to be the case. In the presence of sufficient non-tax related arguments, therefore, the reimbursement of the ATSA can be requested.

If financial instruments held on a securities account were to be converted from 26th of February 2021 or any later date in a registered form, there will be no ATSA applicable if the taxpayer has sufficient non-tax related arguments to substantiate the non-application or even reimbursement of the ATSA.

For the remainder, the ATSA has survived all legal discussions meaning the ATSA should still be declared and paid for the 2022 reference period (01/10/2021 – 30/09/2022) and any further reference periods.

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Additional taxes for the Belgian financial sector and snowball effect for Belgian regulated investment companies (tax-on-tax)

Additional Taxes
In the context of the latest budgetary measures, a decision has been taken to intensify the taxation of the financial intermediaries (banks, insurance companies and investment undertakings). The changes are therefore aimed at the entire financial sector.

The revision will limit the tax deductibility in the Belgian corporate tax regime of the annual tax on credit institutions (the so-called bank tax – tax rate of 0,13231%), the annual tax on collective investment undertakings (the so-called subscription tax – tax rate of 0,0925%) and the annual tax on insurance companies (tax rate of 0,0925%).

Only the tax deductibility of the named taxes for Belgian corporate tax purposes is changed; no changes will be made to the actual taxes or the applicable tax rates.

The deduction of these taxes will be limited to 20%. Previously, they were 100% tax deductible. This means that these taxes will be included in the disallowed expenses up to 80%. Presumably, this is to achieve an effective tax burden of 20% rather than an actual tax burden corresponding to the higher default corporate tax rate of 25%.

This measure obviously only concerns companies subject to Belgian corporate income tax. Belgian branches of foreign companies may also be confronted with this additional taxation.

Indirectly, it also affects investors insofar as Belgian corporate income tax is paid with funds held for the investors.

Snowball effect for Belgian regulated investment companies (tax-on-tax)
A particular problem arises for Belgian regulated investment companies which are liable for the subscription tax and which are also subject to the specific corporate tax regime under section 185bis of the Income Tax Code 1992 (the so-called limited tax base).

For the above-mentioned regulated investment companies, the actual tax burden does not only increase by 20% calculated on the initial tax of 9.25 bp, but it increases even further because the percentage of disallowed expenses will give rise to a corporate tax liability and this corporate tax liability will in turn give rise to a new disallowed expense. This is because Belgian corporate tax is also a disallowed expense at 100% and then taxed at the applicable corporate tax rate (25%).

By treating the corporate tax as a disallowed expense, from the year in which corporate tax becomes payable as a result of this measure, the regulated investment companies concerned will continue to pay additional corporate tax year after year.

This measure thus gives rise to a so-called "tax on tax" situation. This problem is already known but its effects are now increased significantly by the here discussed measure. The number of years that the snowball effect lasts depends on the size of the taxable base and when the corporate tax is included in the annual accounts.

The question is whether the legislator really intended this additional taxation. Although such tax-on-tax situation has already been challenged before in Belgian courts, no satisfactory result has been achieved for the taxpayer. However, sufficient arguments can be found today to challenge this unequal treatment.

The measure would apply to taxes due as from 1 January 2023.

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Reclaim opportunity re Belgian WHT for Luxembourg SICAVs

The double tax treaty between Belgium and Luxembourg gives the opportunity for Luxembourg residents to lower the Belgian withholding tax rate of 30% to 15% and even in some cases to 10% for Belgian sourced dividends. Regarding interest income the treaty provides a reduced rate of 15% applicable and in certain cases even a complete abolition of withholding tax instead of the regular 30%.

To be able to benefit from this reduced tax rate, the claimant has to be able to invoke the double tax treaty.

The Belgian tax administration has always taken the point of view that Luxembourg SICAVs cannot benefit from the double tax treaty because they are not subject to (income) tax (they enjoy an exemption regarding Luxembourg corporate income tax) and can therefore not be qualified as "resident of a contracting state" in the application of the treaty. The Luxembourg tax administration has always taken the point of view that Luxembourg SICAVs should enjoy double tax treaty benefits.

However, the courts of Brussels have decided several times that Luxembourg SICAVs can be qualified as "resident of a contracting state" in the interpretation of the DTT BE/LUX since they are: (1) subject to Luxembourg withholding tax (income tax); (2) subject to the Luxembourg subscription tax (taxe d'abonnement; a wealth tax in the interpretation of the DTT) and (3) a specific land/property tax.

The decisions by the courts in Brussels were related to the discussion whether the Belgian subscription tax (taxe d'abonnement) is due by Luxembourg SICAVs which develop activities in Belgium (due on the total net amounts outstanding in Belgium). After all, the double tax treaty BE/LUX states that the power to levy wealth taxes resides with the home country.

These discussions were brought before the Belgian Court of Cassation earlier this year.

For now, no favorable outcome has been obtained regarding the applicability of the Belgian subscription tax: the Belgian Court of Cassation ruled that the double tax treaty is not applicable regarding this Belgian subscription tax since it is not included in the – opinion of the Court – exhaustive list of the "in scope" taxes of the double tax treaty (a discussion *ratione materiae*). However, there isn't a single Luxembourg SICAV that is persuaded at this moment by the Court's reasoning and several litigations are continued with new argumentation in development.

More important for our current newsletter is the fact that the courts in Brussels decided upon the possibility for Luxembourg SICAVs to enjoy the double tax treaty *ratione personae*. The courts in Brussels decided that they are indeed to be considered "resident of a contracting state".

Since the administration has lost their argumentation before the courts in Brussels, the reasonable expectation was that they would have also contested this part of the decision before the Belgian Court of Cassation, but they have not.

The only reasonable explanation at this point in time is that the Belgian tax administration has made an assessment whether to contest the argumentation *ratione personae* or not. The fact that the administration did not contest shows, in a certain way, the overall weakness in the administration's own argumentation.

The absence of a decision by the Belgian Court of Cassation leaves room for further development in this regard, yet many have now understood / interpreted the absence of any argumentation against the treaty entitlement by the tax administration to be a window of opportunity: the positive arguments stated here above and the positive case law by the courts in Brussels remain uncontested at this moment.

A 5-year period is available for withholding tax reclaim procedures. If one initiates a reclaim procedure in 2022, one can effectively ask for reimbursement of withholding taxes paid as of the 1st of January 2018. If a reclaim procedure would be installed in 2023 one can go back up until withholding taxes paid as from the 1st of January 2019.

Given the amounts that can be involved by not being able to enjoy the lowered tax rates, initiating reclaim procedures should definitely be considered.

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China

Tax audits on private wealth

The high net worth individuals ('**HNWI**') segment in China has drawn intensive public and regulator attention in recent years because of the eye-popping wealth growth and scale of tax evasion.

In March 2022, the central government urged for intensified measures on tax administration on HNWIs, echoed by local tax authorities launching plans to reignite HNWIs-focused tax inspections, leading to a surge in tax audit cases on HNWIs. The following table illustrated some of the recent well-known cases.

Date	Profession	HNWIs	Tax & fine (USD)	Location
Oct. 2018	Entertainer	Fan Bing Bing	114.3 million	Jiangsu
Mar. 2021	Entrepreneur	Bao (not fully named)	1.7 million	Anhui
Aug. 2021	Entertainer	Zheng Shuang	42.9 million	Shanghai
Oct. 2021	Agent of actor	Zhang Hen	4.6 million	Shanghai
Dec. 2021	Online streamer	Huang Wei	185.7 million	Hangzhou
Mar. 2022	Entertainer	Deng Lun	14.3 million	Shanghai
Jun. 2022	Online streamer	Xu Guo Hao	14.3 million	Jiangxi
Nov. 2022	Entertainer	Wu Yi Fan	85.7 million	Beijing

How is the term HNWI defined?

There is no official and unanimous definition for HNWIs. Yet by the tax filing standard, individuals with an annual income over RMB 120,000 are already called the *"high-income earners"* and are required to file an annual return to the Chinese tax authorities, according to a tax circular, Guo Shui Fa [2010] No. 54. In practice, as observed in many tax audit cases, HNWIs are often affluent individuals with assets of RMB 10 million or more (ca. 1,3 million EUR).

How are targets selected?

In general, local Chinese tax authorities have now the mature technical means to organize big-data-based tax inspections targeting at HNWIs comprising also tax data from the official tax system (called the Golden Tax System). A typical system-based audit procedure would cover the following:

- **Information sharing:** The data would be collected from various regulatory regimes, including tax, employment and social security, judiciary, financial, licensing and immigration, etc.;
- **Information verification:** The data would be verified, consolidated, and classified in various ways according to taxpayers' identity, cell phone number, or profession;
- **Taxpayer portrait module:** Taxpayers' portrait and behavioral data would be analyzed comprehensively according to a tax risk index model covering over a thousand indexes;
- **System-generated alerts:** Taxpayers with abnormal or significant cash flow or turnover could be red-flagged by the system which may disseminate reminders for compliance checks.

What is the tax audit status on HNWIs in China?

China is now home to 2.62 million HNWIs with investable assets of RMB 10 million or more in 2020, according to the 2021 China Private Wealth Report published by China Merchants Bank (CMB).

HNWI segment tax audits are getting more frequent and organized. Two national decrees were issued by the central government for reinforcing tax administration on HNWIs, in March 2021 and July 2022. Places practicing preferential tax regimes also join the efforts to mandate periodic tax audits. For example, Hainan Province announced a two-week intensive tax check on HNWIs on 22 September 2022.

More audit cases against aggressive tax planning are published by the authorities. In one recent case, as listed in the table above, an entertainment celebrity was fined heavy-handedly by the Beijing Tax Bureau on 25 November for tax evasion. The tax payer, Canadian by origin, earning billions from his acting and singing career in China, was charged for concealing his income between 2019 and 2020 and was finally charged RMB 300 million (equivalent to USD 85.7 million) for taxes, late payment fees, and fines.

Experienced HNWIs are more open to equity and financial products, and professional asset allocation, posing significant challenges to the tax administration. This tax payer segment has its particular complexity, arrangements, and cross-border income structure. More governmental efforts could be foreseeable in legislative updates, inter-departmental collaboration, and international cooperation to curb aggressive tax planning.

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Windfall tax

Windfall tax, i.e. tax on unexpected profits, is introduced into the Czech tax system as a subcategory of corporate income tax. It is intended to be an additional taxation of corporations that generate unexpected profits as a result of energy prices and interest rates increase. Exceptional profits of banks and companies in the energy and fossil fuel sectors will be subject to the new tax between **2023 and 2025.**

Who will be subject to the tax

An entity falling into one of the following categories of taxpayers shall be subject to windfall profits tax:

1. The first group is represented by taxpayers who are **banks**. Banks will be subject to the tax for the given tax period, in which they achieve a net interest income of at least CZK 50 million and at the same time, in 2021 they achieved the same income of at least CZK 6 billion.

2. The next group is **non-bank taxpayers**. These taxpayers are subject to the tax for the given tax period in which the total annual net turnover from the activities listed below amounts to at least CZK 50 million and at the same time, in 2021 they achieved a turnover of at least CZK 2 billion from these activities.

The aforementioned turnover of CZK 2 billion can be achieved by the company individually or as a group (the income of all group members is added together). If the turnover is exceeded, all members of the group who also meet the CZK 50 million turnover criterion for the given tax period are taxpayers.

Activities counting towards turnover:
› mining of hard coal, oil and natural gas;
› production of coal oven products and refined petroleum products;
› generation, transmission and distribution of electricity (with certain exceptions) and gas production and distribution;
› wholesale of liquid fuels, gaseous fuels and related products;
› pipeline transport by oil and gas pipeline.

3. The last category is made up of taxpayers who are subject to the tax for the given tax period in which the total annual net turnover from the activities listed below amounts to at least CZK 50 million and at the same time, in 2021 the income from these activities accounted for at least 25% of their turnover.

Activities counting towards turnover:
› mining and treatment of hard coal, oil and natural gas;
› production of coke oven products and refined petroleum products.

Calculation of tax

The tax base for windfall profits is based on the amount by which the tax base (calculated for corporate income tax purposes) for the given tax period exceeds the comparative tax base plus 20% of its value. The comparative tax base is the arithmetic average of the tax bases for the years 2018 to 2021. A tax rate of **60%** will be applied to the tax base thus calculated.

Tax collection
Windfall tax will be paid during the tax period similarly to income tax through the payment of advances calculated from the last known tax.

The amount of advances paid in 2023 shall be calculated on the basis the notional windfall profits tax amount. This notional tax will be determined from the data provided by the company in its 2022 notional tax notice. The notice shall state the details for calculating the windfall profits tax and shall be filed with the Specialized Tax Office no later than July 3, 2023. Advances paid during 2023 will then be offset against the actual amount of tax for 2023.

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Germany

Draft bill to improve attractiveness of Germany as a Financial Services location

The German government presented to the public a memorandum on future legislative measures to improve the financing of investments and to facilitate capital market access for companies, especially start-ups, growth companies and SMEs. The Memorandum intends to take a holistic approach to strengthen both the supply as well as the demand side of the investment sector. On the one hand, the legislator aims to adjust aspects of German regulatory law and company law, while on the other hand the tax framework is to be improved.

In particular, the following **tax measures** are set out:

1. Introduction of a tax-free allowance for capital gains realized from the sale of stocks and of equity fund units for private investors,

2. Improving the framework conditions for investing in shares by abolishing the separate loss offset regarding the sale of shares,

3. Simplification of the withholding tax procedure, the separate loss offset for losses from forward transactions and from bad debts in private assets are to be abolished,

4. In order to strengthen Germany as a fund location from a tax perspective, the VAT exemption for venture capital funds is to be extended to the extent permitted by EU VAT rules.

The initiative of the German legislator to abolish the offsetting restrictions for losses from common stock and to introduce a tax-free allowance for shares to promote equity culture and start-ups in Germany is generally commendable. However, it remains to be seen just how investor-friendly the actual draft bill will be.

From the investor's point of view, it would be desirable if losses from common stock, from derivative transactions and losses from non-recoverable debt assets realized in previous tax periods could be offset against all realized gains or income from capital assets as of the date of the abolition of the restriction on loss offsetting. Another desirable feature would be the possibility to recognize directly at the level of the depositary the tax-free allowance for gains from the sale of stocks and equity fund units, instead of having to file the tax allowance as part of the annual tax return.

The **regulatory adjustments** include in particular:

1. Simplification and facilitation of stock exchange listing requirements and post-admission obligations,

2. Improvement of the legal framework for modern forms of transactions in order to facilitate an IPO, such as related regulations on share-based options (naked warrants) and the use of SPACs (Special Purpose Acquisition Companies),

3. Expanding the possibility to issue digital assets including equity stocks (based on DLT)

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4. Improving the legal framework for the transfer of crypto assets,

5. Easing the rules for increases of the statutory capital,

6. Modernization of the German financial supervisory authority (BaFin) via digitalization and by enhancing the possibility for communicating with the regulator in the English language

A first draft of the bill is expected before the end of 2022. If the announced measures can be implemented effectively, this initiative promises to significantly increase the attractiveness of Germany as a Financial Services location.

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wts global

Court decision: taxation of realized capital gains from fund units in the context of the 2018 tax reform

In the course of the German Investment Tax Reform 2018, the taxation of investment funds and their German investors changed fundamentally. In order to transition from the old (pre-2018) investment tax law to the new rules, fund units held on 31 December 2017 were deemed to be sold and newly acquired one logical second later. However, the tax on this deemed realization only becomes due once the investor actually sells the corresponding fund units. The capital gain determined for the period prior to 2018 and the profit or loss incurred thereafter are calculated separately; regarding gains / losses from the period after 2018, a 30% tax exemption applies for German private investors in standard retail funds (Chapter-2 Funds).

These rules can lead to interesting results if fund units had a positive performance between their acquisition date and the end of 2017, but then lost in value. In such cases, fund investors may have to pay taxes on deemed capital gains that are never actually realized. It is possible that the overall tax burden exceeds the amount of the realized profit.

In the case at issue, which is now before the German Federal Fiscal Court (BFH) for an appeal decision, the plaintiff invested in foreign equity funds in the years of 2009 to 2017. Under the transitional rules of the investment tax reform, his fund units were deemed sold on 31 December 2017 and newly acquired on 1 January 2018. At the end of December 2017, the market value of the fund units was high, so a tax base of approximately 2,250 € was determined for the deemed realization. However, by the time of the actual sale of the fund units at the end of 2018, the value of the fund units had fallen so that the plaintiff realized a capital loss for the time period in 2018. In total, from the acquisition in 2009 to the actual sale at the end of 2018, the fund investor realized a capital gain of just under 600 €. The fictitious gain from the deemed sale on 31 December 2017 was then fully taken into account, while only 70% of the loss resulting from the year 2018 were recognized. As a result, the actual capital gain was fully consumed by the tax burden of just under 600 €.

This result was challenged by the plaintiff before the Cologne Fiscal Court, which dismissed the case but allowed it to be appealed. In comparable cases, investors should consider filing an objection with their respective fiscal authority against their tax assessment and a request for the proceedings to be suspended with reference to the now pending appeal. In our view, however, the appeal has little chances of success.

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Italian Tax authorities rule on VAT and income taxes on mining activity

With the reply to **ruling No. 5078 of 12 October 2022,** the Italian tax authorities issued important indications as to whether digital currency mining activity should be subject to VAT and direct taxation.

Such mining activity consists in the "mining" of cryptocurrencies, materializing in a validation process aimed at the creation of virtual coins. The process is based on so-called proof-of-work, consisting of the resolution of a complex system of operations in the relevant blockchain using computing power (through the use of hardware and software) provided by a miner.

In the absence of specific tax regulations about mining at both the domestic and EU level, the tax revenue agency clarified that the following general principles must be applied.

VAT

From a VAT standpoint, the OECD in *"Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues"* dated October 12, 2020, " shows consistent behavior among states since almost all of them treat transactions related to cryptocurrencies as **exempt or excluded** from the scope of VAT.

In the light of these considerations and those – on the same subject – developed by the tax administrations of some states, such as France, Germany and the United Kingdom, "mining" seems to be able to be defined as an activity that secures – by recording them and sharing the results with the network – transactions within the so-called "blockchain" technology on which the creation of crypto-assets, including cryptocurrencies, is based.

Miners are generally rewarded-directly or through the pool to which they adhere-by the self-managing system/network/network, through the allocation of cryptocurrencies, and only when they first obtain the validation of a block, the latter eventuality not always occurring. In other words, the performance of the validation activity is not sufficient to entitle the miner to a fee: this fee accrues to him only if said activity "first" succeeds.

In the light of the above, as the miner is rewarded automatically by the system/network, it has been considered that the remuneration paid by the network is not part of an exchange of services relationship. In fact, this is a distributed technology, connoted by the absence of a party that can be considered as a principal of service provision.

The absence of a service directly provided by the miner in favor of a buyer, determined or determinable, allows the mining to be considered **irrelevant for VAT purposes.** It follows that the VAT paid on purchases cannot be deducted. The taxpayer is consequently not bound by the documentary, reporting and payment obligations under the VAT rules on such operations.

Direct Taxes

As the above-mentioned services are remunerated by virtual currencies, the principle expressed in the answer no. Ruling 788/E of 2021 is applicable. This means that the general rules governing transactions in traditional (foreign) currencies apply to transactions in virtual currency (Articles 9 and 110 TUIR).

Notably, regardless of the possibility of identifying the person who provides the consideration for the services provided, the related remuneration is taxable income, in the tax period in which the services can be considered completed, pursuant to paragraph 2 of Article 109 of the TUIR. If the activity of the "miner" is not remunerated, because the "block" was resolved by a different actor, a loss on receivables is realized and the deductibility is allowed under Article 101, paragraph 5 of the TUIR.

Lastly, for IRAP purposes, the remunerations of the "miner" must be included in the value of net production as revenues for services related to the main activity of the taxpayer. Fluctuations in value, on the other hand, would not be included in the taxable base of the regional tax, only to the extent that they do not transit from items relevant for IRAP purposes.

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Poland

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Changes to banking tax

As of 1 February 2016, Poland has had a banking tax.

This tax applies to domestic banks, branches of foreign banks, branches of credit institutions, cooperative savings and loans associations, domestic insurance undertakings, domestic reinsurance undertakings, branches of foreign insurance or reinsurance undertakings, main branches of foreign insurance or reinsurance undertakings and lending institutions.

The tax is charged on the amount by which the taxpayer's total assets (as per its month-end trial balance derived from general ledger accounts) exceed the applicable statutory threshold. These thresholds are defined for the various categories of taxpayers as follows:

1. PLN 4 billion for domestic banks, branches of foreign banks, branches of credit institutions, cooperative savings and loans associations;
2. PLN 2 billion for domestic insurance undertakings, domestic reinsurance undertakings, branches of foreign insurance or reinsurance undertakings, main branches of foreign insurance or reinsurance undertakings;
3. PLN 200 million for lending institutions.

There is case law from the Supreme Administrative Court (including its judgments of 13 January 2022 in cases no. III FSK 235/21 and III FSK 3324/21) construing these regulations unfavourably for the financial industry. The court has held that, for banking tax purposes, the statutory design for the basis of assessment is based solely on taxpayer's assets **(without reference to its liabilities or equity).**

For the taxpayer categories in points 2 and 3 above, assets are taken to mean the aggregate assets of all taxpayers that are **directly or indirectly controlled or jointly controlled by one entity or a group of related entities.**

There are certain deductions from the basis of assessment available for domestic banks, branches of foreign banks and branches of credit institutions. These include, among other items, equity, assets purchased from the National Bank of Poland as security for refinancing extended by that Bank, and treasuries treated as assets.

In addition, all taxpayers except lending institutions will make a deduction from the basis of assessment for the money's worth of assets represented by bonds issued by the Bank Guarantee Fund or asset manager and of loans they extended to the Bank Guarantee Fund or asset manager.

The banking tax is charged at the monthly rate of 0.0366% of the assessment basis.

A bill to amend this legislation was published on 9 Nov 2022. According to the bill, domestic banks, branches of foreign banks, branches of credit institutions, and cooperative savings and loans associations will be entitled to make deductions from the basis of assessment for the money's worth of assets represented by treasuries or securities statutorily guaranteed by the State Treasury. This change is intended to decrease the cost of capital obtained through issuance of bonds statutorily guaranteed by the State Treasury. Moreover, it is also proposed that the above taxpayers might make deductions from the assessment basis for money's worth of assets arising from repurchase transactions involving treasuries. Where the other party to such a transaction is any entity other than the State Treasury, the National Bank of Poland or the Bank Guarantee Fund, the deduction will be available if the transaction is executed on a regulated market or via a multilateral trading facility and is subject to settlement via CCP.

The bill is currently being processed in the lower house of Polish parliament.

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Spain

ARCO
ABOGADOS Y ASESORES TRIBUTARIOS

Changes on Spanish SICAVs

In July 2021, Law 11/2021 of 9 July was published in Spain, on measures to prevent and combat tax fraud, transposing Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, and amending various tax and gambling provisions.

Among other relevant amendments in the area of taxation, the law modified the tax regime for open-ended investment funds (SICAVs) by tightening the requirements for benefitting from the favourable 1% corporate income tax regime that currently exists.

Hence, Article 29.4.a) of the Corporate Income Tax Act was amended, which establishes the application of a reduced rate of 1% as opposed to the general rate of 25% for those SICAVs that comply with the requirement of having a minimum of 100 shareholders, with additional requirements to be met as from 1 January 2022:

(i) To be considered a shareholder for these purposes, it is necessary to hold shares of an amount of €2,500 or more and, in the case of compartmentalised SICAVs, of €12,500 or more.

(ii) The minimum number of shareholders requirement must be met for at least three quarters of the tax period.

Furthermore, whereas previously the regulatory body (CNMV) was responsible for verifying compliance with the requirements for benefitting from the reduced taxation, now the Tax Administration will be responsible for this verification.

The legal modification seeks to guarantee a favourable taxation of 1% for only those SICAVs which have a truly collective vocation, since, in practice, most SICAVs in Spain have one or several main shareholders holding practically all the capital while the remaining shareholders hold a symbolic stake, therefore distorting the open and collective nature that justifies the favourable reduced taxation. It is important to note that the legal modification has not affected Non-UCITS (Hedge Funds), Master Feeder structures or Exchange-Traded funds (ETFs).

The new requirements take effect from 1 January 2022, meaning that SICAVs that do not meet these requirements for benefitting from the reduced rate of 1% must be wound up and liquidated during 2022 and carry out all the necessary formalities for their removal from the register before 30 June 2023. The Law has established a transitional regime with a special tax regime. Essentially: i) the 1% rate is maintained during 2022 for SICAVs that are liquidated until the date of their removal from the register and ii) their shareholders will not be taxed on the gains that become apparent upon liquidation of the SICAV as long as they are reinvested in Spanish IICs (Collective Investment Undertakings) or SICAVs that comply with the new requirements until 31 July 2023.

A large number of SICAVs were liquidated this year, with the members investing their capital mainly in investment funds, merging with other SICAVs or setting them up in other countries, in particular Luxembourg, where taxation is similar to that in Spain.

From the perspective of the claims raised in recent years related to withholding taxes on dividends obtained by non-resident investment funds in Spain, invoking the violation of Art. 63 CJEU, this legal modification does not entail a substantial change. On the one hand, the legal modification only affects SICAVs, not hedge funds, master feeder structures or ETFs (which are regulated by other requirements). On the other hand, the focus of the current legal debate is whether the applicable Spanish legislation as it is currently drafted, is itself discriminatory as it does not provide for a mechanism to enable 1% taxation for non-resident non-UCITS funds, thus calling into question whether it is appropriate to demand of non-resident investment funds strictly the same requirements as those that are demanded of resident funds. Lastly, it should be recalled that, since 2010, non-resident UCITS funds have been taxed at 1% and have only had to prove their UCITS status with a certificate to that effect, without having to comply with other requirements (regarding the number of members or unit-holders or minimum capital, etc.).

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Autumn Statement 2022 impacts financial institutions

With the surge in energy prices, the increased cost of living and rising interest rates, there are challenging economic times ahead both for the UK and globally. The International Monetary Fund has predicted that one third of the global economy will fall into recession over the next year or so. The UK Autumn Statement 2022 issued by Chancellor Jeremy Hunt, reverses much of the changes introduced by the Truss government and seeks to put the UK economy back on track.

The main business-related outcomes from the Autumn Statement 2022 are identified in the table below:

	Pre-Autumn 2022 Statement	Post-Autumn 2022 Statement
Corporation Tax	19%	23% from April 2023
Banking Corporation Tax Surcharge	8%	3% (for banks with profits over £100 million) from April 2023
Energy (Oil and Gas) Profits Levy (EPL) & Investment Allowance (IA)	EPL – 25% IA – 80%	EPL – 35% from Jan 2023 IA – 29% from Jan 2023
Electricity Generator Levy		45% from Jan 2023 New levy for extraordinary returns from low-carbon UK electricity generation.
Research and Development Expenditure Credit (RDEC)	13%	20% (The Government will introduce legislation to reform R&D tax reliefs by expanding qualifying expenditure to refocusing support towards UK innovation and to target abuse and improve compliance.)
Diverted Profits Tax	25%	31% from April 2023
Transfer pricing documentation		From April 2023, large multinational businesses will need to keep all transfer pricing documentation in a 'prescribed and standardised' format (OECD's Transfer Pricing Guidelines – Master File and Local File).
Investment zones		The government's new proposal to set up dedicated geographic areas with specific tax and regulatory rules intended to drive economic growth. The rules are still to be confirmed.

Over the next five years the government will also be investing £79 million in HMRC to resource investigations into serious tax fraud offences, as well as address tax compliance among wealthy taxpayers. The investment is likely to result in returns of circa £725 million of additional tax revenue.

HMRC publish 'Guidelines for compliance'

HMRC's latest initiative seeks to simplify complex and/or unique risks that come with working across multiple tax regimes in order to reduce the rate of non-compliance and likelihood of HMRC needing to employ further checks. The 'Guidelines for Compliance' provide insight both to the practical application of the law and HMRC's administrative approach.

The first set of guidelines, GFC1 (2022), addresses PAYE settlement agreement calculations – an area which has been identified for its catalogue of errors and emerging risks. Further guidelines for large companies are likely to be published with time and signify a new approach for HMRC.

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