MOORE

INTERNATIONAL CORPORATE INCOME TAX BRIEF

June 2021

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INTRODUCTION

Welcome to the first issue of the ***International Corporate Income Tax Brief*** (ICIT), produced by Moore Global's ICIT Group in order to highlight tax news of wider interest from selected countries. The intention of the ICIT Group is to bring you this brief on a regular basis in order to keep our clients up-to-date with relevant tax news.

While we are still undergoing the COVID-19 pandemic, which has significantly affected the entire world and global ongoing business operations for over a year now, we should like to keep you updated on selected tax topics and in this first issue of the ICIT Brief, we present you an overview of recent tax developments from Belgium, France, Germany, Italy, Slovakia and the United Kingdom.

We hope the developments we are featuring in this issue will assist you to navigate your business decisions correctly across these complex tax areas.

Helping you thrive in a changing world!

MARTIN KIŇO

BELGIUM

BELGIUM HAS EXPANDED ITS LIST OF TAX HAVENS

Spurred on by the European Union, the fight against international tax evasion and tax avoidance is being stepped up in Belgium. The new regime not only looks at whether countries have too low a tax burden, but also considers whether or not those countries are willing to make positive changes to their tax legislation and practices.

COMBATING FISCAL FRAUD AT VARIOUS LEVELS

The fight against international tax fraud is being conducted at various levels. Globally by the OECD, which was mandated for this task by the G20 ten years ago and also at a European and national level by individual countries. Each level has its own list and criteria to determine what constitutes a tax haven.

OECD list of tax havens

Any country that does not comply with the OECD standard of transparency and exchange of information.

European list of tax havens

Countries that do not cooperate fully in the fight against tax avoidance and tax evasion. Although they do not necessarily have an inadequate tax burden themselves, they do not impose the necessary measures to combat fiscal fraud. They are referred to as 'noncooperative' countries.

Belgian list of tax havens

There is no unambiguous definition in Belgian law of the concept of a 'tax haven'. Belgium has drawn up several lists of countries with jurisdictions that are considered tax havens in certain situations. Belgium also uses different definitions for a number of specific anti-malpractice definitions. For example, definitions of a 'tax haven' can be found in the legislation concerning payments to tax havens, the definitively-taxed-income deduction, CFC regulations, irregular beneficial tax advantages and the 'old' interest-deduction limitation.

NEW LAW DRIVEN BY EUROPE

The Belgian Law of 20 December 2020 transposes a number of European defensive measures into Belgian law in respect of jurisdictions on the European list of non-cooperative countries.

NEW TAX HAVENS

A number of jurisdictions on the European list of non-cooperative countries are henceforth also to be considered 'tax havens' under Belgian law. They specifically include American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, the Seychelles, Trinidad and Tobago, the American Virgin Islands and Vanuatu.

WHAT ARE THE ACTUAL CONSEQUENCES OF THIS NEW ANTI-FRAUD LEGISLATION?

Extension of the mandatory declaration obligation

The obligation to declare payments exceeding EUR 100 000 per taxable period to certain countries has been extended to all payments to jurisdictions on the European list.

This declaration obligation applies to payments made with effect from 1 January 2021.

Stricter CFC regime

The CFC (Controlled Foreign Company) regime relates to tax legislation that aims to prevent Belgian taxpayers from shifting profits to controlled companies resident in tax havens to avoid paying the higher Belgian rates of corporate income tax.

Hitherto, the undistributed profits of foreign companies controlled by a Belgian entity are included in the basic taxable amount of the domestic company if the profits arise from an artificial structure with the essential purpose of obtaining a tax advantage.

Under the regime as now amended, undistributed profits from artificial structures will henceforth always be taxed on account of the taxpayer who performs the key functions of these assets or risks from which the profits are derived. The condition is that this profit accrue to a foreign company that is based in a jurisdiction which is included in the European list of tax havens, irrespective of whether the participation condition or the taxation condition has been met.

This stricter regime applies to taxable periods ending on or after 31 December 2020.

Extension of the 'Cayman tax'

An entity with a legal personality established in one of the countries on the European list is to be deemed to fall within the scope of the 'Cayman tax'.

The so-called Cayman tax is a look-through tax, on the basis of which certain natural or legal persons who are founders or third-party beneficiaries of offshore legal structures are obliged to pay tax on the income received through those legal structures. The offshore constructions may include, for example, trusts, foundations, and companies.

Belgium's 'Cayman tax' does not apply if the Belgian taxpayer can prove that:

- the relevant legal structure is subject to an income-tax rate of at least 15% of its taxable income, determined in accordance with Belgian rules or
- the income of this legal structure is primarily derived from the performance of actual economic activities.

This amendment applies to taxable periods ending on or after 31 December 2020.

Stricter DBI deduction regime

The DBI (Definitively Taxed Income) regime is Belgium's version of the participation exemption. Hitherto, the exemption has been denied where the income is granted or allocated by a company based in a country where the common-law provisions on taxation are significantly more favourable than in Belgium. Inclusion of a jurisdiction in this list can be challenged by providing proof to the contrary.

Under the law as now amended, dividends paid by a company resident in a jurisdiction that is included in the European list at the time of payment or allocation of the dividend are henceforth also excluded. Challenging the inclusion of the jurisdiction in question in the list of noncooperative countries with proof to the contrary will not be permitted.

This amendment applies to dividends that have been approved on or after 1 January 2021.

IS THIS JUST THE BEGINNING?

Three years after its initial publication, the EU list of tax havens now has an impact on the national legislation of Member States. It is likely, therefore, that the European approach in the fight against tax avoidance and tax evasion will lead to further changes in domestic legal provisions in Belgium. The current adjustment is quite remarkable because it does not merely look at the tax burden in the countries concerned, it actually aims to encourage these countries or jurisdictions to make positive changes to their fiscal legislation and practices through cooperation.

Interested in reading more about fiscal fraud? The fight is being waged on various fronts. Find out more about **FATCA and the US**, **European Directive DAC6** or **cross-border structures**.

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FRANCE

BROADENING OF THE CONCEPT OF PERMANENT ESTABLISHMENT BY THE DECISION IN *CONVERSANT INTERNATIONAL*

The concept of 'permanent establishment' (PE) is fundamental to international tax law, as it is the criterion for the territorial connection of profits. In France, corporate income tax applies, in principle, only to profits made by companies that operate in France (French General Tax Code (CGI) art. 209, I).

The OECD Model Tax Convention defines a permanent establishment to exist in two separate instances, namely (a) a fixed place of business where an enterprise carries on all or part of its activities and (b) a dependent agent, defined as a person acting in a Contracting State on behalf of an enterprise of the other Contracting State, other than an agent with an independent status, who has and habitually exercises powers in that State to conclude contracts in the name of the enterprise.

A dependent agent is normally considered as a permanent establishment if the agent has the 'power to bind', i.e. a power that the agent exercises in a habitual manner, enabling the agent to conclude contracts in the name of the foreign company. It is often a matter of debate whether this 'power to bind' condition, should be assessed realistically or in a narrowly legal manner.

In its commentary on Article 5 of the OECD Model Convention, the OECD clarified the 'authority to enter into commitments' requirement in 2003 and 2005 (paragraphs 32.1 and 33).

The result is that if the agent decides on the transactions of the foreign company in the usual manner, which the foreign company merely endorses, the agent has the power to bind the foreign company.

According to the established jurisprudence of the *Conseil d'Etat* (French Council of State, which is the French supreme court for taxation), when interpreting a double tax treaty, reference may not be made to any OECD commentary that post-dates the adoption of the treaty in question.

The *Conversant* judgment of the *Conseil d'Etat* (CE 11 Dec. 2020 No 420174, Conversant International Ltd) challenges this traditional approach, by interpreting the tax treaty between France and Ireland concluded in 1968 in the light of OECD commentaries published in 2003 and 2005.

In this case, an Irish company that carried out a digital marketing activity by exploiting intellectual-property rights granted by its American parent company, used the services of a French company in the group, which identified and prospected its clientèle and provided it with management, back-office and administrative-assistance services.

The *Conseil d'Etat* had to determine whether this Irish company had a permanent establishment in France.

It held, with reference to the abovementioned OECD commentary, that **a French company that does not formally enter into contracts in the name of a related foreign company, but which habitually decides on transactions that the foreign company merely endorses and which, once endorsed, are binding on the latter, constitutes a permanent establishment in France of the foreign company for the purposes of French tax treaties.**

For a permanent ('fixed') establishment to be set up in France for VAT purposes, the French company must have the human and technical resources enabling it to provide services autonomously.

In the present case, the *Conseil d'Etat* found that these two conditions (sufficient resources and autonomy) were met, since the employees of the French company could decide to conclude a contract with the advertiser and they had access to the group's data centres located in the United States, which enabled them to conclude contracts with the Irish company's advertising customers without the specific intervention of the group's foreign companies.

The permanent establishment was therefore also a fixed establishment for VAT purposes, even though the human and technical resources were owned and located in the United States. The data to which the French employees had access was therefore not only located outside France but also owned and managed not by the Irish company providing the services but by another company of the group established in the United States.

This decision increases the possibility of a foreign company's having a permanent establishment in France, in line with the objective pursued by the Multilateral Instrument ('MLI'), which provides for various measures to curb the development of PE-avoidance schemes.

Specifically, Article 12 of the MLI reinforces the conditions to be met for an agent not to be considered as a PE and provides that a commission agent will henceforth systematically constitute a PE if the condition of dependence is met. However, this article cannot be applied in the relationship between France and Ireland, because Ireland has decided, in accordance with its rights, not to adopt this provision. By virtue of the Conversant decision, Ireland's exercise of derogation on this point becomes void of substance, at least from a French perspective, thus leading to the unilateral application by France of an extended interpretation of the definition of permanent establishment under Article 12 of the MLI.

The profit allocation to the French PE was not addressed in the decision.

As the decision is not limited to digital activities, multinational companies with activities in France should review their business model accordingly.

FRENCH NON-RESIDENT CAPITAL-GAINS WITHHOLDING TAX IS INCOMPATIBLE WITH EU LAW

An Italian company (AVM International Holding) sold a stake of 33% in a French company, and therefore had to pay a 19% tax on the capital gain, in accordance with arts. 244 *bis* B and 200 A CGI and the applicable double tax treaty.

A French company in an identical situation can benefit from the quasi-exemption regime for long-term capital gains (art. 219, I-a *quinquiès* CGI).

The Italian company considered that this difference in treatment, based solely on the tax residence of the transferor company, infringed the freedom of establishment (Art. 49 Treaty on the Functioning of the European Union (TFEU), and therefore decided to request repayment of the tax paid.

The French tax authorities partially accepted this claim. They accepted the restitution of the difference between the tax paid and the tax that would have had to be paid if the Italian company had been able to benefit from the quasi-exemption regime, based on an administrative guideline.

When the case came before the *Conseil d'Etat*, the court ruled that the tax on capital gains realised by non-resident persons on the sale of a significant shareholding in a French company is incompatible with European law. The consequence is total exemption from the tax.

This decision undeniably leads to a situation of reverse discrimination against French companies. Indeed, by relieving AVM International Holding of the totality of the tax, the French court admits that European companies are treated more favourably than French companies.

The *Conseil d'Etat* remains silent on this situation of reverse discrimination.

This case opens up the prospect of contentious claims for European companies that have paid the tax on disposals of significant shareholdings in French companies. Claims may be filed until the 31 December of the 2nd year after that in which the tax was paid.

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GERMANY

NON-RESIDENT TAXATION OF INCOME FROM IP

The German tax authorities have come to the conclusion that the licensing or disposal of intellectual property (IP), e.g. a patent or trademark, which is registered in a German register constitutes is liable to non-resident taxation for foreign licensors or vendors in Germany. The relevant rule (s. 49(1)(2)(f) and 49(6) of the German Income Tax Act (*Einkommensteuergesetz* – EStG) was introduced almost 100 years ago but it has (widely) been overlooked in the past. The legal position now taken by the German tax authorities leads to various compliance obligations for non-resident taxpayers and to withholding-tax filings and payments for the licensor. Nevertheless, the tax authorities also provide for certain filing relief for a transitional period.

On 6 November 2020, the German Ministry of Finance (MoF) issued a decree describing the filing obligations in connection with the non-resident taxation of German-registered IP.

In the decree, the MoF clarifies, based on the wording of the provision that a non-resident owner of IP is subject to German non-resident taxation if the non-resident generates income from the licensing or disposal of IP registered in a German register or used in a German permanent establishment or other facility. It is not necessary for the source of the licence income or the disposal proceeds to be derived in Germany or for any of the involved parties to be resident in Germany.

In addition, the MoF also clarified that IP is treated as German-registered if the application took place via the European Patent Office.

As a result of this regulation, for example, royalty payments made by a French licensee to a UK-resident licensor for the use of a patent registered in the German Patent Register are taxable in Germany.

As a consequence, these royalty payments on IP registered in Germany are subject to German withholding tax (WHT) and the licensee has to file tax registrations on a quarterly basis for royalty payments made in the last seven years (since 2013) and in the future. The withholding tax is due 10 days after the relevant calendar quarter ends.

In the event of a disposal of German-registered IP, the acquirer has to file a non-resident taxpayer's tax return in Germany.

On 11 February 2021, the MoF published a second decree including reliefs concerning WHT filings and payments and for the tax returns of non-resident taxpayers.

Under this second decree, the obligation to file WHT returns and to make WHT payments can be waived upon application if the licence payment has already been made or will be made by 30 September 2021 and various further conditions are met. Among other things, the taxpayer must not be resident in Germany and Germany's right to tax must be excluded under the terms of a double tax treaty.

For the disposal of IP, the filing obligations for non-resident taxpayers remain the same even if the taxpayer is not resident in Germany and the disposal is not taxable in Germany. In this case the return will show tax payable of EUR 0. As a further simplification, the tax return does not have to be filed electronically if it is submitted to the responsible tax office no later than 30 September 2021 and all disposals and documents are disclosed.

The decree also includes an explanation regarding the determination of the tax base. The tax base is to be determined on a revenue-based method ('top-down' approach). A cost-based method or 'bottom-up' approach is not allowed.

The abovementioned principles have retroactive effect to 2013 and are applicable to all open cases.

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ITALY

TAX EXEMPTION FOR EU INVESTMENT FUNDS INVESTING IN ITALY

Italy has finally repealed the existing discrimination between qualifying investment funds under either UCITS or AIFM Directives ('Qualifying Funds') – excluding real-estate funds – established in Italy and analogous investment funds established elsewhere in the European Union or the European Economic Area, with regard to the tax treatment applicable to proceeds from investments in companies that are resident for tax purposes in Italy. Indeed, the 2021 Budget Law has introduced a new provision authorising the tax exemption of dividends and capital gains realised by EU/EEA Qualifying Funds investing in Italian companies. This provision will have a fundamental impact on investment structures which, currently, rely on EU-based corporate sub-holdings as vehicles to hold Italian participations and which could benefit from an alternative structuring designed for these purposes.

CURRENT ITALIAN TAX REGIME FOR QUALIFYING FUNDS

Italian Qualifying Funds

Under Italian tax law, Italian Qualifying Funds are deemed to be resident in Italy for incometax purposes, regardless of their legal form, and are liable to Italian corporate income taxes (IRES applied at a 24% rate, and IRAP – the regional tax – ordinarily applied at a rate of 3.9%).

Italian tax law also establishes that proceeds realised by Qualifying Funds incorporated in Italy are exempt from income taxes (IRES and IRAP). As a consequence, proceeds realised by Italian Qualifying Funds arising from their investments are received gross of any Italian withholding tax or substitute tax (with some minor exceptions, such as in the case of interest from certain unlisted bonds, under specific conditions), and are not subject to Italian income taxes.

Foreign Qualifying Funds

Unlike Italian Qualifying Funds, those established abroad are generally subject to Italian income taxes on the proceeds of investment in Italian entities. In particular:

- 26% withholding tax is applicable on outbound dividends and
- 26% substitute tax is applicable on capital gains realised upon sale of so-called qualified participations (i.e. participations greater than 20% – 2% in the case of listed companies – of the voting rights, or greater than 25% – 5% in the case of listed companies – of the share capital) in Italian companies. Foreign Qualifying Funds are generally exempt, under Italian tax law, from taxation on capital gains realised upon sale of (a) non-qualified participations in Italian companies and (b) participations in Italian companies that are listed on regulated markets.

Based on the current Italian tax regime, the apparent discrimination against Qualifying Funds incorporated abroad and investing in Italy would represent a violation of the fundamental freedoms under EU law (as concerning the free movement of capital), as also outlined in recent relevant judgements of the EU Court of Justice (i.e. case C-480/16 of 21 June 2018, *Fidelity Funds*, and case C-156/17 of 30 January 2020, *Köln-Aktienfonds Deka*).
On this basis, the discrimination issue under Italian tax law has been brought to the attention of the EU Commission, which has launched an investigation with the competent Italian authorities to assess whether infringement proceedings should be initiated (EU Pilot 8105/15/TAXU). To be specific, the EU Commission has dealt with the potential discrimination of EU Qualifying Funds – not of non-EU Qualifying Funds – as compared to Italian ones. Furthermore, as the EU Court of Justice has ruled on several occasions, Member States must not discriminate, from a tax perspective, between EU/EEA Qualifying Funds and analogous domestic funds. With specific reference to Italy, considering that dividends received by Italian Qualifying Funds are exempt from income taxes, those paid by EU/EEA Qualifying Funds must likely benefit from the same regime, which, incidentally, is allowed to avoid double taxation issues.

Furthermore, regarding Italy, it should be pointed out that, in accordance with established practice, foreign investment funds are used to invest in Italian companies through the interposition of foreign special purpose vehicles (SPVs) to obtain, *inter alia*: (a) tax-treaty protection for capital gains and (b) under certain conditions, exemption from withholding tax on outbound dividends under the EU Parent-Subsidiary Directive (C-116/16 and C-117/16, so-called Danish Cases). However, the interposition of SPVs has been subject to extensive scrutiny by the Italian tax authorities under the beneficial-ownership test and the general antiavoidance rule (GAAR), mainly relying on the lack of adequate economic substance.

AMENDMENTS INTRODUCED BY THE 2021 BUDGET LAW

New tax regime for EU/EEA Qualifying Funds

Under the 2021 Budget Law, EU Qualifying Funds investing in Italy are exempt from taxation on proceeds (dividends and capital gains) realised in Italy. The new provision applies to distributions of profits and capital gains realised on and after 1 January 2021.

COMMENTARY

The abovementioned amendments represent a landmark change to the Italian tax regime of EU/EEA Qualifying Funds, permitting them to invest directly in Italian companies and benefit from exemption in the same way as granted to Italian Qualifying Funds.

Nevertheless, several considerations on the implications of the new provision ought to be borne in mind:

- The newly introduced tax exemption specifically refers to the 'payment' concept. Therefore, if interpreted literally, the exemption would apply only to direct recipients that qualify as EU/EEA Qualifying Funds, suggesting that only direct investments would be considered for the purposes of the new tax exemption (interpretation aligned with the approach of the Italian tax authorities, Ruling 423/2019). However, this restrictive interpretation would preclude the possibility of exempting SPV structures set up by EU/EEA investment funds for different (non-tax) reasons, regardless of their economic substance for tax purposes.
- It should be possible to claim a tax refund for withholding taxes levied in Italy in previous tax years, on the basis that the new tax exemption has been introduced precisely to avoid the discrimination against EU/EEA Qualifying Funds highlighted by the European Commission. In this regard, please note that the repayment request must be submitted within 48 months of the payment date.
- The new provision would also have a relevant impact on tax audits and tax- litigation proceedings where the tax treatment applicable to foreign SPVs (e.g. an intermediate subholding company based in Luxemburg or in the Netherlands) used by EU/EEA investment funds is challenged based on improper tax advantages under the Italian GAAR.
- The new tax exemption is applicable to EU/EEA Qualifying Funds with (investing) interests in Italy, which would, implicitly, restrict the free movement of capital for countries outside the EU. Indeed, the exemption from Italian taxation of proceeds realised through investments in Italy could not be granted to investment funds established outside the European Union (even if comparable to the EU/EEA funds), thus entailing possible discrimination issues for Italian income tax purposes under EU tax law.

An alignment of the relevant law provisions concerning the applicability of the new tax exemption regime, or clarifications from the Italian tax authorities on the issues outlined above, would certainly be welcomed by asset-management operators, and would also prevent the EU Commission from starting potential infringement proceedings against Italy.

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SLOVAKIA

SELECTED INCOME-TAX AMENDMENTS EFFECTIVE AS OF 1 JANUARY 2021

The Income Tax Act of the Slovak Republic defines a legal person to be a resident of Slovakia if its registered office or place of effective management is located in the territory of the Slovak Republic. The term 'registered office' is being supplemented by a reference to the Commercial Code and the 'place of effective management' criterion is specified as well. Under the Act as now amended, the place of effective management is considered to be a place where **key management decisions and business decisions are made or taken for the legal person as a whole**. This applies regardless of whether these decisions are taken by the bodies of a legal person or by other persons. Consequently, neither decisions for smaller organisational units of a legal entity nor decisions of an administrative nature are considered to be key decisions for the legal entity as a whole. These provisions are particularly important for companies with an international ownership structure, especially those with holding companies abroad.

CHANGES IN THE APPLICATION OF THE REDUCED TAX RATE OF 15%

With effect from 1 January 2021, the 15% tax rate is retained only for taxpayers (legal or natural self-employed persons) whose taxable income does not exceed **EUR 49 790** per tax year. This change also applies to entities with the status of a 'micro-taxpayer'. For these purposes, only taxable income will be considered income. For the 2020 tax year, an income threshold of up to EUR 100 000 applies for the purposes of the 15% tax rate.

THE EXCEPTION FOR CROSS-BORDER WORKERS IS REPEALED

The procedure for determining the residence of natural cross-border workers, who cross the border into the Slovak Republic on a daily basis for the purpose of performing a dependent activity and who would otherwise be tax residents of the Slovak Republic is changing. From 1 January 2021, the tax residence of these natural persons is determined according to the delimitation criteria defined in the relevant double tax treaty. A similar procedure will be followed when determining the tax residence of legal persons, i.e. the conflict of double residence is to be resolved by reference to the relevant double tax treaty.

THE DEFINITION OF TAXPAYERS FROM NON-COOPERATING JURISDICTIONS IS SPECIFIED

Starting in 2021, the Ministry of Finance of the Slovak Republic will exclude the following countries from the national list of cooperating jurisdictions, which is always published on 1 January of the relevant calendar year:

- countries that are on the EU list of non-cooperating jurisdictions for tax purposes
- published in the Official Journal of the EU, the so-called blacklist;
- countries that do not apply corporate income tax,
- countries that apply a corporate income tax rate of 0%.

If a non-cooperating jurisdiction is a contracting state of the Slovak Republic on the basis of a double taxation avoidance agreement, this state will not be included in the national list of cooperating jurisdictions. However, the aforementioned does not affect the application of the double taxation avoidance agreement in question.

DATE OF CREATION OF A PERMANENT ESTABLISHMENT

Under the new wording of the Income Tax Act, if a foreign taxpayer becomes aware a permanent establishment was established in Slovakia in the previous tax year, the taxpayer will be liable to fulfil additional obligations relating to the employer who is a taxpayer in the territory of the Slovak Republic (i.e. payment of income tax from dependent activities, submission of returns etc.). The foreign taxpayer must file a tax return by the end of the third month after becoming aware of this fact and must pay the tax within the same period. The aforementioned shall apply to foreign taxpayers who employed employees with limited tax liability in the territory of the Slovak Republic. The creation of a permanent establishment is assessed from the date of commencement of the 'on-site' activity, i.e. in the territory of the Slovak Republic, which results from contractual relations (e.g. commercial agreements).

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UNITED KINGDOM

UK TAX POLICY

The UK Budget speech took place on Wednesday 3 March 2021.

In a change to the previous process for UK tax-policy making, certain items which would normally have been released on Budget day were instead published on 23 March, two weeks later, in a documents called **Tax policies and consultations: Spring 2021.**

BUSINESS TAX

Corporation tax rates

On Budget Day, the Chancellor announced that for companies with profits over GBP 250 000, the rate of corporation tax will increase from 19% to 25% from 1 April 2023.

For companies with profits of GBP 50 000 or less, the applicable corporation-tax rate will continue to be 19%, in the form of a new small-profits rate. Companies with profits that fall between GBP 50 000 and GBP 250 000 will be subject to the main rate of 25%, but will be able to claim marginal relief. Associated-company rules will be introduced (with the limits being reduced according to the number of associated companies) and the current 51% 'group company' legislation will be repealed.

The associated-company rules aim to prevent companies from being structured as multiple different companies in order to attract lower corporation-tax rates.

RATE OF DIVERTED PROFITS TAX TO INCREASE

The rate of the UK's diverted profits tax will increase from 25% to 31% from 1 April 2023. This ensures that the rate remains six percentage points greater than the main rate of corporation tax.

The diverted profits tax aims to counteract contrived tax-avoidance arrangements used by multinational companies which divert profits away from the UK tax regime. Certain arrangements that exploit the permanent-establishment rules are prevented. Companies are also prevented from creating tax advantages using transactions or entities that lack sufficient economic substance.

TEMPORARY EXTENSION TO CARRY-BACK OF TRADING LOSSES

A temporary extension to the period over which trading losses may be carried back by companies and unincorporated businesses was announced on Budget Day. For a period of two years, trading losses may be carried back for three years rather than the current maximum period of 12 months.

For companies, this is available for trading losses incurred in accounting periods ending between 1 April 2020 and 31 March 2022. For unincorporated businesses, the equivalent period is for tax years 2020/21 and 2021/22 (the tax year begins on 6 April).

The amount that can be carried back is subject to restriction as follows.

Restriction on extended loss carry back – companies

For companies, there is no restriction on the amount of trading losses that can be carried back to the year before the loss has arisen. There is a GBP 2 million limit on the amount that can be carried back beyond the previous 12-month period. This applies as follows:

- GBP 2 million for losses arising in accounting periods ending between 1 April 2020 and 31 March 2021 and
- GBP 2 million for losses arising in accounting periods ending between 1 April 2021 and 31 March 2022

A group-level GBP 2 million limit applies where any group-member company may make a claim in excess of GBP 200 000.

Restriction on loss carry-back – individuals

For individuals, there is no restriction on the amount of trading losses that may be carried back for offset against profits of the previous year. A GBP 2 million limit applies to trading losses carried back beyond that period and incurred in each of the tax years 2020/21 and 2021/22.

The above is a brief summary of what is quite a complicated set of rules.

CAPITAL ALLOWANCES

Super-deduction

Capital allowances are the UK's equivalent of tax depreciation. At Budget 2021, the Government announced a temporary 'super-deduction' allowance for expenditure on plant and machinery by companies. The super-deduction will be available from 1 April 2021 until 31 March 2023 and will allow companies to claim a first-year capital allowance of 130% on qualifying expenditure on plant and machinery that would ordinarily qualify for the 18% main rate of writing-down allowances.

A first-year allowance of 50% will be available for the same period for qualifying expenditure on plant and machinery that would ordinarily qualify for 6% writing-down allowances.

The super-deduction will apply to contracts entered into on or after 3 March 2021 (Budget Day) only. This means that it will not apply in respect of agreements entered into for the acquisition of plant and machinery prior to that day, even if the assets in question were not received until afterwards.

A modified version of the list of general exclusions at section 46 of the Capital Allowances Act 2001 (which excludes certain type of plant and machinery from first-year allowances altogether) applies to the new super-deduction. Expenditure on cars, second-

hand assets and equipment acquired by means of connected-party transactions are excluded, for example. Leased assets are also excluded, except for expenditure on background plant and machinery in leased buildings.

Where qualifying expenditure is incurred in an accounting period straddling 1 April 2023, a hybrid rate of deduction will apply.

Annual Investment Allowance limit extension

It was confirmed on Budget Day that the Annual Investment Allowance limit of GBP 1 million will be extended by one year, to finish on 31 December 2021. The limit had previously been set to reduce to GBP 200 000 from 1 January 2021 but the extension of the GBP 1 million limit was announced on 12 November 2020. The Annual Investment Allowance offers qualifying persons to write off 100% of their acquisitions of plant and machinery in the year of acquisition instead of claiming capital allowances in the normal way.

Regulations extend 100% FYAs for low-emission vehicles

At Budget 2020, it was announced that 100% first year capital allowances for green cars, zero-emission goods vehicles and equipment for gas-refuelling stations would be available for an additional four years, until April 2025.

At Budget 2020 it was also announced that the CO2 emissions thresholds for writing-down allowances will be reduced from April 2021. Cars will only be eligible for 100% first-year allowances where they have zero emissions. Business cars with CO2 emissions of up to 50g/km will be eligible for a writing-down allowance of 18% per annum (the main rate), and cars with emissions of over 50g/km will be eligible for a writing-down allowance of 6% (the special rate).

CONSULTATION ON NEW TAX FOR LARGE PROPERTY DEVELOPERS

As announced on 23 March 2021 (Tax Day), the Government has launched a consultation on a new tax on the largest residential-property developers. The intention is for the proceeds from his proposed tax to contribute towards the costs of replacing defective cladding on multistorey residential accommodation.

FREEPORTS

More generous tax reliefs, customs benefits and government support will be available to businesses operating within set areas within Freeports, which should begin operating from late 2021. The Freeports which have so far been announced are East Midlands Airport, Felixstowe & Harwich, Humber, Liverpool City Region, Plymouth and South Devon, Solent, Teesside and Thames.

Businesses located within tax sites within Freeports will be eligible for the following enhanced tax reliefs.

Enhanced Structures and Buildings Allowance

A 10% rate of Structures and Buildings Allowance (SBA) will be available for companies and unincorporated businesses for the construction or renovation of non-residential structures and buildings within Freeport tax sites. The SBA currently gives relief at 3% on a straight-line basis. In order to qualify, the relevant building or structure must be brought into use on or before 30 September 2026.

Enhanced capital allowances

An enhanced capital allowance of 100% will be available for companies acquiring plant and machinery to use in Freeport tax sites.

Stamp Duty Land Tax relief

The purchase of land or property intended for use for a qualifying commercial purpose within Freeport tax sites in England will attract full relief from Stamp Duty Land Tax, the highest rate of which is currently 5% of the purchase price. This will apply until 30 September 2026.

Business Rates Relief

Full business-rates relief will be available for a period of five years to all new businesses in Freeport tax sites and to certain existing businesses which expand. Business rates are a form of property tax on commercial property.

Relief from Employer's National Insurance contributions

The government intends to legislate for relief from employer National Insurance contributions for eligible employees in all Freeport tax sites. This would commence from April 2022 or a later date on which a tax site is designated. This would end at the earliest in April 2026 although the government has stated its intention that subject to review, this could extend for a further five years until April 2031.

These reliefs will be available from the date on which Freeports are designated until 30 September 2026.

For further questions or more detailed information, contact **Eloise Brown and Ruth Brennan** of **Moore Kingston Smith**.

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