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International Tax Newsletter

October 2019

Editor's welcome

We are very excited to present the first edition of our newly designed International Tax Bulletin bringing together topical articles from our Kreston member firms around the world.

Through these publications we hope to raise awareness of both tax risks and opportunities to help you achieve your global ambitions.

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We are very proud of the strength and breadth of the Kreston International Tax Group and meet regularly to discuss the latest issues and developments in tax planning for our multi-national clients.

If you feel Kreston can be of assistance to you, please don't hesitate to contact myself, the article contributor or Kreston Head Office.

I hope you enjoy the first of many future updates!

VAT and duty: Brexit update and practical considerations

The UK has previously set out a number of scenarios that could reduce friction in terms of the customs procedures at Brexit; but any changes to the current customs, VAT and excise systems will only be known following the conclusion of ongoing negotiations – which, as widely reported, are not at an advanced stage.

Although Brexit is expected to happen by 31 October 2019, a transitional period may well be negotiated that will allow time for UK and EU businesses to adjust to any new arrangements and avoid any 'cliff-edge' changes immediately following Brexit. The European Commission suggests that any negotiated transitional arrangement should not last beyond 31 December 2020 and that, in line with the European Council guidelines of 15 December 2017, any transitional period will require the UK to continue to participate in the Customs Union and the Single Market.

Though the UK hopes and expects to achieve an agreement with the EU, it is also being prudent in preparing for the possibility of a 'no deal' scenario. In the absence of any agreement, the UK would adopt World Trade Organisation (WTO) terms – which include imposing customs duty and VAT on imports from the EU, and vice versa. No agreement would mean that the concept of an 'acquisition' of goods from the EU would be abolished; goods from the EU would be treated as imports from outside the EU and, as such, would be subject to import VAT.

Media reports of the new customs arrangements give the impression that we are approaching a cliff-edge because negotiations with the EU have not yet indicated a likely outcome for the indirect tax system, so many are anxious that there will be no system to cope with trade when the UK's exit arrives.

However, what is not widely reported or acknowledged is that there is already a customs framework in place that had been negotiated over many years and could, we understand, be adopted at Brexit: the Union Custom Code (UCC), which became law on 1 May 2016. Exactly what is adopted is, of course, subject to negotiation; but the UK could agree to remain compliant with the UCC, which would be consistent with the planned upgrade (or rather, replacement) of the system for controlling imports and exports (CHIEF). The new import system – the Customs Declarations Service (CDS) – was scheduled for delivery prior to March 2019 but will not be fully implemented until 2020. In reality, therefore, the picture is not as gloomy as public reports may illustrate.

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VAT and duty: Brexit update and practical considerations

Stepping back from the political negotiations and considering what, practically, Brexit may mean for businesses, there will inevitably be changes that need to be anticipated. It is not advisable to wait indefinitely for the details to arrive, as this could happen too near to October 2019 to allow sufficient time for planning.

While transitional arrangements may alleviate some of the issues that immediately arise at Brexit, they are unlikely to solve all of the problems, which is why we would recommend a review of potential risks to see if contingency plans could be put in place for current supply chain models.

Some of the issues you may wish to consider are discussed below and on the following pages.

Contracts

Contracts that span pre and post Brexit periods – do they need to allow for any necessary revisions including (for example) supply chains, routes and timescales? Are there any aspects of contracts that may be inappropriate or difficult to achieve? Is there a need to agree revisions so that these can remain valid in the transition to the new system and not give rise to breaches at Brexit?

Investigating alternative supply routes for goods destined for/from the EU

Although the UK is looking to negotiate a deal that minimises disruption, busier ports (such as those in the southeast of England) could experience delays following Brexit, as many fear the procedures needed to clear exports and imports will not achieve a similar result to the current free flow of EU trade. Will there be additional customs requirements? Will the system be able to cope with the increase in declarations? Should businesses test alternative routes and forwarders, building relationships that stand them in good stead at Brexit should the need arise?

VAT and duty: Brexit update and practical considerations

Do UK suppliers need an EU establishment and EU VAT registration number?

In certain circumstances, businesses and other organisations within the EU demand that an EU VAT number is provided and/or that a supplier has an EU establishment in order for the supplier to be part of a contract/tender, or to avoid the need for multiple registrations for VAT in EU countries. See also comments on `distance selling' below.

Distance selling

The EU operates a 'distance selling' regime for businesses that sell goods from one EU country (e.g. the UK) to private individuals and unregistered organisations in other EU member states. The regime allows sales VAT to be paid by the supplier in the country of dispatch of the goods, until the level of sales exceeds the 'distance selling' threshold in the country where the customer is based.

This threshold varies depending on the member state but is between €35,000 and €100,000 per annum. As and when the threshold is exceeded, a UK supplier – as used in this example – is obliged to register for VAT in the other territory and to charge VAT there instead of in the UK. This regime only exists within the EU, and will presumably not apply to UK businesses post Brexit.

The implication for UK businesses is that unless they expect private customers to pay duty and VAT on import into their EU country following Brexit, or unless they wish to register for VAT in every country to which goods are supplied no matter the turnover, they will need to set up a base (and EU registration) in a chosen EU country from which they can trade and benefit once more from the distance selling regime.

For EU suppliers dealing with the UK

Post Brexit, EU businesses dealing with the UK will also need to think about their trade with the UK. They too will need to establish who will pay the duty and VAT on import of goods into the UK. Again, unless private customers are expected to pay the taxes in order for goods to be released to them, there may need to be a VAT registration in the UK or arrangement with a UK-based distributor to declare the VAT and duty at import and subsequent VAT on the supply to the customer.

Also, for business-to-business (B2B) supplies, which entity will be responsible for the import? The self-accounting (acquisitions) mechanism for VAT on goods received in the UK from the EU will no longer apply; so it is likely that suppliers will want to act as the importer, requiring a UK VAT registration, as the UK has a nil VAT registration threshold for supplies made in the UK, irrespective of the lack of an establishment. The imposition of a VAT charge at import will result in a cash flow disadvantage in that importers, or EU businesses that have registered for VAT in the UK, will have to await the refund of the import VAT from HM Revenue & Customs (HMRC) following submission of their VAT returns.

Interestingly, the Office of Tax Simplification in the UK has just announced, in the first complete review of the VAT system to be completed in the UK since its introduction in 1973, a recommendation that HMRC should consider introducing an electronic system for dealing with import VAT certificates. This would allow the import VAT to be claimed back, presumably more quickly. While this may alleviate some of the cash flow issues, the change is thought to be a few years away.

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VAT and duty: Brexit update and practical considerations

Selling 'electronically supplied services'

Currently, the EU operates a 'Mini One-Stop Shop' (MOSS) regime in which a supplier accounts for VAT due in each EU country on sales of electronically supplied services to EU private customers. The MOSS system avoids the need for a supplier to register in every country to which it supplies e-services. It allows for a single MOSS VAT return filing. This may no longer be applicable for UK businesses after Brexit.

For UK businesses currently supplying e-services to EU private customers (such as automated tutorials, e-magazines/books), in order to avoid the need to register for VAT in each EU country post Brexit, they will need to identify an EU country that they can register in, in order to continue to file MOSS returns. Equally, post Brexit, there will be changes for suppliers remaining within the EU. Those supplying e-services to UK private persons will need to register for VAT in the UK, as the UK will presumably no longer fall within the EU MOSS rules.

Major change to B2B rules for supplies of goods within the EU

Under the new system (due to take effect around 2022, although quick fixes will be introduced in 2020) VAT will be due by the supplier, but according to the country where the goods are destined. VAT will be charged at the buyer's local rate, collected by the seller and then remitted to the buyer's tax authority via the MOSS mechanism. In other words, VAT in the EU will become a destination-based system.

This will solve some of the 'missing trader' fraud issues that exist where currently the system allows goods to circulate within the EU VAT free. There will be simplified procedures for those businesses that qualify as 'certified taxable persons', such as the use of the reverse charge mechanism for businesses acquiring goods. The criteria for being a 'certified' person are similar to those used to achieve the current customs Authorised Economic Operator (AEO) status, focussed around the compliance record, proof of solvency and controls over the VAT system. Trading without this status certainly appears to be a disadvantage.

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VAT and duty: Brexit update and practical considerations

Four ‘quick fixes’ to the EU VAT system will be introduced with effect from January 2020:

Simplifications for call-off stock arrangements

- Simplified chain transactions and which supply is linked to the intra-community transport
- Proof of transport required for goods moving between two EU countries (certified persons only)
- Clarification that a VIES system VAT number of the customer is required to achieve exemption/zero-rating on movements of goods across borders.

UK businesses may be relieved that these new rules will not apply to their transactions. They will instead have to cope with the inevitable changes to the VAT system that will begin to arise post Brexit, especially with the recommendations announced by the Office of Tax Simplification – such as one recommendation to review and amend the exempt, zero-rated and reduced-rated reliefs from VAT in UK law so that they align with the government’s social, welfare and economic policies.

However, any UK business finding the need for an establishment and registration in the EU post Brexit, for reasons discussed above, will need to understand how this new system works. Significant changes are ahead; fortunately, the Kreston Network and its indirect taxation Special Interest Group will be on hand for advice and help with implementation.

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Tax alert: Serbia

December 2018 saw changes in many tax regulations, to be initiated that month or in January 2019. These included:

- Law on Personal Income Tax (PIT Law) – amended in the domain of tax exemptions (recreation of employees), the rights of the employers of the newly established company to tax exemption, ways of determining and paying income tax on catering services, etc.
- Law on Contributions on Mandatory Social Insurance (CMSI Law) – abolishing the unemployment contribution at the expense of the employer in the amount of 0.75%, as well as a number of other changes.
- Law on Corporate Income Tax (CIT Law) – a new method of calculating the tax depreciation of fixed assets has been established, and new issues have been adopted regarding the recognition of certain revenues and expenditures in the tax balance (expenses for advertisement and propaganda, costs related to research and development [R&D], etc.).
- Law on Tax Procedure and Tax Administration – foresees the establishment of the Directorate for Games of Chance.

Here, we will focus on amendments to the CIT Law that introduce significant tax incentives. The main reason for the amendments is creating more favourable conditions for performing business activities and a better application of the provisions of the CIT Law, where most of the amendments refer to tax incentives intended for knowledge industry and investment in R&D.

The most significant amendments include:

- Change of method for calculation of tax depreciation.
- Suspension of limit for deductibility of marketing expenses, so marketing expenses are now fully deductible.
- Deductibility of R&D
  - New tax incentive provides that expenses directly related to R&D activities performed in the Republic of Serbia are tax deductible at the double amount of the expenditure.
- Special tax treatment of intellectual property (IP) income
  - New tax incentive for taxpayers who derive income based on compensation for the use of IP, on condition that the IP is registered.
- Tax credit for investments in startup companies.
  - A taxpayer which is not a newly established company performing innovative business activities, and which invests in the share capital of the newly established company performing innovative business activities, has a right to a tax credit in the amount of 30% of such investment.
- Exemption of part of the capital gains derived from disposal of IP developed in Serbia from taxation.
  - Disposal of IP is the subject of capital gains tax.
  - A new tax incentive has been introduced, which provides that only 20% of capital gains will be included in the tax base if derived from the transfer of full property rights on:
  - Registered IP.
  - Patents, in accordance with the law governing patents.
- Tax credit for capital gains tax paid abroad.
  - A Serbian resident taxpayer who realised capital gains from the sale of assets in foreign country, and paid tax in that country, could decrease the calculated CIT in the Republic of Serbia for the amount of tax paid in that other country.

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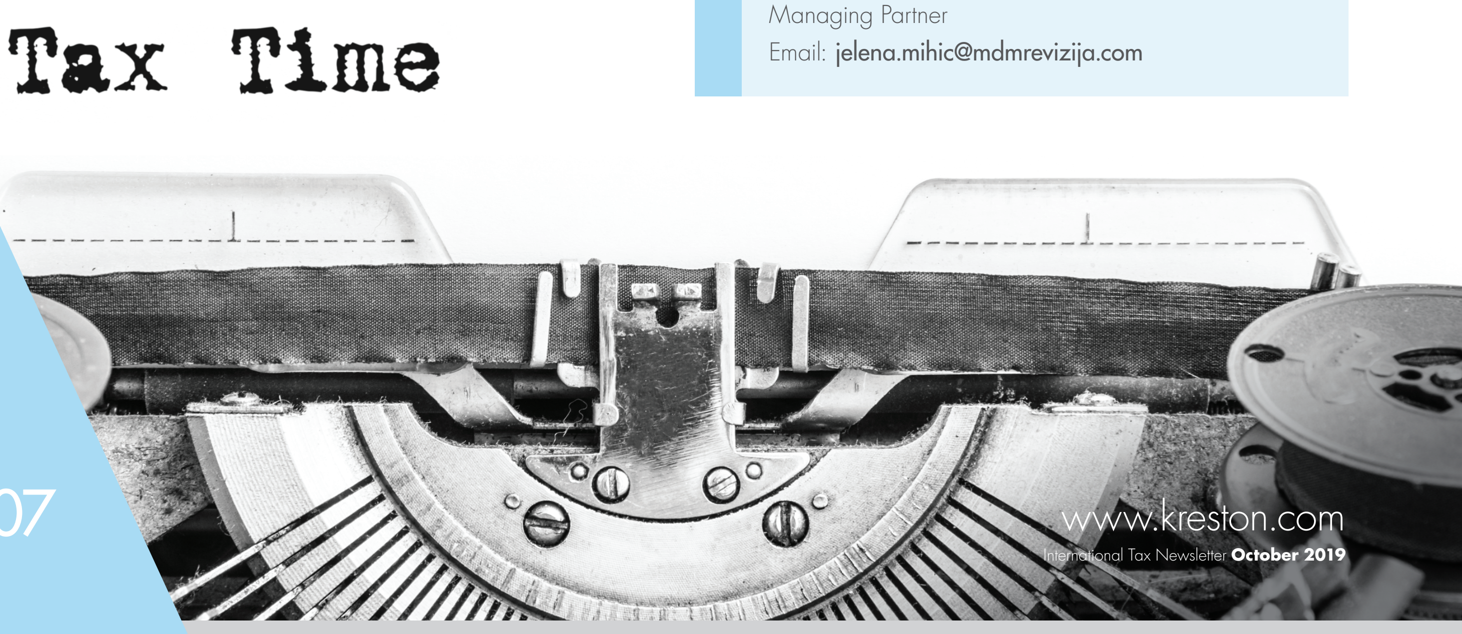

Focus on Belgium: Belgium starts applying statutory seat theory to determine a company's residence

On 1 May 2019, the reform of the Belgian company code entered into force. This reform led to some significant changes in the Belgian corporate landscape.

As from 1 May, for example, the nationality of a company (and therefore the applicable law) is determined by its statutory seat instead of its place of effective management. This means that Belgium started applying the statutory seat theory, instead of the real seat theory that was previously applied.

For tax purposes, however, a company's residence is still determined by its place of effective management. In order to prevent double (non-)taxation, companies are refutably presumed to have their place of effective management in Belgium if their statutory seat is situated in Belgium. The presumption can be refuted by proving that the company's place of effective management is not situated in Belgium and that the company is a tax resident of another state.

In an international context this may lead to differing applicable legislation, having (important) consequences for companies having their statutory seat abroad, while maintaining their place of effective management in Belgium. For example:

Notwithstanding the obligation to comply with foreign accounting legislation, the company will have to determine its corporate tax base according to Belgian tax law.

Dividend distributions made by the company are subject to differing company and tax legislation.

Therefore companies having their statutory seat (or envisaging to transfer their statutory seat) abroad, while maintaining their place of effective management in Belgium, may have to take an elevated administrative burden into account and should pay attention to apply the correct legislation.

Focus on Belgium: Transfer pricing reporting obligations: Concrete application of penalties published in the Belgian official gazette

Failing to comply with Belgium's transfer pricing reporting obligations (i.e master file, local file, country report) can result in a fine of €1250 up to €25,000.

Recently, the concrete application of the administrative fines was determined by royal decree and was published in the Belgian official gazette. The administrative fines (see Table) depend on the severity of the infringement and the number of infringements previously committed.

Note that the sanctions apply as were in case of non-submission, late submission or when providing incorrect or incomplete information.

TABLE. Summary of penalties for non-compliance with Belgian transfer pricing reporting obligations

	Involuntary (€)	Without malicious intent to evade tax (€)	With malicious intent to evade tax (€)
First infringement	0	0	12,500
Second infringement	0	1250	25,000
Third infringement	0	6250	25,000
Fourth infringement	0	12,500	25,000
Subsequent infringements	0	25,000	25,000

Withholding obligations and reporting obligations for remuneration and benefits in kind attributed by a non-resident group company (non-Belgian taxpayer) from March 2019.

Companies often reward their employees with stocks – either free or at a reduced cost, allowing the employee to acquire the company's stock at a predetermined price. The attribution of stock options is a benefit in kind that qualifies as taxable employment income in Belgium. The employer should apply a withholding tax when attributing stock options.

This withholding tax is not applicable when stock options (or other benefits in kind) are attributed by foreign companies. The Belgian government gave the example of a non-resident group company (e.g. parent company) attributing stock options to the employees of a Belgian group company. The non-resident group company cannot be subject to Belgian withholding obligations after all. Moreover, no specific reporting obligations existed with regard to this type of income, so that the income risked not being taxed.

Remunerations and benefits in kind attributed by a non-resident group company to an employee of a Belgian group company, a Belgian legal entity or a foreign group company subject to the Belgian taxation of non-residents will therefore be presumed to be attributed by that Belgian entity or group company subject to the Belgian taxation of non-residents as from March 2019. The Belgian group company, Belgian entity or foreign group company subject to the Belgian taxation of non-residents will have the obligation to apply a withholding tax to the employment income. They are also subject to the existing reporting obligations with regard to withholding tax on employment income.

In order to ensure correct taxation, income attributed in the period from 1 January 2019 up to 28 February 2019 is subject to a specific reporting obligation, since the withholding obligation will only enter into force from March 2019. Failure to comply with the specific reporting obligation is sanctioned with a fine amounting to 10% of the attributed remuneration per infringement, unless proof is delivered that the income was subject to tax.

Focus on Belgium: Impact of EU law on Belgian anti-tax avoidance measures

In 2012 a new general anti-tax avoidance measure entered into force with regard to Belgian income taxes. Its main goal was to tackle tax avoidance more effectively. In 2018 and early 2019 the first cases applying the new measure were settled before Belgian courts, giving some insight into its application and interpretation.

From the beginning of 2019 the European Anti Tax Avoidance Directive (ATAD) also came into force, obliging member states to incorporate a (strict) general anti-tax avoidance measure in their national laws. Given the principle of primacy of the EU law, Belgian judges will have to interpret the existing general anti-tax avoidance measure in conformity with ATAD, even in purely internal situations.

The European Court of Justice confirmed in two recent milestone cases that the principle of EU law prohibiting tax abuse prevents the application of EU benefits to abusive situations, even if no specific national anti-avoidance measures exist. With regard to tax law, this means that member states should sacrifice the principle of legality when fighting structures set up to abuse tax benefits granted on the basis of EU law. Clearly, the increasing impact of EU law in the fight against tax abuse could interfere with important principles in Belgian tax law, such as the principle of legality.

Reporting obligations: Belgian beneficial owners register (UBO Register)

The law of 18 September 2017 created an obligation for companies and other entities to report their beneficial owners to a centralised register, thus implementing the 4th Anti-Money Laundering Directive ('4th AML Directive'). On 14 August 2018, the royal decree setting out the operational procedure of the UBO Register was published.

Following this reporting obligation, the representatives of companies incorporated in Belgium and other entities (e.g. foundations or trusts having certain connections with Belgium) are obliged to provide the UBO Register with information on their beneficial owners. This however, is limited to obligations for companies incorporated in Belgium.

The following persons are considered to be beneficial owners of companies:

Person(s) having a direct or indirect ownership or a sufficient percentage of the voting rights in the company. Voting rights, or ownership amounting to ≥25%, indicate a sufficient percentage.

Please note that the person holding the right of usufruct as well as the person holding the bare property of shares should be reported, provided that they have a sufficient percentage of the voting rights to establish ownership. This was recently confirmed by the Belgian administration implementing the UBO Register.

The natural person(s) controlling the company by any other means (e.g. shareholder agreement, power to appoint members of the management board, veto right).

The natural person(s) holding the position of senior managing official(s), if, after having exhausted all other means of identification, they were unable to identify beneficial owners based on the previous categories. Being a residual category, the identification of a beneficial owner must be duly documented and justified (e.g. measures and actions undertaken to identify the two first categories, results of said measures and actions).

The persons representing the company (e.g. the managing director or the board of directors) are responsible to provide the UBO Register with the necessary information. In case of non-compliance, administrative fines from €250 to €50,000 can be imposed.

Note that changes of the beneficial owners should be reported within a period of 1 month. If the ultimate beneficial owners don't change, the reported information should be confirmed annually.

The UBO registration deadline was the 30th of September 2019. However, the FPS Finance announced that it will apply a policy of tolerance until 31 December 2019.

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'Google tax' – meaningful or damp squib?

The UK has recently released the first full year's figures for the Diverted Profit Tax (DPT) – the so-called 'Google tax'. HMRC have suggested that the yield from the tax was £281m for the 2016/17 reporting period.

DPT was intended to deal with a number of perceived tax avoidance arrangements. It targeted businesses that either had significant operations in the UK, without creating a permanent establishment, or where there were transactions between connected entities that lacked economic substance but generated tax mismatches (e.g. royalty payments between the UK and a lower tax jurisdiction).

This sounds like a great result for the UK Treasury and for the new legislation. However, on closer examination informed by a little understanding of organisational dynamics and human nature, it might not be the success that HMRC are claiming.

Included in the suggested yield of £281m is a figure of £138m, which is a total drawn from DPT 'charging notices'. These are notices that require payment of the DPT by the 'affected' company. The appeal process is long; so it may be well over a year before these notices are either confirmed, or indeed overturned. As such, the actual increase in tax revenues generated from such notices may be limited. In addition, HMRC have stated that many of the negotiations over the impact of DPT turn into a more involved discussion around transfer pricing. This implies that there may well have been a standard corporation tax liability, with DPT being used as a negotiating lever.

If this is the case, then the extra tax generated may be as little £33m; and that assumes all the notices are upheld. DPT may accelerate the tax charge (as losses cannot be offset in the DPT calculation), but there may not be an overall increase in revenue raised.

The balance of yield claimed is, however, from changes in taxpayer behaviour following the introduction of DPT. HMRC have identified changes in group structures and transfer pricing policies driven by the new law. This is where human nature plays its part.

HMRC say that these changes have been identified by the customer relationship managers dealing with taxpayers. These senior tax inspectors will have been tasked by HMRC senior management to identify eligible cases. HMRC will be keen to present the DPT as a success, and therefore will be actively looking for cases that can be presented as such.

Multinational groups with operations in the UK will need to revisit their arrangements to ensure that they are DPT compliant. More importantly, they must ensure that their arrangements are properly documented from a transfer pricing perspective.

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