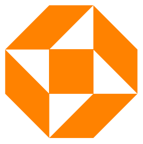

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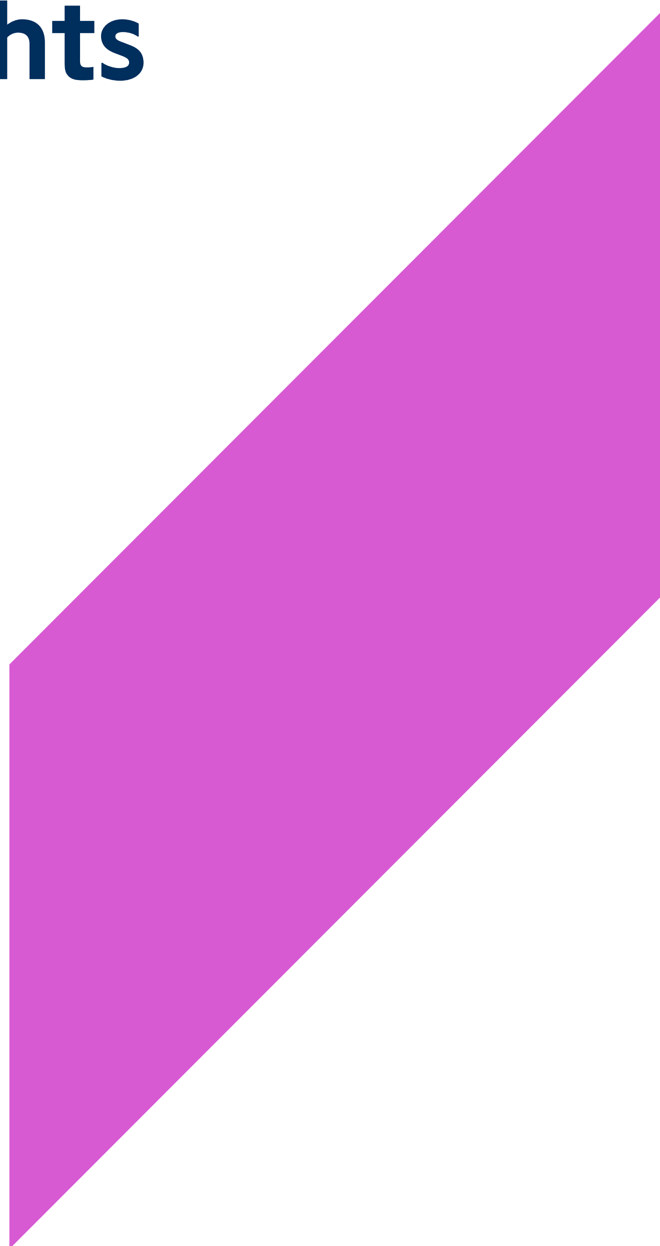

Building Better
Business Globally

Morison Global

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Editorial

Many countries in the world such as the UK, US, Italy, Canada and Germany have rules to tax crypto's in one way or the other

In the Indian Union Budget 2022-23 as tabled in the Parliament on 1st February 2022, the Government has proposed amendments to tax income arising from cryptos. Many countries in the world such as the UK, US, Italy, Canada and Germany have rules to tax crypto's in one way or the other. Up until now there was no separate tax regime for taxing cryptos, accordingly to provide certainty to the taxation regime a new section dealing with taxation of Virtual Digital Assets (VDAs) is sought to be included in the Indian tax regime.

VDA has been defined in an exhaustive manner and includes all types of cryptocurrencies (like such as Bitcoin, Ripple, Ethereum, etc.), crypto tokens as well as non-fungible tokens (NFTs). The relevant aspects of the taxation regime are as under:

- Income arising from the transfer of VDAs will be taxable at a flat rate of 30% (plus applicable surcharge, cess) irrespective of the period of holding. There is thus no tax on holding of the VDA and there is no concept of a short term or long-term tax on the VDA as there is a flat rate of tax.
- There would be no set-off of any loss or allowance or expenditure allowed under any provision of the Act, except the cost of acquisition of such VDA while computing the income from the transfer of the VDA. Moreover, the loss from transfer of VDAs cannot be set off against any income and will also not be allowed to be carried forward.
- Gifting of VDAs has also been made taxable and the receipt of VDAs for NIL or inadequate consideration would be taxable as ordinary income in the hands of the recipient.
- Payments made in relation to transfer of VDAs would also be subject to tax deduction @ 1% of such consideration above specified monetary thresholds.

While the Government has gone ahead and laid down a separate taxation regime for cryptos but whether holding of cryptos in the first place is legal or not is a larger issue which remains unaddressed. There is still ambiguity on the legality of holding of cryptos in India even though there are many platforms which have mushroomed in the last year to facilitate trading in cryptos.

A pandemic ravaged world is now witnessing the Russia-Ukraine conflict. This would again have a serious effect on world economy which was seeing some signs of revival. I am reminded of John Lennon's famous song: perhaps enough of us can 'imagine' an end to the current world situation.

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EU court decision on Model 720 – How may it affect Spanish tax-residents? What will happen now? What about crypto assets?

> *Greed tore open the sack and nobody said anything until 'Santa Europa' came along, but late*

At the beginning of 2013, a time of cuts and adjustments, Model 720 was born: an informative declaration to the Tax Agency of assets abroad having value exceeding €50,000 (chiefly bank accounts, financial investments and real estate). However, it must be noted that in most cases the taxpayer's personal income tax return would include such information. The penalties for not complying with this obligation could exceed 150% of the tax due.

In 2015, the European Commission stated in a recommendation that Model 720 clearly failed to comply with several community principles and filed an appeal to the Court of Justice of the European Union (CJEU). Sadly, in Spain these matters are left to the EU Court, so the government and the legislator did nothing.

On 27 January 2022 the CJUE pronounced its judgment. The important aspects of the judgment are:

1. Those who have never made a Model 720 declaration, but should have, must file one now because currently no specific sanctioning regime is in force except the general sanction regime (for failing to submit a tax filing on time).

   The general four-year statute of limitations period will now apply.

2. Those sanctioned for late filing of a Model 720 declaration will receive a claim requesting the fine to be paid.
3. If you challenge the sanction within the four-year period, consider requesting state liability.

Regardless of these points, for the 2021 reporting period a supplementary reporting obligation has been added: crypto assets (a new class of assets) must be included in the Model 720 declaration form, which had to be submitted by 30 March 2022.

Withholding taxes applicable to non-resident companies

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The 2022 Finance Act brings withholding taxes applicable to non-resident companies into compliance with European law and adjusts the withholding tax deferral mechanism for loss-making foreign companies.

Withholding taxes on certain income paid to foreign companies – compliance with European Union law

Income and profits accruing to non-resident foreign companies are subject to withholding tax as per European law.

Until now, the withholding tax was calculated on the gross amount i.e. the total amount corresponding to the remuneration for the activity without deduction of the expenses incurred because of the activity.

This affects withholding taxes on:

- Dividend distributions (Article 119*bis*, 2 of the General Tax Code, CGI)
- Remuneration for artistic services (Article 182A CGI)
- Certain non-salary income: royalties, non-commercial profits, remuneration for services of any kind and sports services (Article 182B CGI).

In practice, these withholding taxes are calculated on the gross sums paid, but French companies receiving such income may deduct a certain amount of expenses incurred by them.

This difference in treatment led the Conseil d'Etat to rule that the methods of calculating the withholding taxes do not comply with European Union law.

A new system has been introduced allowing certain foreign companies to obtain, under certain conditions, a refund of withholding taxes on distributed income, and some types of remuneration for artistic services and of non-wage income, up to the difference between the withholding tax paid and the withholding tax calculated on the basis of an amount net of charges. The conditions are:

1. This refund regime applies where the headquarters of the beneficiary company or its permanent establishment are located in an EU Member State or in Iceland, Norway or Liechtenstein.
2. The refund mechanism is reserved for legal entities or organisations whose results are not subject to income tax in the hands of a partner.
3. The taxation rules in the state of residence must not allow beneficiaries to offset the withholding tax there.

Withholding taxes on remuneration for artistic services and on some types of non-salary income enjoy a flat-rate deduction of 10%. Here, the refund is limited to the difference between the withholding tax calculated after the flat-rate deduction and that determined on the basis of actual expenses.

The company may request restitution of the difference between the withholding tax paid and the withholding tax determined on a basis net of acquisition and conservation expenses directly related to its products. Restitution will however be subject to two conditions:

- The expenses in question would be deductible if the beneficiary were established in France, and
- The taxation rules in the beneficiary's state of residence do not allow it to deduct the withholding tax.

The refund must be claimed from the non-resident tax department under the conditions of ordinary law for a

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contentious claim, i.e. no later than 31 December of the second year following the year the tax was paid.

The system applies to withholding taxes for which the taxable event (date of payment of the income) occurs on or after 1 January 2022.

Adjustment of the restitution system for loss-making companies

The Finance Act 2020 introduced a mechanism for the restitution to and temporary deferral of withholding taxes for loss-making foreign companies, codified in Article 235*quater* CGI. This mechanism covers the withholding tax systems provided for in Articles 119bis, 182Abis and 182B CGI. Taxation of the income is deferred until a taxable event puts an end to the loss-making, in particular when the company becomes profitable again.

To benefit from the restitution and the tax deferral the legal entity must:

- File a declaration (form 2780-SD) with the non-resident tax department showing its loss-making income
- To maintain the deferral in following years, file a new declaration stating the incomes and any profits taxation of which is deferred
- In both cases, within three months of the end of the fiscal year concerned.

The temporary refund of withholding tax to loss-making companies has been adjusted by:

- Extending the deadline within which an eligible non-resident company may claim the refund, and the deadline for filing the follow-up statements, to refer to the deadline for contentious claims, i.e. 31 December of the second year following the year tax was paid
- In the event that the company becomes profitable again, specifying the order in which the deferred taxes become due; where the taxes carried forward relate to different fiscal years, the oldest taxes must be paid first
- Extending the deadline for filing returns to claim tax deferral (and follow-up statements) from three to six months after the end of the fiscal year for which the deferral is requested.

The changes made to the system apply to withholding taxes for which the taxable event occurs on or after 1 January 2022.

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Australian tax implications for temporary residents

> *As a general principle, an Australian resident is assessed on their worldwide income including capital gains on the sale of capital gains tax (CGT) assets regardless of where the asset is located*

Globalisation and increased cross-border labour mobility create tremendous opportunities for overseas-resident individuals who wish to do business or take up employment in Australia. One of the challenges for such individuals who stay and work in Australia is to manage their tax residency and comply with the Australian tax rules.

Proposed change to tax residency rules for individuals

Australia's current residency rules are complex and difficult to apply in practice. To attract global business and talent, the Australian government announced in its 2021/22 Federal Budget that it will reform the individual tax residency rules and adopt a new and modernised framework. The primary residency test will be a simple 'bright-line' test. Under this test an individual will be an Australia tax resident if the individual is physically present in Australia for 183 days or more in an income year. An individual who does not meet the primary test will be subject to secondary tests which include a combination of physical presence and measurable and objective additional factors to determine the individual's tax residency. The measure will have effect from the first income year after the date of Royal Assent of the enabling legislation. To date the draft legislation has not been released.

Who is an Australian resident?

As the law currently stands, there are four tests to assess whether an individual is an Australian resident:

- Residence according to ordinary concepts
- The 183-day test
- The domicile and permanent place of abode test
- The Commonwealth superannuation test.

If an individual satisfies any of these tests, the individual will be regarded as an Australian resident for Australian tax purposes.

These residency tests will be replaced by a new set of residency rules, once enacted.

As a general principle, an Australian resident is assessed on their worldwide income including capital gains on the sale of capital gains tax (CGT) assets regardless of where the asset is located (subject to any tax treaty relief). On the other hand, a foreign resident is only subject to Australian tax on Australia-sourced income and capital gains on the sale of assets that are classified as 'taxable Australian property' ('TAP' mainly refers to real property located in Australia, an asset used in carrying on a business through a permanent establishment in Australia and an equity interest of at least 10% in an entity whose assets mainly comprise taxable Australian real property).

However, there is also a class of individual taxpayers who are Australian residents but are treated as 'temporary residents' for Australian tax purposes.

Who is a temporary resident?

The definition of 'temporary resident' is contained in section 995–1 of the Income Tax Assessment Act (ITAA) 1997 which provides that:

> *you are a temporary resident if:*
>
> *(a) you hold a temporary visa granted under the Migration Act 1958; and*
>
> *(b) you are not an Australian resident within the meaning of the Social Security Act 1991; and*
>
> *(c) your spouse is not an Australian resident within the meaning of the Social Security Act 1991.*
>
> *However, you are not a temporary resident if you have been an Australian*

> *resident (within the meaning of this Act), and any of paragraphs (a), (b) and (c) are not satisfied, at any time after the commencement of this definition.*

This definition came into force on 6 April 2006.

The first condition requires the individual to hold a temporary visa. The second and third conditions require that neither the individual nor their spouse is an 'Australian resident' as defined in the Social Security Act 1991. In that act, an 'Australian resident' is defined as a person who resides in Australia and is an Australian citizen, the holder of a permanent visa or a protected special category visa holder.

Most expatriates who hold a temporary visa working in Australia would likely be classified as temporary residents for Australian tax purposes, unless they satisfy the Australian resident test under the Social Security Act.

If an individual is considered a temporary resident, they are only taxed on Australia-sourced income and certain foreign employment income at resident tax rates

Tax concessions for temporary residents

Australian tax law provides tax concessions to temporary residents. If an individual is considered a temporary resident, they are only taxed on Australia-sourced income and certain foreign employment income at resident tax rates (Australian residents are entitled to a tax-free threshold of $18,200).

Further, a temporary resident is only subject to Australian CGT on the sale of CGT assets which are taxable Australian property. However, a temporary resident is not entitled to the general CGT discount on the sale of taxable Australian property. The CGT discount is generally available to Australian resident individuals or trusts where an asset is held for more than 12 months before disposal.

The recent legislative change to remove the main residence exemption for foreign residents does not apply to temporary residents. Temporary residents are entitled to the main residence exemption on the sale of their main residence.

A temporary resident is not subject to the controlled foreign company (CFC) rules or the transferor trust rules. These rules generally apply to tax Australian residents on income of their controlled foreign entities on an accruals basis.

CGT implications when an individual ceases to be a temporary resident but remains an Australian resident

An individual's temporary residency status ceases if they no longer meet the conditions of being a temporary resident, for example where the individual has obtained a permanent visa or become an Australian citizen.

When an individual ceases to be a temporary resident but remains an Australian resident (i.e. becomes a 'normal' resident), all CGT assets they own, other than taxable Australian property and assets acquired before 20 September 1985, are taken to have been acquired at their market value at the time of the individual becoming an Australian resident. This rule ensures that any capital gain or loss accruing before becoming an Australian resident is protected from Australian CGT and any capital gain or loss accruing after that time would potentially be subject to CGT in Australia. The individual will need to obtain a market valuation of these assets to establish a cost base of the assets for CGT purposes.

This deemed acquisition rule does not apply to an employee share scheme (ESS) interest acquired by the individual where the ESS interest qualifies for deferred taxation and the deferred taxing point has not occurred, or where the start-up concessions apply to the ESS interest when the individual becomes a 'normal' Australia resident.

'Tie-breaker' rules in tax treaties

Where an individual is treated as both an Australian resident and a resident of another country, it is necessary to consider the 'tie-breaker' rules contained in most double tax agreements (DTAs) that the Australia has with other countries, to establish residence solely in Australia or the other country for the purposes of the DTA.

The following table summarises the general tax treatment of income or gains derived by a temporary resident versus a 'normal' Australian resident. This does not consider any specific exemptions provided under the Australian tax law or the application of any DTA.

Will there be any change to the temporary resident rules?

In its report to the Australian government on reforming individual tax residency rules the Board of Taxation recommended some changes to the temporary resident rules, including limiting the tax concessions to four years where an individual has been in Australia for more than four years. It is unclear at this stage whether these recommendations will be adopted by the Australian government as the draft legislation on reforming individual tax residency rules has not been released. This is certainly a space to watch out for.

Income or gains	Temporary resident	Australian resident
Australia-sourced income	Taxable	Taxable
Foreign income (excl. foreign employment income)	Exempt	Taxable
Foreign employment income	Taxable	Taxable
Capital gains on sale of TAP	Taxable	Taxable
Capital gains on sale of non-TAP	Exempt	Taxable
General CGT discount	Not eligible	Eligible
CFC and transferor trust rules	Not applicable	Applicable
Taxed at resident rates	Yes	Yes

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Important changes to the expat status in Belgium

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The Belgian government has reached agreement on the introduction of a new legal framework for incoming taxpayers and researchers. As from 1 January 2022 this new special tax regime replaced the old tax status for foreign executives ('expat status').

Former tax status of foreign executives (expat status)

For years, Belgium has had a special tax status for certain foreign employees and company directors who work temporarily in Belgium for a Belgian company that is part of an international group. This tax regime was a purely administrative arrangement, introduced by a Circular of 8 August 1983.

The advantage of that status was that foreign executives were fictitiously considered as 'non-residents' by the tax authorities. Consequently, they were only taxable in Belgium on their income of Belgian origin, not (in Belgium, at least) on any part of their remuneration for services rendered abroad. In addition, expatriates were not taxed on reimbursement of certain extraordinary expenses relating to the assignment to Belgium, with a maximum of €11,250. For researchers and persons with a supervisory or executive function, the maximum amount was € 29,750.

New regulation

The new regulation is included in the Income Tax Code by the Programme Act of 27 December 2021 and will therefore offer more security than the old administrative regulation (which could have been withdrawn or changed at any time).

Conditions

The new regulation applies to 'incoming taxpayers', both employees and company directors, and to 'researchers', who may only be employees. The new regime applies only where these conditions are met:

1. **Entitled employers and companies**

   The employee, employee-researcher or company director must either have been directly recruited abroad or posted within a multi-national group or non-profit organisation.

2. **Absence of a link with Belgium during the preceding 60 months**

   Throughout the 60 months preceding the entry into service in Belgium, the qualifying employee, employee-researcher or director must have had no link with Belgium:

   - Not have been a (tax) resident of Belgium
   - Not have lived within 150 km of the Belgian border
   - Not have been subject to the non-resident tax on professional income in Belgium.

   Unlike the former regulation, there will no longer be a requirement for foreign nationality. Employees and company managers with Belgian nationality (or double nationality) can thus benefit from the new regime.

3. **Minimum remuneration**

   The new regulation requires annual gross salary to be at least €75,000. This threshold will be assessed at the time the application for the regime is submitted and includes gross salary, holiday pay, end-of-year bonus, benefits of all kinds and variable remuneration, but some benefits are exempted, such as meal vouchers or expense allowances (including the 30% allowances described under 'Advantages' below).

   If the employment period of the concerned employee or executive does not cover a full calendar year, the threshold may be calculated pro rata to the actual employment.

This threshold does not apply to 'researchers'.

4. **Qualification as 'researcher'**

   Employees wanting to access the new scheme as a 'researcher' will have to indicate this status by holding a specific scientific master's or doctoral degree, or demonstrate at least ten years' relevant professional experience in the relevant field(s).

   In addition, researchers will have to devote at least 80% of their working time to research activities.

Application and formalities

To benefit from the new tax regime, the employer or company must submit an electronic application to the Administration within three months from the start of employment in Belgium. The employee or director concerned must attach a signed certificate to this application 'for approval'.

The Tax Administration must then rule on the application within three months. Where the answer is affirmative, the new regime will apply from the start of the employment period in Belgium.

By 31 January each year the employer or company must submit a list of the employees and company directors who benefited from this system during the previous year.

Advantages

The residence rules included in Belgian income tax legislation apply to the new tax system, unlike the former regime. Employees or directors considered resident under Belgian tax rules will be taxable in Belgium on their worldwide income. Where considered non-resident, they will have to present a certificate of fiscal residency from another country.

Consequently, the tax benefits of the new regime are limited to the tax-free reimbursement of 'costs proper to the employer' and are identical for both 'incoming taxpayers' and 'researchers'.

1. **'30% rule' for recurring expenses resulting from employment in Belgium**

   The employer or company may reimburse the employee or director, if contractually agreed, for expenses that are a direct consequence of the employment in Belgium (e.g. living expenses, housing, ...). Such reimbursement will be tax-free up to 30% of gross salary (or €90,000 per year, if less). The National Social Security Office (NSSO) have confirmed that this reimbursement can be made free of both employer's and employee's social security contributions.

   Such recurring expenses may be granted on top of the costs traditionally proper to the employer, such as any home-work allowance, internet allowance, etc.

2. **Other expenses proper to the employer**

In addition to expenses covered by the 30% rule, the following exceptional costs are accepted by both the tax authorities and the NSSO as a reimbursement of expenses proper to the employer, if payment and amounts paid are proven:

- Costs resulting from the move to Belgium
- Costs for furnishing the residence in Belgium, to a maximum of €1,500
- School fees for children of compulsory school age who attend school in Belgium
- Costs related to obtaining expat status (advice, application, ...).

Maximum period of application

The new regime is valid for an initial period of five years, with a possibility of renewal

> *In all new situations the application must be submitted within three months after the employment in Belgium starts*

for three years (requiring a new application and demonstrating that the conditions are still met).

The regime is no longer linked to a specific employer and therefore the five-year or eight-year period can continue to apply if there is a change of employer.

Entry into force and transitional regime

The new regime applies to 'incoming taxpayers' and 'researchers' entering into service in Belgium as from 1 January 2022. However, some transitional measures are provided for existing situations under the former regime, which will have to be applied for and reviewed on a case-by-case basis.

What should you do?

Where the conditions are met the employer or company must submit an electronic application to apply the new regime to existing situations by no later than 31 July 2022. In all new situations the application must be submitted within three months after the employment in Belgium starts.

UK tax update – more time to report capital gains on UK land and property

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From 6 April 2020 legislation required UK tax residents to report disposals of residential property that attract a CGT liability within 30 days of completion

The way capital gains are taxed and reported on UK land and property has changed considerably over the past few years.

Prior to 5 April 2015 non-UK residents were not liable to capital gains tax (CGT) on the disposal of UK land and property. However, with effect from 5th April 2015, non-UK residents disposing of UK residential property were made liable to CGT on the gains arising after that date. The scope of taxability was expanded to include gains arising on the disposal of UK non-residential property from 5 April 2019.

Where the land or property were owned prior to these changes, individuals are only liable for the part of the gain that accrued since the changes came into force.

From 6 April 2020 legislation required UK tax residents to report disposals of residential property that attract a CGT liability within 30 days of completion. Non-UK residents were also required to report the disposal of any type of UK land and property, regardless of whether tax is due on the disposal or not.

Implications and considerations

Professional bodies such as the Chartered Institute of Taxation and the Association of Taxation Technicians lobbied the Government to extend the 30-day deadline, as they felt that this period does not allow sufficient time for taxpayers to comply. As a result the Chancellor of the Exchequer announced in the autumn 2021 Budget that it would be extended from 30 days to 60 days.

This change came into force immediately, so all completions made on or after 27 October 2021 have 60 days in which to be reported.

The Chancellor also confirmed that, for a UK resident making a disposal of mixed property, only the portion of the gain relating to the residential property must be reported (and the tax paid) within the 60 days; the remainder of the disposal will be reported through the annual self-assessment tax return.

Hence, it is now important to review the potential CGT consequences when selling UK land or property, to ensure that all deadlines for reporting are met and the taxes due are paid within these timelines.

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Plastic packaging tax (PPT)

The plastic packaging tax (PPT) is an environmental tax aimed to incentivise the greater use of recycled materials in the production of plastic packaging. It comes into effect in the UK from 1 April 2022

New plastic tax considerations

The plastic packaging tax (PPT) is an environmental tax aimed to incentivise the greater use of recycled materials in the production of plastic packaging. It comes into effect in the UK from 1 April 2022.

The charge to PPT arises when a chargeable plastic packaging component is produced in the UK by a person acting in the course of a business, or where it is imported into the UK on behalf of such a person. The tax only applies to finished products.

The tax will apply at a rate of £200 per tonne on plastic packaging containing less than 30% recycled plastic.

Applicability of PPT

- UK manufacturers of plastic packaging
- Importers of plastic packaging
- Business customers of manufacturers and importers of plastic packaging.

There is an exception for manufacturers and importers of less than 10 tonnes of plastic packaging per year.

Packaging component

A 'packaging component' is a product that is designed to be suitable for use, whether alone or in conjunction with other products, in containing, protecting, handling, delivering or presenting goods at any stage in the supply chain, from the producer to the consumer. This has made the definition wide. It will include items such as coat hangers and covers re-usable and refillable items such as plastic crates and bulk containers.

Potentially, imports of packaging that already contains goods, such as plastic bottles filled with drinks or packaging around goods, will also be subject to the tax.

There are some exclusions, such as filled packaging components with a primary storage function – e.g. DVD cases – and packaging that is integral to the goods – e.g. printer cartridges.

Products that are designed as single-use packaging products for use by a consumer, such as plastic bags, bin liners and disposable cups, will also be covered.

Plastic content

Packaging that uses multiple materials but contains more plastic by weight than any other substance will be a plastic component for the purpose of the PPT.

A business will need to demonstrate to HMRC (the UK tax authority) that a packaging component which contains plastic is not subject to the tax. If it cannot, then the component will be treated entirely as plastic.

Records will need to be maintained, covering the materials consumed in the manufacturing of packaging and the weight of each material.

A plastic packaging component is chargeable when it is 'finished'. This means when the component has undergone its last substantial modification, and the business that completes this stage will be liable for the PPT. A substantial modification is a manufacturing process which changes the nature of the packaging component and its features, such as:

- Shape
- Structure
- Thickness
- Weight.

Exemptions

A number of types of packaging components are excluded from PPT, including:

> *A manufacturer/importer who has manufactured/ imported 10 or more tonnes of finished plastic packaging during the last 12 months, or will do so in the next 30 days, is required to register for the PPT*

- Packaging for use in the immediate packaging of medicinal products (manufacturers and importers exempted)
- Transport packaging used on imported goods
- Packaging used in aircraft, ship and rail goods stores
- Components that are permanently designated or set aside for use other than a packaging use.

If the packaging is intended for export, payment of the tax can be deferred for up to 12 months if certain conditions are met, and if exported within that 12-month period the liability is cancelled.

Key sectors affected amongst others:

- Packaging manufacturing
- Industrial manufacturing
- Consumer goods
- Online retail
- Pharmaceutical
- Chemical
- Food and drinks
- Cosmetics.

Compliance requirements

A manufacturer/importer who has manufactured/imported 10 or more tonnes of finished plastic packaging during the last 12 months, or will do so in the next 30 days, is required to register for the PPT.

The 10-tonne threshold will include plastic packaging that contains at least 30% recycled plastic or is exempt.

Registration is required even if a business's packaging is not chargeable to PPT and it does not have to pay any tax.

Businesses outside the UK will also be required to register under the PPT regime if they import plastic packaging into the UK.

Quarterly returns must be filed. Businesses that are members of a group of companies will be able to appoint a representative member to submit returns and pay PPT for the group.

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Divesting the shareholding in a corporation on moving to Germany

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> *Anyone who moves his or her residence to Germany becomes principally liable to tax without limitation, i.e., on his or her worldwide income*

In many countries, the sale of shares in corporations held as private assets is subject to taxation. In some cases, more than one state claims taxation on the appreciation of the shareholding - e.g., if the taxpayer sells the shareholding after moving abroad. In order to avoid double taxation, Germany will, in certain circumstances, allow a step-up in the value of the shareholding in cases of moving in. The Federal Fiscal Court recently specified the requirements for this in a ruling - and made clear that cross-border moves need to be well planned in order to avoid tax consequences especially double taxation.

Anyone who moves his or her residence to Germany becomes principally liable to tax without limitation, i.e., on his or her worldwide income (of course when calculating the actual tax, one considers possible DTT rules). In principle, gains realised from the private assets of a natural person are not subject to taxation. An important exception to this principle, however, are gains from the sale of stocks and other securities like shares in corporations. In the context of unlimited tax liability, such gains are subject to German taxation regardless of the domicile of the corporation in question.

Sale of shares held as private assets is generally regulated by Sec. 20 para. 2 of the German Income Tax Act (EStG). The capital gains are, as income from capital assets, subject to the flat rate withholding tax of 25%. However, a "substantial" participation within the meaning of Sec. 17 para. 1 EStG is treated separately. Such a participation is given if the taxpayer has directly or indirectly hold at least 1% of the shares in a corporation within the last five years. The capital gain from such a participation is considered as income from trade or business. Consequently, the partial income method (according to which only 60% of the capital gain is subject to taxation, and at the same time only 60% of the related expenses can be deducted) and the taxpayer's personal income tax rate apply.

Capital gains within the meaning of Sec. 17 para. 1 EStG correspond to the amount by which the selling price exceeds the acquisition costs after deduction of the selling costs.

To avoid double taxation, Sec. 17 para. 2 sentence 3 EStG allows for a step-up: If

1. the shares were already attributable to the taxpayer prior to the establishment of unlimited tax liability and
2. any increase in value that occurred before the move to Germany was subject to a tax comparable to the German exit tax in the foreign state.

In this case, the value relevant for the foreign exit tax, but no more than the fair market value, takes the place of the acquisition costs.

But at which point does the increase in value that occurred prior to the move becomes *subject to* a foreign exit tax? The Federal Fiscal Court recently had to deal with this question (judgement of 26 October 2021 - IX R 13/20). In the case concerned, a Dutch citizen, who was the sole shareholder of a Dutch corporation and had moved from the Netherlands to Germany, had filed a lawsuit.

Dutch tax law ordinarily provides for exit taxation of the shares in such cases. However, at the time of the exit, the Dutch tax authorities had failed to determine the taxable value of the shares in a tax assessment notice and to assess the tax due on them. Since the tax would have been deferred anyway, the tax authorities agreed with the taxpayer that the latter would be treated as if he had been granted a deferral notice. In the course of this, the Dutch tax authority had also determined the value of the shareholding.

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Shortly after moving to Germany, whereby he became subject to unlimited tax liability there, the taxpayer sold his shares in the corporation. While he assumed that the value of the shareholding determined by the Dutch tax authorities replaced, in accordance with § 17 para. 2 sentence 3 EStG, the acquisition costs, the German tax office argued that the requirements for this step-up were not met as the taxpayer had not had to pay any tax in the Netherlands.

In its decision, the Federal Fiscal Court explains that the wording "subject to" used in § 17 para. 2 sentence 3 EStG does not necessarily require - in view of its use in other legal passages - that a foreign tax that has actually been determined and paid. Instead, in principle, merely the tax intended by law could be meant.

However, since Sec. 17 para. 2 sentence 3 EStG also refers to the value that the foreign state has used for the *calculation* of its exit tax, according to the Federal Fiscal Court the application of the rule requires that the exit state has, at least, issued a tax assessment notice that includes a calculation and assessment of the exit tax. This would also be supported by the taxpayer's obligation to provide evidence of the taxation.

Consequently, in the case in dispute, no step-up was granted; the increase in value of the shares was thus subject to German taxation in full (after deducting the costs of disposal). The case shows that cross-border moves should be well planned in order to avoid unintended tax consequences. Also, existing double taxation agreements (DTAs) between the countries concerned must always be taken into account: In the case in question, for example, Germany was only allowed to tax the increase in value that occurred before the move because there had not been any taxation in the Netherlands.

Ultimately, each case requires an individual assessment of the tax consequences, ideally with the assistance of advisers in all the countries concerned.

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Relevant aspects of Mexico's international tax reform for FY 2022

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The SARS-CoV-2 (COVID-19) pandemic imposed a tremendous challenge on all tax administrations worldwide in fiscal years (FY) 2020 and 2021. Most governments were forced to adjust budgets, public expenditures, incentives and collection programs to try to avert the economic and health problems originated by the spread of the virus.

In Mexico, very limited assistance was generally granted in terms of incentives to businesses or corporations. Instead, the Mexican Government opted to launch social protection programs to provide economic incentives directly to specific sectors of the population (elderly adults and unemployed youths) and increase public expenditure on and investment in strategic infrastructure (the Dos Bocas refinery, the Maya train and a new airport known as 'Felipe Ángeles').

The social programs of reference increased the government's needs for additional funding (it maintained its official policy of avoiding contracting additional public debt and creating new taxes). Accordingly, in FY 2020 the Mexican Tax Administration Service (SAT) implemented an effective collection campaign intended to exceed annual tax collection objectives by enforcing tax compliance by large taxpayers and multi-national corporations.[1]

Following this principle, in September 2021 the Congress received from Mexico's Presidential Office the Budget and tax reform for FY 2022, which included simplified tax regimes for individuals and small corporations (*regimen de confianza*, or RESICOs) and multiple amendments associated with international taxation and transfer pricing, among the most relevant modifications to the Mexican Income Tax Law (MITL) and the Mexican Tax Code.

Regarding transfer pricing-related changes, beginning FY 2023 Mexican taxpayers will be obliged to file (for FY 2022) detailed returns on transactions undertaken with any related party (DIMA9), regardless of tax residence (formerly, this obligation was restricted to transactions with foreign related parties, but in FY 2022 the scope of the obligation was extended to include controlled local transactions).[2]

Due to lack of reliable tax and financial information for risk assessment purposes, the Mexican Congress approved for FY 2022 the requirement that large taxpayers (those reporting taxable income of 1,650,490,600 Mx pesos and above in the preceding fiscal year),[3] and public Mexican companies must file a detailed tax report in the subsequent year (SIPRED format), issued by an independent CPA.[4] SIPRED reports must be filed no later than May of the year following fiscal year-end, and include detailed transfer pricing exhibits and questionnaires.

In accordance with this latter modification, the 2022 tax reform now allows earlier submission to SAT (in May of the year following fiscal year-end) of the annual tax returns associated with transfer pricing and 'local filings' (in the past, the deadlines for DIMA9 returns and local filings were June and December of the year following fiscal year-end, respectively).[5]

To acquire additional, detailed sources of information, the Mexican Congress approved requiring all local parties related to large Mexican taxpayers to submit to SAT local filings[6] and detailed tax returns (ISSIF format) in connection with the SIPRED submission of the large taxpayer concerned.[7] ISSIF reports also contain detailed transfer pricing exhibits and questionnaires.

In addition, important obligations entered into force for the preparation of supporting documentation relating to annual transfer pricing. In 2022 taxpayers affected must

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include detailed functional analyses, explanations and disclosures of the calculation of any type of comparability or economic adjustment used in the preparation of this documentation. Multiple-year information may be required in strongly justified cases, which basically implies that taxpayers may only use annual contemporaneous information (for both the tested party and the selected comparables), excluding any possibility of using average information.[8]

Reduced income tax withholding rates (4.9% and 10%) may not be applied to payments to foreign beneficial owners of interest on corporate debt in cases in which SAT discovers that the beneficial owner of the interest payment (obtaining 5% or more of the aggregate interest payment) is a foreign stockholder or a foreign subsidiary of the Mexican taxpayer. After excluding the reduced withholding rates, and where no preferential withholding rate is provided for in an income tax treaty, the withholding rates on interest payments provided for in the MITL could range from 15%, 21%, 35% to 40%.[9]

For corporate restructuring processes occurring in 2022 and forward, the MITL and the Mexican Tax Code provide for advance written notification to SAT of any transfer of shares issued by Mexican subsidiaries to foreign residents (cross-border restructurings). Failure to submit such advance notification may result in the Mexican corporation issuing the shares concerned having joint tax liability. Additionally, all income tax deferrals (involving transactions between foreign residents) and (in domestic reorganizations) written authorizations to report no taxable base for income tax are now conditional on the taxpayer demonstrating valid business reasons for the respective corporate reorganization and submitting tax returns on 'relevant operations'.[10] All evidence addressing the valuation of the shares transferred between related parties should be supplemented by a related transfer pricing study in the corresponding CPA's tax opinion.

The Qualified *maquiladora* approach or QMA program was jointly developed by the Mexican and US competent authorities for the Mexican *maquiladora* industry (to avoid foreign residents having to maintain a permanent establishment as a result of the use of foreign-owned assets in manufacturing activities taking place in Mexico). The program evolved in late 2021 by providing detailed methodologies for the settlement of advance pricing agreement (APA) cases. These methodologies cover FY 2018 and 2019 at present, with the commitment to reach agreement on a bilateral approach for the COVID years of 2020 and 2021 (which severely affected the operations of *maquiladora* groups on both sides of the border). Notwithstanding this, in the 2022 tax reform SAT cancelled the APA taxation option for FY 2022 and forward, leaving safe harbor the sole tax approach for the *maquila* industry.[11] Nonetheless, SAT has unofficially confirmed that its APA program will continue in operation, until the existing backlog of APA cases is eliminated. As a result, beginning FY 2022 the extreme circumstances in which the statute of limitations rule in Mexico is suspended have been complemented by including APA requests.[12]

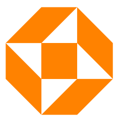
In recent years, specific written requests to taxpayers have become SAT's preferred examination method in transfer pricing cases. As a result, the 2022 tax reform included the possibility to use secret comparables in this type of tax examination, which was previously reserved only for on-site transfer pricing audits.[13]

From FY 2022 forward, back-to-back anti-abuse rules in the MITL incorporate a new scenario: loans by multi-national groups to Mexican borrowers that lack valid business purposes. As a result, where deductions of interest expenses are rejected, these would be re-characterized as dividend distributions, giving rise to controversial double-tax cases.[14] Finally, anti-simulation rules (restricted to controlled transactions for income tax purposes) have moved from the MITL to the Mexican Tax Code,[15] which implies that SAT has been legally empowered to challenge whether controlled transactions between multi-national group members are essential not only for income tax purposes, but also for any other federal tax (e.g. VAT).

Most tax practitioners in Mexico consider that the new set of rules will provide new mechanisms and tax capabilities to SAT with the clear objective of maintaining its continued efforts to crush large taxpayers' and multi-national groups' tax avoidance.

REFERENCES

1. Financial Times, 'Mexico's "Iron Lady" cracks whip on multinationals' taxes', available at www.ft.com/content/814b42b2-d8ab-42ce-a151-9ddbde749732.
2. Article 76(X) MITL.
3. Equivalent to US$78,594,790, using an exchange rate of 21 Mx pesos per USD.
4. Article 32-A of the Mexican Tax Code.
5. Articles 76 and 76-A MITL.
6. Article 76-A MITL.
7. Article 32-H of the Mexican Tax Code.
8. Article 76(IX) MITL.
9. Article 166 MITL.
10. Articles 24, 76(XX), and 161 MITL and Articles 26 and 31-A of the Mexican Tax Code.
11. Articles 182 and 183bis MITL.
12. Article 67 of the Mexican Tax Code.
13. Article 48 of the Mexican Tax Code.
14. Article 11 MITL.
15. Article 42-B of the Mexican Tax Code.



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