

EU Direct Tax Newsalert

Gibraltar implements ATAD 2 – Extending Hybrid mismatch rules to third countries



On 30 January 2020 the Gibraltar Government published the Income Tax (Amendment No.2) Regulations 2020 (“the Regulations”) transposing the provisions of the Council Directive (EU) 2017/952 (“2017 Directive”) amending Council Directive 2016/1164 (“2016 Directive”) as regards hybrid mismatches with third countries into Gibraltar law.

As part of the OECD BEPS measures, the 2016 Directive contained rules against tax avoidance including, in particular a framework to tackle hybrid mismatches.

The 2017 Directive expands the provisions relating to hybrid mismatches so that they cover those involving third countries, the interaction between corporate tax systems of different Member States, permanent establishment (“PE”), hybrid transfers, imported mismatches and a fuller range of double deduction outcomes; it also makes other miscellaneous amendments to the 2016 Directive regime.

Scope

The hybrid mismatch definition in Schedule 4 to the Income Tax Act 2010 (Anti-Avoidance) now include situations where:

- a payment under a financial instrument gives rise to a tax deduction without inclusion;
- a payment to a hybrid entity gives rise to a deduction without inclusion;
- a payment to an entity with one or more PEs gives rise to a deduction without inclusion;
- a payment gives rise to a deduction without inclusion as a result of a payment to a disregarded PE;
- a payment by a hybrid entity gives rise to a deduction without inclusion as a result of the payment being disregarded;
- a deemed payment between two PEs gives rise to a deduction without inclusion as a result of the payment being disregarded; or
- a double deduction outcome occurs.

Denial of deductions

A hybrid mismatch which results in a double deduction:

- shall be denied in the investor jurisdiction; and
- where the deduction is not denied in the investor jurisdiction, it shall be denied in the payer jurisdiction.

A hybrid mismatch which results in a deduction without inclusion:

- shall be denied in the payer jurisdiction; and
- where the deduction is not denied in the payer jurisdiction, it shall be included in income (for tax purposes) in the payee jurisdiction.

Except where one of the jurisdictions involved in the transaction(s) has made an equivalent adjustment in respect of the hybrid mismatch, a deduction for tax purposes shall be denied for payments which directly or indirectly fund expenditure which gives rise to a hybrid mismatch.

Where a hybrid mismatch results in disregarded PE income, the taxpayer must include the income that would otherwise be attributed to the disregarded PE. This does not apply to income exempted under a double taxation treaty.

Where a hybrid financial instrument results in withholding tax relief for more than one party, the benefit of such relief is limited in proportion to the net taxable income of the payment.

Tax residency mismatches

Where a deduction for payment, expenses or losses of a taxpayer is deductible from the tax base in multiple jurisdictions, the deduction shall be denied to the extent that the other jurisdiction allows the duplicate deduction against income that is not dual-inclusion income.

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