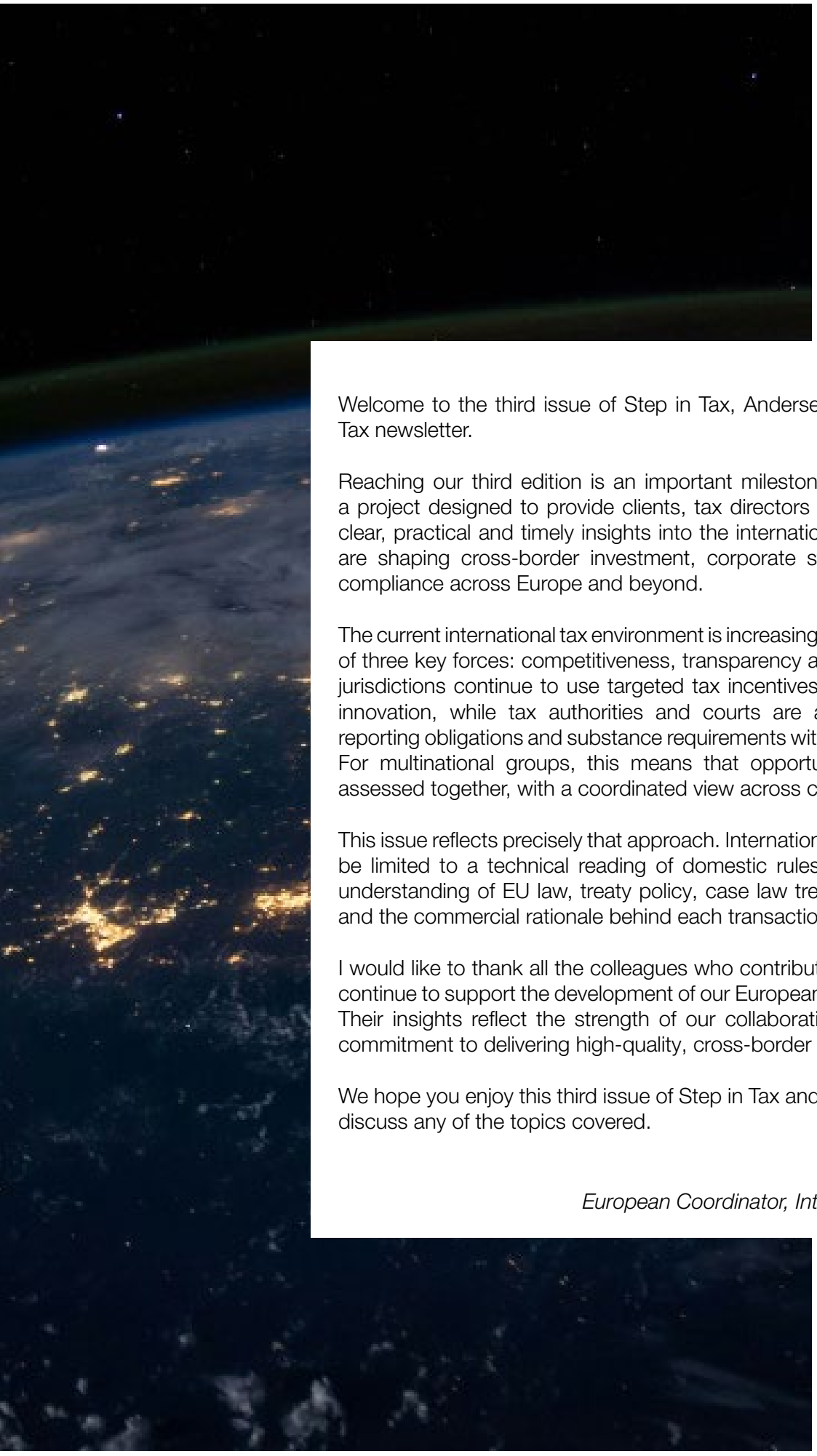
Step in Tax

No.2/2026

Designed for companies and tax managers who want to stay ahead of the fast-evolving regulatory landscape in Europe. Each quarter, our team of European experts provides practical insights and analysis on national and EU legislation that may impact business operations, strategy, and compliance.



Welcome to the third issue of Step in Tax, Andersen's European International Tax newsletter.

Reaching our third edition is an important milestone. It confirms the value of a project designed to provide clients, tax directors and business leaders with clear, practical and timely insights into the international tax developments that are shaping cross-border investment, corporate structuring and day-to-day compliance across Europe and beyond.

The current international tax environment is increasingly defined by the interaction of three key forces: competitiveness, transparency and tax certainty. European jurisdictions continue to use targeted tax incentives to attract investment and innovation, while tax authorities and courts are applying anti-abuse rules, reporting obligations and substance requirements with increasing sophistication. For multinational groups, this means that opportunities and risks must be assessed together, with a coordinated view across countries and disciplines.

This issue reflects precisely that approach. International tax advice can no longer be limited to a technical reading of domestic rules. It requires an integrated understanding of EU law, treaty policy, case law trends, tax authority practice and the commercial rationale behind each transaction.

I would like to thank all the colleagues who contributed to this edition and who continue to support the development of our European International Tax platform. Their insights reflect the strength of our collaborative model and our shared commitment to delivering high-quality, cross-border advice.

We hope you enjoy this third issue of Step in Tax and remain at your disposal to discuss any of the topics covered.

Francesco Marconi
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01

Failure to transpose article 8(7) ATAD into its CFC rules

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On 26 February 2026, the Court of Justice of the European Union (**CJEU**) condemned Belgium for infringement of the Anti-Tax Avoidance Directive (**ATAD**), due to its failure to transpose Article 8(7), which requires Member States to provide a tax credit for foreign taxes paid by a controlled foreign company (**CFC**).

The ATAD framework and the initial choice of Belgium

The ATAD requires Member States to implement CFC rules designed to include, under certain conditions, the undistributed profits of low-taxed subsidiaries in the tax base of the resident parent company.
Two models are available for determining the income to be included: Model A ("entity-based") and Model B ("transactional"). However, Article 8 ATAD governs the calculation of CFC income in all cases and establishes mechanisms to eliminate double taxation, including the mandatory tax credit under Article 8(7).

Belgium introduced its CFC regime in 2019 through Article 185/2 of the Income Tax Code (CIR 92), initially opting for Model B, based on the concept of "non-genuine arrangements" targeting income artificially diverted to a low-taxed CFC.

At the time of transposition, the Belgian legislature expressly decided not to implement Article 8(7) ATAD, arguing that the Directive established only a minimum level of protection and permitted stricter measures, in particular, the denial of any credit for foreign taxes paid by the CFC.
The European Commission initiated infringement proceedings in 2020 and, following a reasoned opinion dated 2 December 2021, referred the case to the CJEU (C-524/23) in 2023 for failure to transpose Article 8(7).

Case C-524/23 - Scope of article 8(7) ATAD

The CJEU was asked a straightforward question: may a Member State choose not to transpose Article 8(7) when implementing CFC rules?
Belgium argued, in particular, that:

1. ATAD is an instrument of minimum harmonization (Article 3), authorizing national measures that further protect the domestic tax base;
2. Article 8(7) would only apply where a Member State opts for Model A (Article 7(2)(a)), and not where it chooses Model B; and
3. denying the foreign tax credit strengthens the deterrent effect of the CFC rules and thereby

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furthers the objective of combating base erosion.

The Court adopted a considerably stricter approach:

- Article 8(7) is drafted in mandatory terms and contains no opt-out clause or exception. It requires "the Member State of the taxpayer" to allow the deduction of tax paid by the CFC or permanent establishment. The reference to domestic law relates only to the method for calculating the credit.
- Article 8(7) applies irrespective of the choice between Model A and Model B; while other paragraphs of Article 8 explicitly distinguish between the two models, paragraph 7 is of general application.
- Recital 5 of ATAD states that anti-avoidance rules should not create other obstacles to the internal market, such as double taxation. The tax credit under Article 8(7) is an integral part of that balance.

The Court therefore concluded that the "minimum level of protection" clause in Article 3 does not allow a Member State to neutralize a double-taxation prevention mechanism expressly provided for by the Directive. Stricter measures are permitted, but only beyond this mandatory floor, not in contradiction with it.
Since Belgium failed to adopt the provisions transposing Article 8(7) within the period laid down in the reasoned opinion of the Commission, the Court declared that there had been an infringement of the Anti-Tax Avoidance Directive.

Interaction with the reformed CFC regime in Belgium

In the meantime, Belgium substantially overhauled its CFC regime through the Programme Law of 22 December 2023, switching to an entity-based model (Model A) applicable from assessment year 2024.
The new regime applies to a broader range of entities (foreign companies and permanent establishments of Belgian or foreign companies), with control assessed by combining direct shareholdings and participations held through associated entities, and subject to a low-taxation test (nil tax or tax less than half of the Belgian tax computed under Belgian rules).

The regime includes several safe harbours that exempt a CFC where it carries out substantive economic activity, where its passive income does not exceed one third of total income, or where it is a qualifying financial institution with limited intragroup flows.

In addition, multiple mechanisms are designed to prevent double taxation of CFC income taxed in Belgium, including a tax credit for foreign taxes paid by the CFC, a specific dividend-received deduction (**RDT**), and a correlative exemption on capital gains on shares in respect of profits already subject to Belgian corporate income tax.
These amendments bring Belgian law into significantly closer alignment with the ATAD framework as interpreted by the CJEU, even though the C-524/23 ruling formally establishes the infringement for the period prior to these adjustments.

Recovering denied CFC tax credits in practice

For the period between 2019 and the entry into force of the reformed CFC regime (tax year 2024), Belgian parent companies whose CFC income was included in their tax base were therefore entitled to a credit that was not provided for in Belgian law.

Based on the judgment of the Court of Justice, these taxpayers may claim a refund of the resulting excessive tax, either through the standard administrative appeal procedure (one-year deadline) or through the ex officio relief procedure (five-year deadline). For the purposes of applying the latter procedure, the Court of Justice's judgment can be regarded as a new fact, which is a prerequisite for its application.

Conclusion - A more demanding but more coherent CFC regime

The C-524/23 judgment confirms that the CFC tax credit under Article 8(7) ATAD is a mandatory obligation that Member States cannot disregard. For Belgian groups, the ruling creates both a recovery opportunity for prior years, to be pursued through the general correction mechanisms of Belgian tax law, and a compliance imperative going forward.

We would be happy to assist you in analyzing your specific situation, identifying the remedies available in your case, and initiating the necessary procedures to that end. We can also support you in ensuring full compliance with the reformed CFC regime going forward.

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DAC8 and Crypto reporting

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On 27 March 2026, Cyprus enacted legislative changes to its Law on Administrative Cooperation in Tax Matters, implementing the requirements of EU Directive 2023/2226. This directive updates the existing framework under Directive 2011/16/EU and marks the introduction of DAC8 into Cypriot law.

The new provisions significantly broaden the scope of automatic exchange of information between EU tax authorities by incorporating transactions involving crypto-assets. Their primary objective is to enhance tax transparency and improve cross-border cooperation by ensuring that crypto-asset activities are subject to reporting standards comparable to those already applicable to traditional financial instruments.

DAC8 establishes a harmonised EU approach aligned with the OECD Crypto-Asset Reporting Framework (**CARF**), ensuring consistency with emerging international reporting norms. Under this framework, information on crypto-asset transactions will be automatically shared between EU Member States.

Reporting obligations and in-scope entities

The reporting obligations introduced by the amendment primarily apply to Crypto-Asset Service Providers (**CASPs**). These entities are required to carry out due-diligence procedures and submit detailed reports to the Cypriot tax authorities regarding their users and related crypto-asset transactions.

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Information to be reported

CASPs must collect and disclose comprehensive information, including:

1. Identification details of reportable users

- **Individuals**: full name, residential address, date and place of birth, tax identification number (TIN), and tax residence.
- **Legal entities**: key entity information together with details of any controlling persons or beneficial owners.

2. Transaction-level data

For each category of reportable crypto-asset, CASPs must report aggregated financial information covering:

- **Purchases and disposals**, including total amounts paid or received and the number of units involved.
- **Market valuation data**, reflecting transactions executed either against other crypto-assets or in the context of retail payments.
- **Transfers**, capturing movements of crypto-assets where these do not fall within conventional buying or selling activity.

3. Transfers to external wallets

The legislation introduces a specific reporting requirement for crypto-asset transfers to distributed ledger addresses that are not linked to regulated financial institutions or other virtual asset service providers.
This measure aims to mitigate opacity risks associated with unhosted or self-custodied wallets.

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Dividend withholding tax relief at risk for US disregarded entity structures?

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In the past, foreign shareholders claiming treaty relief on dividends distributed by German corporations mainly faced questions around residence, beneficial ownership, substance / treaty or directive shopping. While these procedural hurdles remain relevant, a new and potentially fundamental issue has emerged in recent cases before the German Federal Central Tax Office (**BZSt**).

Based on our recent practical experience of pending dividend withholding tax (**WHT**) exemption and refund procedures, the BZSt now appears to review not only the status of the foreign recipient, but also the foreign tax classification of the German distributing entity itself. This is particularly relevant where the German corporation is treated as fiscally transparent or as a disregarded entity in the shareholder jurisdiction (for example under US check-the-box rules). While current cases predominantly concern US inbound structures, similar considerations may arise in other jurisdictions where hybrid or disregarded entity treatment leads to a qualification mismatch.

Why this matters

Under German domestic law, dividend distributions by German corporations are generally subject to WHT of 26.375% (including solidarity surcharge). Relief under an applicable double tax treaty up to 0% is typically available, depending of course on the treaty in question, ownership thresholds and satisfaction of anti-treaty shopping requirements.

Recent application requests with the BZSt indicate a potential shift in focus. In addition to the shareholder analysis, tax authorities now appear to examine whether the German entity is treated as a taxable corporation or as a transparent/disregarded entity in the investor jurisdiction - a question that is particularly relevant in a US tax context.

Where a German entity is treated as disregarded for US tax purposes, its income is typically attributed directly to the US shareholder. As a result, subsequent distributions do not constitute dividend income from a US tax perspective.

This creates an obvious tension: Germany first levies dividend WHT because the payment is a dividend and denies treaty relief because from a US perspective, no corresponding dividend income arises.

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Practical implications for US inbound structures

The issue is therefore highly relevant for US investors holding German subsidiaries that are treated as disregarded entities for US tax purposes. Based on current observations, comparable issues have not yet emerged in the same way for other jurisdictions, making this, at present, a predominantly US-specific topic.

At present, it remains to be seen how the BZSt will decide pending and future cases. However, the increasing number of targeted information requests suggests that the topic is gaining importance and may lead to more restrictive assessments going forward. If this approach were to be applied consistently, it could lead to a denial of treaty relief in affected US structures, resulting in full German WHT leakage.

Recommended action

In light of these developments, US investors should:

1. review existing inbound structures involving disregarded German entities;
2. assess whether the US tax classification could affect treaty entitlement under the Germany–US treaty;
3. analyze whether and how the underlying income is taxed at US shareholder level; and
4. prepare for enhanced documentation requirements in WHT relief procedures.

From a structuring perspective, investors may also consider whether maintaining disregarded entity treatment remains appropriate, whether the US tax treatment of the income can be clearly evidenced, and whether alternative holding structures could mitigate the qualification mismatch. Each of these options involves trade-offs and should be assessed carefully from both a German and US tax perspective.

Given the potential financial impact, US investors with interests in German disregarded entities should closely monitor further developments and proactively review their existing structures. If a restrictive position is adopted by the tax authorities, it is likely that the issue will ultimately be subject to judicial clarification.

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Why is Poland becoming a European R&D hub? Innovation, expertise and substantial tax incentives

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Poland as a strategic location for your R&D

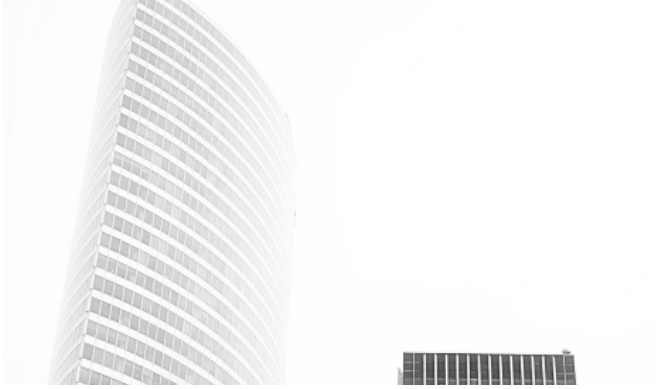
When advising multinational corporations on the optimal location for new centers of excellence, Poland invariably tops the list. Why? The era of competing solely on the basis of lower labour costs is over. Today, Poland attracts global players from the technology and industrial sectors with a unique ecosystem built on two pillars.

Firstly, it has exceptionally strong human capital. Polish engineers, programmers and other specialists have long occupied the top spots in global skills rankings. Secondly, it has one of the most aggressive and favorable tax incentive schemes in Europe.

For foreign companies planning to develop software, optimize production processes or create new technologies, locating these operations in Poland means a dramatic increase in return on investment. This is all thanks to Polish research and development (**R&D**) tax relief. Our experience of working with international capital shows that properly implementing this mechanism can reduce the operating costs of innovative projects significantly. This is just one element of tax efficiency improvement that can be implemented basing business operations in Poland.

What is the Polish research and development (R&D) tax credit?

In many European countries, R&D tax relief schemes tend to be complex and subject to restrictive limits. Poland has adopted a different, highly effective approach. From an international investor's



perspective, the Polish R&D relief scheme allows the same expenses to be deducted twice.

When a Polish company accounts for development expenditure as a standard tax-deductible cost, its tax liability is reduced. The R&D tax relief then allows these costs, if they are classified as research and development activities, to be deducted from the tax base a second time at the end of the year.

The biggest draw for foreign capital is that Polish regulations currently permit an additional deduction of up to 200% of the salary costs of specialists involved in R&D. This means that every zloty or euro invested in an innovative team in Poland generates a substantial tax shield.

Which projects actually pass verification? (Industrial and IT sectors)

In our experience, the key to success lies not in whether a project is 'groundbreaking for humanity', but in whether it is innovative within the context of the company in question. This approach is accepted by the local tax authorities.

IT sector experience: For foreign software houses and shared service centers (SSCs/GBSs), R&D tax relief is almost an automatic part of their tax returns.

An example from our practice: An international corporation opened an IT branch in Poland to work on a CRM system using a proprietary algorithm to predict customer churn. Designing the logic and testing the algorithm's effectiveness at the Polish office is an excellent example of development work that is eligible for relief.

Integration and scalability: We often implement the relief where local teams are building complex software solutions and integrating numerous incompatible global group systems in ways that are not described in the technical documentation.

Industrial sector experience

An example from our practice: A foreign packaging manufacturer relocated part of its R&D to a Polish factory to reduce the weight of a bottle by 15% while maintaining its strength. Every test of a new plastic compound on the Polish production line, as well as every defective prototype, constituted an eligible cost and provided additional tax relief.

Process optimization: We often handle the accounting for bespoke machinery or production lines designed by the group's Polish engineers. If the solution requires dedicated technical expertise, this constitutes R&D.

How much can you gain? Analysis based on real-world scenarios

We present two scenarios that reflect the investments we optimize for our international clients in Poland, at the Polish corporate income tax (CIT) rate of 19%.

Scenario A: IT Centre (people-focused)

A foreign company opens a technology hub in Poland and employs a team of five programmers to work on a new e-commerce platform module. Their annual salary costs amount to PLN 800,000 (approximately EUR 185,000).

- **Standard approach**: The company reduces its tax liability in Poland by PLN 152,000.
- **With our help (R&D relief)**: By documenting their work properly as R&D, we can deduct an additional PLN 1,600,000 (200% of costs).
- **Savings for the taxpayer**: The Polish company retains an additional PLN 304,000 (approx. EUR 70,000). These are funds that can be allocated to hiring further talent or development.

Scenario B: Polish factory (mixed costs)

The Polish branch of an international automotive group is developing a new steel hardening process. The cost of salaries for Polish engineers is PLN 200,000 and the cost of energy consumption, local raw materials, and prototype molds is PLN 300,000.

- **Application of the relief**: We deduct 200% for personnel (an additional PLN 400,000) and 100% for materials (an additional PLN 300,000).
- **Total additional deduction**: PLN 700,000.
- **Savings for the taxpayer**: PLN 133,000 in net tax savings on a single project.

How can the R&D tax relief be implemented safely?

Our experience of implementing R&D tax relief shows that attention to detail is crucial. While the Polish tax authorities are open to innovation, they require strict record-keeping. Our implementation process for foreign capital comprises four pillars of security:

Technical audit

We verify where intellectual property (**IP**) is created and ensure that the Polish company is fully entitled to the deductions. We consult with engineers and translate their work into the language of the Polish tax authorities.

Timesheets and data

This is the most common issue during audits. We adapt global timesheet reporting systems to meet the rigorous, specific requirements of the Polish Ministry of Finance.

Accounting segregation

We assist local accounting departments in setting up a set of accounts that automatically segregates R&D costs, thereby minimizing the risk of errors when completing annual CIT returns.

Legal protection

For complex projects, we assist in obtaining an Individual Tax Ruling from the Director of the National Tax Information Service in Poland. This guarantees settlement security for the head office.

Experience in recent years has shown us that establishing centers of competence and development in Poland allows companies not only to outperform the competition in terms of new or improved products, but also to deliver measurable financial savings. When properly planned, these savings enable improved tax efficiency. Most importantly, however, the Polish tax system offers greater incentives to companies that locate their product or service development departments in Poland. Research and development tax relief is just one of these elements, and it brings significant financial benefits.

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05

Refunds of Portuguese withholding tax

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Following the significant increase of case law, both at national and EU level, concerning the taxation of investment, rental and capital gains income obtained by Collective Investment Undertakings (i.e., through definitive withholding tax), opportunities exist to reclaim Portuguese tax withheld. Our comments on this matter follow.

Background

As a general rule, income obtained in Portugal by non-resident Collective Investment Undertakings (**CIUs**) is subject to a final withholding tax, for Corporate Income Tax purposes, at a rate of 25%. It should be noted, however, that the Portuguese Tax Benefits Code provides for a tax exemption applicable to investment income (e.g., interest, dividends), rental income, and capital gains whenever received by Portuguese resident CIUs, by determining that such income should be excluded from their taxable profit.

In this context, it is important to note that both national case law (including a Supreme Court judgement unifying the court decisions on this matter) and EU case law have upheld that the above Portuguese tax framework is unlawful for breaching the principle of free movement of capital enshrined in Article 63 of the Treaty on the Functioning of the European Union (discrimination between residents and non-resident CIUs). By way of example, consider the Portuguese arbitral decisions nr. 1007/2025-T, 600/2025-T, 884/2025-T, 810/2025-T, 337/2025-T, all issued this year, which are consistent with the ruling of the Portuguese Supreme Administrative Court nr. 93/19.7BALS, which, in turn, incorporates the European case law of the CJEU cited in case nr. C-545/19, *AllianzGI-Fonds*.

Note that EU treaties state that this principle extends to third countries not part of the EU.

Proposed strategy

In line with the interpretation adopted by national and EU courts, we consider that the filing of refund claims by non-resident CIUs on the basis of the breach of free movement of capital may allow for significant tax savings. Such tax refund claims may be filed up to two years from the taxable event (i.e., final withholding tax).

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"I came back because of the missiles." Will HMRC accept it?

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Over the past few weeks I've seen a string of Dubai based clients and contacts back in London. Not on holiday. Back because Iranian strikes on regional infrastructure, airspace closures and the broader escalation have made Dubai feel materially less safe. The same two questions come up every time:

Will HMRC treat this as "exceptional circumstances" so the days don't count?

For UAE returnees specifically, the honest answer is: probably not - and certainly not on the current Foreign Common wealth & Development Office (**FCDO**) posture. Here's why.

The exceptional circumstances rule (FA 2013, Sch 45, para 22) requires that the circumstances are beyond your control and prevent you from leaving the UK. The Court of Appeal reinforced this restrictive reading in A Taxpayer v HMRC [2025] EWCA Civ 106; the test is whether the individual is "prevented", not "discouraged". HMRC's own guidance at RFIG22240 gives war and civil unrest as examples, but the threshold remains that you could not reasonably leave the UK.

HMRC's Manual, RFIG22230 provides that a maximum of 60 days can be spent in the UK in any tax year that may be ignored due to exceptional circumstances. It's a limit, not an allowance or entitlement, and applies whether there is one event or several events in the same tax year. Days spent in the UK over the 60-day limit count as a day of presence for the purposes of the SRT.

The FCDO position is the practical pivot point:

- For Israel and Iran, the FCDO currently advises against all travel - that is the "avoid all travel" tier - HMRC's manual and informal communications have consistently linked to a successful exceptional circumstances claim (subject always to the cap and the per-day evidence).
- For the UAE, Bahrain, Qatar, Kuwait and Lebanon, the FCDO advises against all but essential travel - a materially lower tier. The fact that travel is discouraged but not prohibited will generally not prevent an individual from leaving the UK; nor will personal preference, employer concern, or a wish to avoid perceived risk.

In other words: if you were in Tel Aviv when the strikes began and could not get out, you have a real claim. If you were in Dubai, watched the news, and decided London felt safer - you almost certainly do not, however reasonable that decision was on a human level.

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Even where the rule does apply:

- The 60 day hard cap (RFIG22230) applies regardless of how serious or prolonged the situation is.
- It does not disregard days for the second automatic UK test (only home), the full-time work tests, or the work and family ties under the sufficient ties test (RFIG22220).
- Evidence is required day by day: FCDO screenshots dated to the day, cancelled flights, employer repatriation directives, airspace NOTAMs, insurance withdrawals.

And don't forget the temporary non-residence trap (FA 2013, Sch 45, Pt 4). If you've been non-resident for fewer than five complete tax years and tip back into UK residence, certain income and gains realised during your time away, including close company distributions, can become taxable on return.

For a lot of the Dubai cohort who left in 2022–2024, this is the real exposure.

How would HMRC even know?

More easily than ever:

- Advance passenger information from carriers and Border Force - every arrival and departure is recorded
- CRS / automatic exchange - the UAE, Cayman, BVI, Switzerland and ~120 jurisdictions exchange financial account data annually
- UK debit/credit cards, contactless and mobile data have all featured in residence enquiries
- Repeat Deliveroo and Uber orders to a UK address
- Companies House filings, LinkedIn, geotagged posts, press mentions
- HMRC's Connect platform cross-references all of the above
- And, less well known, HMRC has a specialist research team staffed by trained librarians whose job is precisely to carry out deep open source research and collate evidence from disparate sources. They are very good at it.
- There is also long-running (and entirely unconfirmed) gossip in the profession that HMRC has used plane-spotting websites and private aviation trackers to corroborate the movements of certain well known HNWIs. Whether or not that's true in any specific case, the broader point holds: if a piece of information about your whereabouts is on the open internet, assume it is reachable.

The burden of proof in a residence enquiry sits with the taxpayer.

So what should you actually do?

If you've genuinely left the UK and want to stay that way:

- **Don't rely on exceptional circumstances** for UAE-driven returns under the current FCDO posture. Plan as though every UK midnight counts - because it does.
- **Mind your ties** - Accommodation kept "just in case", a UK workday or two - these accumulate quietly. One of the most common traps is where you remain non-UK resident, but your partner (a relevant relationship with another person) becomes resident; in that case, you will inadvertently establish a family tie (and it is irrelevant if the UAE/UK double tax treaty applies to allocate taxing rights to the UAE under the tie-breaker test).
- **Track every midnight** contemporaneously, with supporting evidence (boarding passes, hotel folios, card receipts).
- **Diversify your time** - a more nomadic pattern

- splitting time across multiple jurisdictions - is often the cleanest way to wait out the regional situation without drifting into UK residence or accidentally triggering residence somewhere else.
- **Watch your Schengen 90/180**. For UK and other non-EU passport holders relying on UAE residency, this bites quickly.
- **Ireland and the Channel Islands** sit outside Schengen, are an hour from London, English-speaking, and are excellent buffer jurisdictions when Schengen days are tight but you want to stay close to family, clients and the time zone. Cyprus too sits outside Schengen, but is a longer flight. Each has its own day-counting rules - light planning required, but very workable.
- **Get advice before 5 April**, not after. Once the tax year closes, options narrow sharply.

The UAE remains a genuinely attractive base. The current situation is unsettling but, for most people, navigable with proper planning. The mistake is to assume HMRC will be sympathetic to a story that, on the statute and the case law, doesn't quite land.

A note for those running Dubai entities

Several of the people I've spoken to are directors of UAE incorporated operating companies, holding companies or stablecoin issuers. If that's you, the temporary return raises two corporate level issues that are easy to overlook:

UK corporate residence via central management and control

The common law CMC test (*De Beers Consolidated Mines v Howe [1906] AC 455*) looks at where the highest level strategic decisions are actually taken. Board meetings dialled into from a hotel room, contracts negotiated from a London kitchen, or a sustained period of the directing mind being physically in the UK can, depending on facts, drag a UAE company into UK corporate residence and worldwide corporation tax exposure.

The widened UK Permanent Establishment (PE) rules from 1 January 2026

Section 49 and Schedule 7 of the Finance Act 2026 align the UK's domestic PE definition (CTA 2010, ss.1141–1144) with Article 5 of the 2017 OECD Model. In practical terms this means a broader dependent agent PE - capturing those who "habitually play the principal role leading to the conclusion of contracts" rather than only those who formally conclude them.

The interaction matters: an individual who is comfortably non-resident under the Statutory Residence Test can still create a UK PE, or worse, UK corporate residence, for the entity they direct. Treat the two analyses separately.

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Loans, loans for sale

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The UK Court of Appeal recently handed down its decision in HMRC v Burlington Loan Management DAC. It is an interesting read as to how the courts view the anti-avoidance provisions in a treaty as working.

The case

It goes all the way back to the collapse of Lehman Brothers in 2008. A Cayman company, SICL, ended up receiving interest in respect of claims it had in relation to the collapse of the bank. As the Cayman Islands/UK Double Taxation Arrangement (**DTA**) makes no allowance for a reduction of withholding tax (**WHT)**, SICL was receiving 80% of the interest with 20% lost going in WHT.

Burlington, being Irish resident, would be able to claim exemption from UK WHT under Article 12 of the Ireland/UK DTA and so bought the claims from SICL, splitting the benefit of the WHT with SICL, i.e. Burlington bought the claims based on getting 90% of the interest.

HMRC looked at the claim for reduced WHT and opened an enquiry on the basis that one of the main purposes of Burlington buying the claim was because it could take advantage of the DTA as they would not suffer WHT due to the operation of the DTA, whereas SICL would face a 20% deduction.

What is a treaty for, if not to give relief?

This then highlighted one of the problems for tax authorities with anti-avoidance provisions and DTAs. Generally, anti-avoidance rules are based around obtaining some sort of tax advantage/reduction in the tax due, but, of course, a DTA is generally aimed at reducing a taxpayer's tax bill.

Therefore, treaty anti-avoidance rules have to look for something beyond simply a reduction in a tax bill so that they can take effect - obtaining a benefit of the treaty (e.g. getting the reduction in WHT), in a way that is contrary to the spirit of treaties. HMRC looked here at the fact that Burlington had split the reduction of the WHT given by the DTA with SICL by paying SICL more.

HMRC are currently 3:0 down in Court decisions with the First Tier, Upper Tier and Court of Appeal all allowing the claims of Burlington to benefit from the reduced rate of WHT.

The Court of Appeal's judgments are interesting as they acknowledge that tax can be part of a commercial decision to enter into a transaction without automatically bringing a "main purpose" rule into effect.

Here, Burlington's business was as an investment vehicle to obtain and benefit from interest payable under the Lehman Brothers claims. It was a tax resident of Ireland and therefore inherently able to take advantage of the Ireland/UK DTA. Any loan/debt claim it had with a UK counterparty would fall within the Ireland/UK DTA and be able to benefit from the 0% rate of WHT. It needed something more to bring the anti-avoidance in the DTA into play, and buying a loan from a company resident in another country and paying more for the loan because of the differential in WHT was not that something as it was not an improper use of the relevant DTA.

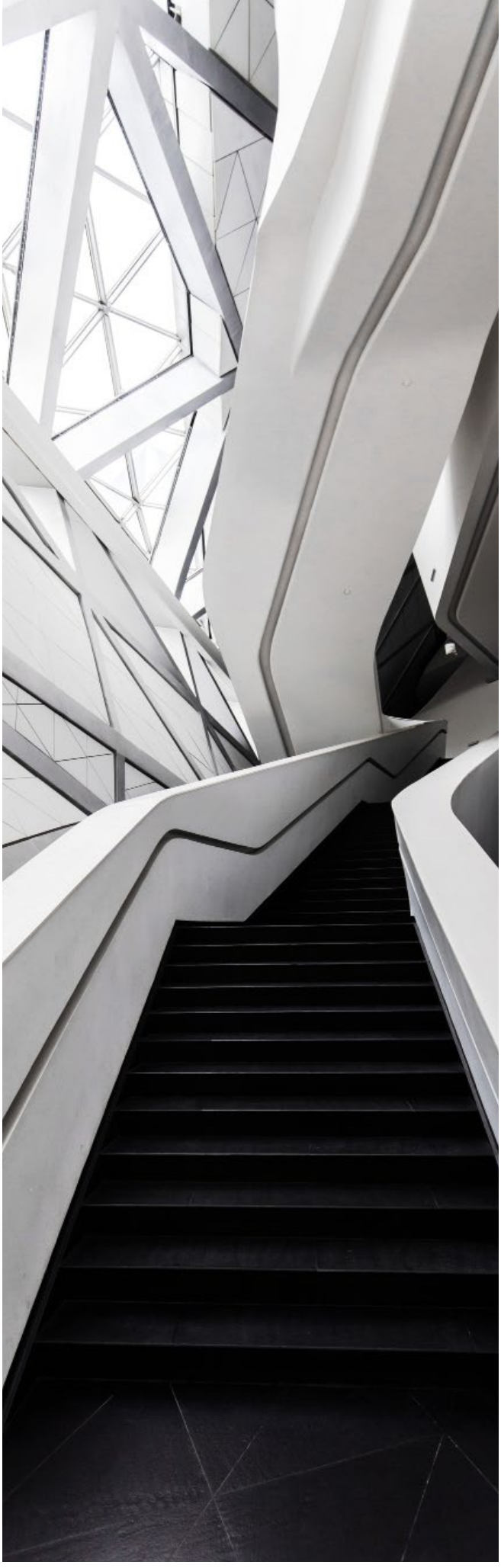
The Court of Appeal gave a couple of examples where they would expect the rule to bite. For example, if SICL had formed an Irish subsidiary and contributed the loans to the new sub then that would likely be caught as the reason for the subsidiary's existence would be to take advantage of the DTA. The same conclusion would have been reached if the payment the new Irish subsidiary was to make to SICL was based on not suffering WHT.

The suggestion is that the main purpose test is only likely to apply in conduit cases and not third party sales of loan books. However, the relevant provision in the DTA refers to the motive of any person, which could include SICL. Here, the Court said that they didn't know if SICL's motive for the sale was that the DTA would be used by Burlington which suggests that if SICL had sought to only sell the loan to a third party that could take advantage of the DTA, HMRC may have a case. It is also worth noting that the relevant provision in the Ireland/UK DTA has been replaced by the Principal Purpose Test, but despite the different wording, the above should still hold true.

Overall a score-draw, but Burlington win on away goals

This is one of those cases where you can see both sides of the argument. It is clear that the amount Burlington paid for the loan was more because they would suffer less WHT due to the DTA. However, that is what DTAs are for, and Burlington was an investment company and this transaction was bang in the middle of what they did, so highly commercial.

I believe the Court of Appeal got it right and where the purpose of a DTA is to give relief there has to be something contrived or artificial and not just obtaining that relief in order to invoke a main purpose anti-avoidance rule.



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International Tax - Treaties

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The Principal Purpose Test

The Principal Purpose Test **(PPT**) is a treaty-based anti-abuse rule reshaping how cross-border transactions are scrutinised. Here is a digest of the key points.

What is the PPT?

The PPT is a treaty-based general anti-abuse rule developed under Action 6 of the OECD/G20 BEPS Project and embedded into existing double tax agreements (**DTAs**), primarily through the Multilateral Instrument (**MLI**). It denies treaty benefits where it is "reasonable to conclude" that obtaining the benefit was "one of the principal purposes" of an arrangement, unless granting it would accord with the object and purpose of the relevant treaty provisions.

As of November 2025, the MLI covers 105 jurisdictions (89 ratified) and has modified over 1,500 of around 2,000 covered bilateral treaties. The PPT may now effectively be become the global default minimum standard for tackling treaty shopping.

Anatomy of Article 29(9)

The PPT operates as a two-step filter:

The subjective "way in" test

asks whether it is reasonable to conclude that obtaining a treaty benefit was one of the principal purposes. The threshold is low - tax need not be the dominant purpose, only one of several principal ones. The provision opens with "Notwithstanding",

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meaning it overrides specific anti-abuse rules and Limitation of Benefits (**LOB**) clauses already in the treaty.

The objective "way out" test

offers a safety valve: even where a tax purpose exists, benefits should still be granted if doing so accords with the object and purpose of the relevant provision. Sources for determining object and purpose include the treaty text, the revamped post-BEPS preamble, the Vienna Convention on the Law of Treaties (Articles 31 and 32), LOB provisions, and the OECD Commentary.

Burden of Proof

While tax authorities bear the initial low bar of showing it is "reasonable to conclude" a tax motive existed, the heavier burden then shifts to the taxpayer to prove alignment with the treaty's object and purpose. Procedural mechanics vary by jurisdiction.

Interaction with Domestic GAARs and SAARs

The OECD does not envisage a conflict between domestic anti-abuse provisions and the PPT because they both intend to achieve the same outcome. The OECD views domestic GAARs, SAARs, and judicial doctrines (substance over form, sham, business purpose) as tools for establishing the factual reality, after which the treaty applies. However, taxpayers face a "Standard Gap" - a structure may pass a domestic GAAR requiring tax to be the "sole" purpose yet fail the PPT, which only requires it to be "one of the principal" purposes. Multinationals must therefore manage a "double filter," structuring transactions to the stricter PPT threshold and maintaining split documentation addressing both commercial substance (for GAAR) and treaty policy alignment (for PPT).

Judicial treatment

No major court has yet delivered a precedential PPT ruling, but related case law is illuminating:

In the **United Kingdom**, as covered by Andrew Parkes in this edition, *Burlington Loan Management DAC v HMRC* [2026] EWCA Civ 461 saw the taxpayer prevail at all three stages (FTT, UT, Court of Appeal). The case concerned the "main purpose test" in Article 12(5) of the Ireland/UK DTA after Burlington (Irish-resident) bought a Lehman debt claim from a Cayman seller. The Court of Appeal rejected HMRC's broad position that any tax-efficient transaction implies treaty abuse, holding that "taking advantage" of a treaty requires a result contradicting the treaty's object and purpose. Allowing an Irish purchaser to bid a higher price reflecting its tax-exempt status was precisely in line with the UK-Ireland Treaty's purpose of facilitating capital flow. The judgment signals that taxpayers should focus not on hiding tax benefits but on documenting alignment with treaty goals.

In **India**, the Mumbai ITAT's 2025 decisions in *Sky High Appeal XLIII Leasing and TFDAC Ireland II* are significant. *Sky High* held that the MLI cannot be enforced without specific treaty-by-treaty notifications under Section 90(1) of the Income Tax Act 1961, leaving the PPT practically dormant in India until further notifications are issued or the Supreme Court puts to rest the controversy that a treaty-by-treaty notification is essential under law. TFDAC upheld an Irish aircraft-leasing SPV against conduit claims, recognising Ireland's role as a global aviation hub and the legitimacy of standard SPV structures.

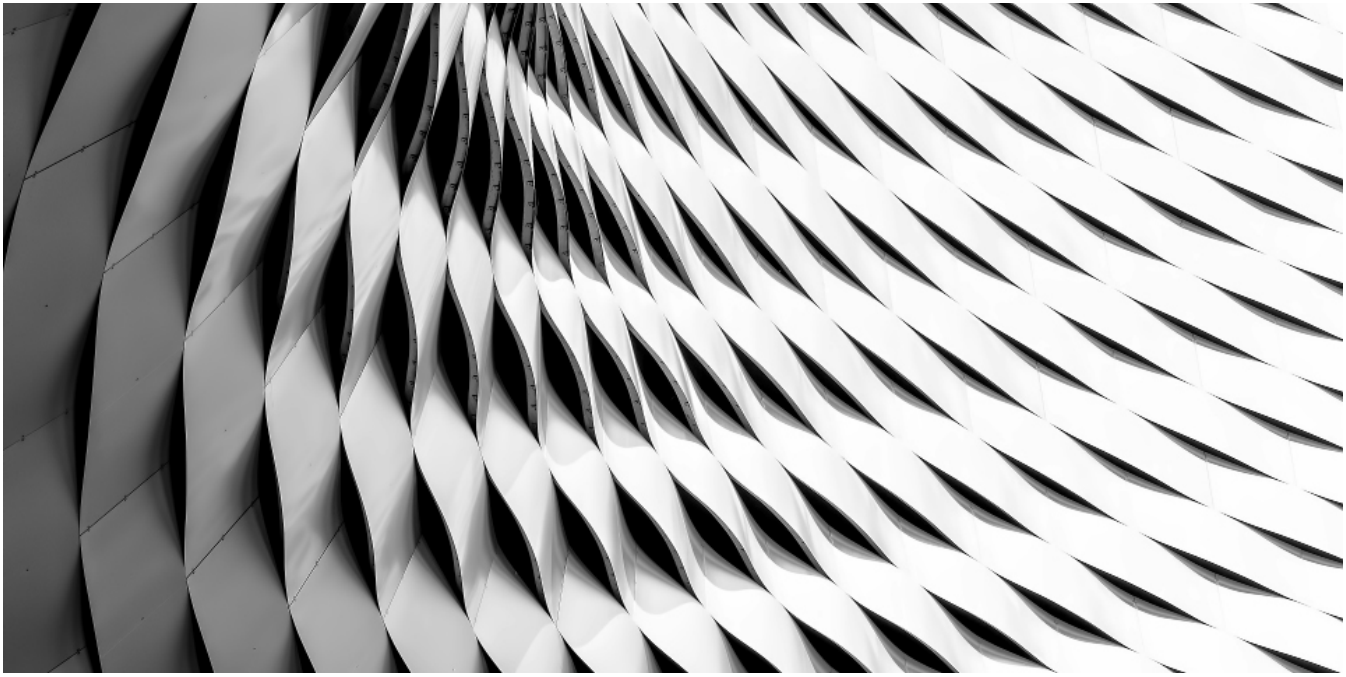
How to "Deal with it"

At the planning stage:

- Establishing genuine economic substance - qualified personnel, physical assets, real risk-bearing - beyond mere legal existence.
- Building a contemporaneous "Defence File" documenting non-tax rationales through board minutes, economic impact studies, correspondence, and function/risk analyses.
- Ensuring decision-making power genuinely sits with the entity, examined through historical board minutes, board packs, director CVs, bank mandates, cash-flow instructions, funding agreements, and shareholder agreements.
- Verifying alignment with the specific treaty Article's object and purpose (not the treaty in general).
- Mapping facts to OECD Commentary "safe harbour" examples.
- Avoiding last-minute restructuring near taxable events.

When defending before authorities or courts:

- move past assertions to objective evidence;



- argue the “principal” threshold by showing tax was ancillary;
- lean on the object-and-purpose escape; and
- consider the Mutual Agreement Procedure (MAP), bearing in mind its length, cost, and the risk of total benefit denial.

Jurisdictional divergence

Implementation varies:

- **Australia** integrates the PPT within its rigorous GAAR framework via high-level panels (PS LA 2020/2).
- **India** has issued CBDT Circular 01/2025 and faces ongoing constitutional litigation over MLI notification.
- **Singapore** emphasises bona fide commercial transactions in its IRAS e-Tax Guide.
- **The UK**’s HMRC has yet to issue specific PPT guidance.

Conclusion

The PPT is more than another anti-abuse rule; it is a subjective gatekeeper running through every stage of the transaction lifecycle. Three shifts are essential: tax benefits must be a consequence of business, not its driver; the Defence File must be built in real time, not retrofitted; and there is no one-size-fits-all approach across jurisdictions. Tax planning is not forbidden, but it must be anchored in commercial reality.

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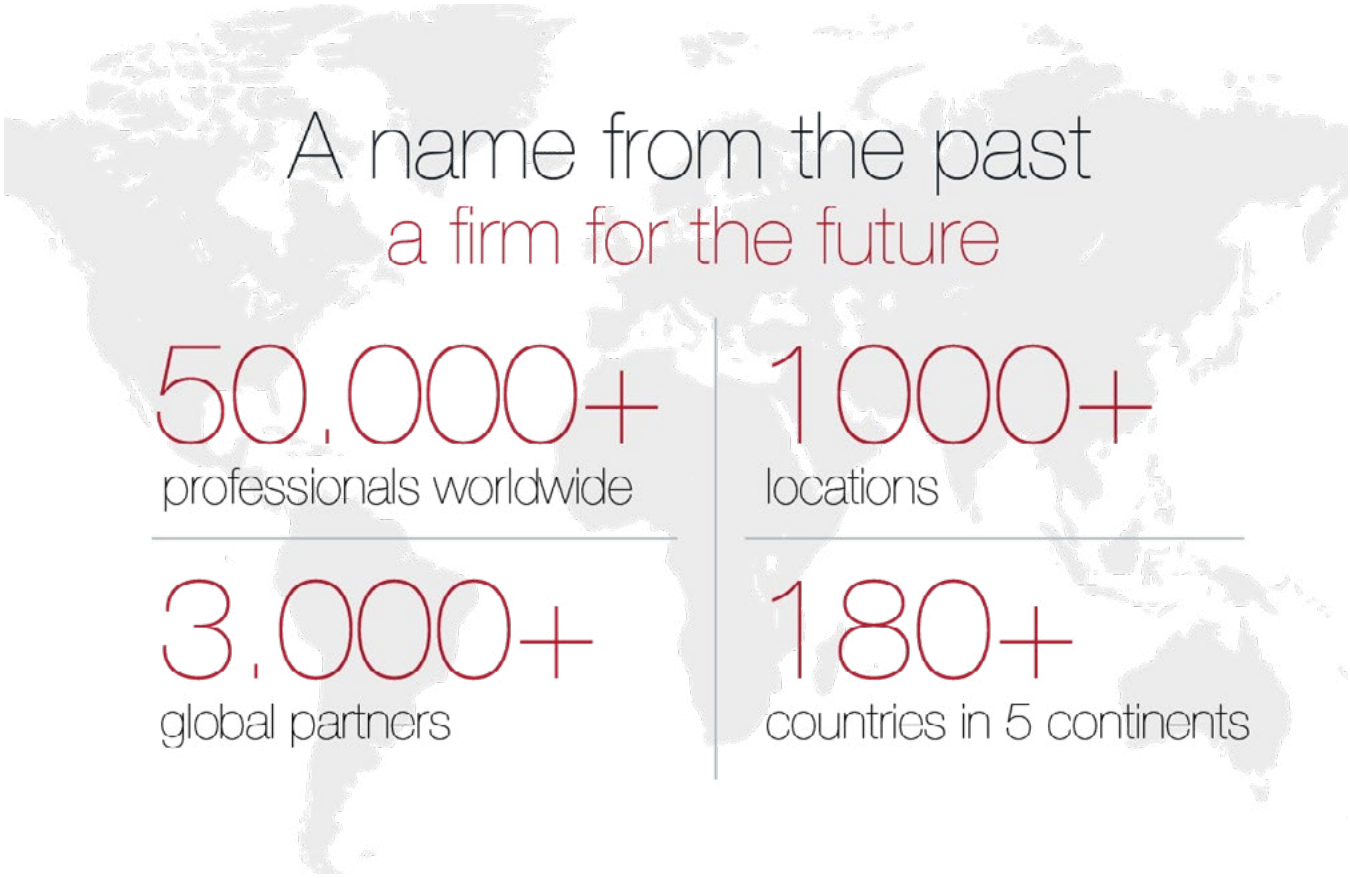

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