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a closer look

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SUBJECTS TRANSFER PRICING INTELLECTUAL PROPERTY VAT, GST AND SALES TAX CORPORATE TAXATION INDIVIDUAL TAXATION REAL ESTATE AND PROPERTY TAXES INTERNATIONAL FISCAL GOVERNANCE BUDGETS COMPLIANCE OFFSHORE

SECTORS MANUFACTURING RETAIL/WHOLESALE INSURANCE BANKS/FINANCIAL INSTITUTIONS RESTAURANTS/FOOD SERVICE CONSTRUCTION AEROSPACE ENERGY AUTOMOTIVE MINING AND MINERALS ENTERTAINMENT AND MEDIA OIL AND GAS

COUNTRIES AND REGIONS EUROPE AUSTRIA BELGIUM BULGARIA CYPRUS CZECH REPUBLIC DENMARK ESTONIA FINLAND FRANCE GERMANY GREECE HUNGARY IRELAND ITALY LATVIA LITHUANIA LUXEMBOURG MALTA NETHERLANDS POLAND PORTUGAL ROMANIA SLOVAKIA SLOVENIA SPAIN SWEDEN SWITZERLAND UNITED KINGDOM EMERGING MARKETS ARGENTINA BRAZIL CHILE CHINA INDIA ISRAEL MEXICO RUSSIA SOUTH AFRICA SOUTH KOREA TAIWAN VIETNAM CENTRAL AND EASTERN EUROPE ARMENIA AZERBAIJAN BOSNIA CROATIA FAROE ISLANDS GEORGIA KAZAKHSTAN MONTENEGRO NORWAY SERBIA TURKEY UKRAINE UZBEKISTAN ASIA-PAC AUSTRALIA BANGLADESH BRUNEI HONG KONG INDONESIA JAPAN MALAYSIA NEW ZEALAND PAKISTAN PHILIPPINES SINGAPORE THAILAND AMERICAS BOLIVIA CANADA COLOMBIA COSTA RICA ECUADOR EL SALVADOR GUATEMALA PANAMA PERU PUERTO RICO URUGUAY UNITED STATES VENEZUELA MIDDLE EAST ALGERIA BAHRAIN BOTSWANA DUBAI EGYPT ETHIOPIA EQUATORIAL GUINEA IRAQ KUWAIT MOROCCO NIGERIA OMAN QATAR SAUDI ARABIA TUNISIA LOW-TAX JURISDICTIONS ANDORRA ARUBA BAHAMAS BARBADOS BELIZE BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS COOK ISLANDS CURACAO GIBRALTAR GUERNSEY ISLE OF MAN JERSEY LABUAN LIECHTENSTEIN MAURITIUS MONACO TURKS AND CAICOS ISLANDS VANUATU

GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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State Taxation In A Global Environment – Factor Presence Nexus Considerations For Foreign Companies

by Charlie Fischer, National Multistate Tax Services, Deloitte Tax LLP

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This is the first in a series of ongoing articles by Charlie Fischer of Deloitte Tax LLP focused on US state tax considerations for the international operations of multinational taxpayers, whether headquartered in the US or elsewhere around the world, with a particular focus on state tax considerations for foreign entities.

A growing trend in state taxation is the adoption of bright-line statutory nexus thresholds in determining what it means to be doing business or otherwise have nexus in a state for income or gross receipts tax purposes.[1] In 2002, the Multistate Tax Commission ("MTC") adopted a uniformity proposal with respect to a bright-line statutory nexus for business activity taxes.[2] Under the proposal, "substantial nexus" would be established if any of the following thresholds are exceeded during the tax period:

- USD50,000 of property in the state;
- USD50,000 of payroll in the state;
- USD500,000 of sales in the state; or
- 25 percent of the entity's total property, payroll, or sales are in the state.[3]

Some states that have adopted a factor presence nexus standard have included the threshold amounts proposed by the MTC (*see* the California example discussed below), while others have implemented variations that utilize different threshold amounts, particularly with respect to sales activity within the state. For example, effective for taxable years beginning on or after January 1, 2015, the nexus standard for the New York franchise tax has expanded such that corporations with sales of USD1m or more to New York customers during the taxable year will be subject to tax.[4]

As applied to foreign companies that lack a physical presence within a state that has adopted statutory nexus thresholds, the potential for nexus most typically arises from meeting the sales threshold.[5]

The property threshold may also present state income tax nexus concerns. Foreign companies may store large quantities of inventory in the United States. Because of treaty protection, such storage

may not create a "permanent establishment" or taxable presence for federal income tax purposes. However, treaty protection would be inapplicable in a state that does not follow US treaties or does not automatically conform to federal taxable income. Stored inventory that exceeds that state's property threshold would thus trigger state nexus and potential exposure.[6]

In addition to the nexus considerations, states are trending towards single sales factor apportionment and increasingly adopting market-based sourcing rules for the sale of services and intangibles. These changes in applicable sourcing and apportionment formula rules would generally cause a potential increase in the apportionment and tax liability of foreign companies.

California Example

For tax years beginning on or after January 1, 2011, in addition to California's traditional definition of "doing business" as that of "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" in the state, a taxpayer is "doing business" in California, and thus subject to the state's franchise tax, if any of four factors are satisfied, including bright-line statutory nexus thresholds based on specified amounts of property, payroll, or sales in the state.[7] With respect to sales, for tax years beginning on or after January 1, 2011, the threshold is whether the taxpayer's sales in California exceed the lesser of USD500,000 or 25 percent of the taxpayer's total sales.[8] The sales threshold is indexed for subsequent tax years, so for taxable years beginning on or after January 1, 2014, the threshold is USD529,562.[9]

Additional California tax law changes have also recently altered the apportionment formula and sourcing rules previously utilized by most taxpayers. For tax years beginning on or after January 1, 2013, all business income from an apportioning trade or business must generally be apportioned to California on the basis of a single sales factor with market-based sourcing required for revenue from sales of other than tangible personal property.[10] The market-based sourcing rules also apply when determining whether the sales threshold is satisfied under California's bright-line statutory nexus rules.[11]

During 2011 and 2012, single sales factor apportionment was elective. Taxpayers not making a single sales factor apportionment election sourced sales of other than tangible personal property under costs of performance rules which generally were more favorable to non-California based taxpayers.[12] The costs of performance rules sourced sales based on the location where the greater costs of the income-producing activity that generated the service or intangible revenue were performed. In contrast, market-based sourcing rules look to where the benefit of the services is received by the customer or generally where the customer uses the intangible property.[13]

Because of these tax law developments, foreign companies with US inbound activities, including those with no physical presence in California, may

now be subject to California franchise tax due to the bright-line, sales-based statutory nexus threshold and may be required to apportion income on the basis of a single sales factor. Also, foreign companies that store inventory in California may be subject to California franchise tax where the property exceeds the state's property-based nexus threshold despite the fact that the foreign company may, by application of a US treaty, avoid imposition of federal income tax.[14]

As a result of these tax law changes, foreign companies may potentially be at higher risk of exposure to the California franchise tax.[15] Foreign companies with US inbound activities may wish to consider the following hypothetical factual scenarios, each of which may require further analysis regarding whether a California franchise tax filing requirement and liability potentially exist:

- A foreign company generates licensing or royalty revenue from California use of intangible property such as patents, trademarks, licenses, royalties, internet games, *etc.* or from the sale of goods into the California market that incorporate such intangible property under a licensing arrangement with the product manufacturer; (*e.g.*, marketing intangible);
- Executives or employees of a foreign company travel to California to perform services for the benefit of the foreign company's US affiliates or customers;
- Executives or employees of a foreign company perform services outside the US and charge their California affiliates or customers for such services;
- A foreign company sells tangible personal property into California to a US affiliate or to a third party;
- A foreign company generates interest income on loans to its California affiliates or customers.

Endnotes

1 Some form of bright-line, non-industry-specific statutory nexus threshold has been adopted in the following states: California (Cal. Rev. & Tax. Code § 23101(b)), Colorado (Colo. Code Regs. § 39-22-301.1(2)(b)), Connecticut (Conn. Gen. Stat. § 12-216a(a), Informational Publication 2010 (29.1)), New York (NY Tax Law § 209.1(b)), Ohio (Ohio Rev. Code § 5751.01(I)), and Washington (Wash. Rev. Code § 82.04.067).

2 For the MTC model statute regarding Factor Presence Nexus Standard for Business Activity Taxes, *see* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/FactorPresenceNexusStandardBusinessActTaxes.pdf.

3 The model statute provides that the threshold property, payroll and sales amounts may be adjusted annually to reflect the cumulative percentage change in the consumer price index.

4 NY Tax Law § 209.1(b).

5 Note that 15 US Code § 381 (Public Law 86-272, "PL 86-272") prohibits a state from taxing out-of-state corporations on income from business activity within the state if such activity is limited to "solicitation of orders" for the sale of tangible personal property and the orders are approved and filled from outside the state. Consideration should be given to ascertain whether PL 86-272 protection may potentially still

exist even where a business has otherwise triggered nexus based on a sales threshold nexus standard. In addressing this issue, taxpayers should consider that PL 86-272 protection is compromised where the tangible personal property is shipped from outside the United States, thus characterizing the sale as not arising from an interstate transaction.

6 Ownership of inventory in a state generally triggers "physical presence" nexus regardless of whether a state has adopted bright-line statutory nexus provisions.

7 Cal. Rev. & Tax. Code § 23101(a)-(b).

8 Cal. Rev. & Tax. Code § 23101(b)(2).

9 *Tax News*, California Franchise Tax Board, September 2014.

10 Cal. Rev. & Tax. Code §§ 25128.7, 25136, 25128(c)-(d). Note, however, that market sourcing has been mandatory for tax years beginning on or after January 1, 2011, for taxpayers making a single sales factor election. Note also that the single sales factor requirement does not apply to an apportioning trade or business that is primarily engaged in certain qualified business activities, including banking/financial, extractive, or agricultural.

11 Cal. Rev. & Tax. Code § 23101(b)(2).

12 Cal. Rev. & Tax. Code §§ 25128, 25128.5, and 25136 (effective for tax years beginning before January 1, 2013).

13 Cal. Rev. & Tax. Code § 25136; Cal. Code Regs. tit. 18, § 25136-2.

14 California does not follow United States treaties. *See* Cal. Code Regs. tit. 18 § 25110(d)(2)(F)1.a. *See also Container Corporation of America v. Franchise Tax Board*, 463 US 159, 196 (1983).

15 Similar considerations would exist in other states with bright-line statutory nexus thresholds.

Planning For Transfer Pricing: Establishing A Tax, Customs, And Business Efficient Supply Chain

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Introduction

This case study shows how an economic analysis can lead to substantial value creation in a complicated corporate spin-off and merger. The value-creation analysis could be used to drive significant commercial benefits for the group, and the transfer pricing could be aligned with the value creation. The process of the restructuring was complex, in that it required changing the functional profile of several entities, in order for sizable exit tax payments to be avoided. A critical, but often overlooked issue was establishing a value chain that prevented overly large customs duties.

Background

A traditional business-segment of several industrial companies was becoming less and less profitable. Investment analysts started to provide a very negative outlook for this segment and shareholders urged for a turnaround.

Several European MNCs in the general sector therefore decided to divest this segment jointly and merge it into a new stock corporation. Since the primary business segment was relatively unattractive to the stock market, the founding MNCs added additional secondary business activities so that the overall divestment and merger would succeed.

The new company was successfully introduced to the stock market and a new headquarters was quickly formed. However, the entire rest of the organization consisted of several business units that were uprooted from their parent organizations, not integrated with their new sister companies and, at least partially, had a pessimistic commercial outlook. A major reorganization effort was needed.

Most of the managers of the new company were unmotivated and unhappy that they had to leave their previous prestigious MNCs and become part of this "hopeless" new group. Thus the task of reorganizing fell to the Head of Corporate Planning, who was supported by a single assistant. That was all.

Analysis

We met the Head of Corporate Planning and started to analyze this somewhat challenging situation.

(a) First we analyzed which area had the best scope for improvements: Distribution, Manufacturing, or Supply Chain Management. In this case, we came to the conclusion that Manufacturing and Supply Chain Optimization had better prospects than Distribution.

(b) As a second step, we scrutinized the costs of each product separately, identifying total and marginal costs per product of each manufacturing, service and distribution entity worldwide. This exercise became a sophisticated economic analysis, rather than "simple" cost accounting. The existing product costs were insufficient, and we had to include the effects of reclassified overheads on remaining and future activities that resulted from the reorganization. To capture these dynamic effects, we had to develop new economic models and new proprietary.

(c) The costs analysis was further complicated by taxes and, especially, customs duties. The merger had resulted in a fragmented organization with a complex delivery chain. Due to the nature of the products, some pre-products were transferred across the border multiple times, and some customs regimes were very unfavorable, adding substantially to the overall product costs.

(d) Based on these building blocks we could then establish a comprehensive model of the overall global supply chain around the globe under different assumptions, and identify the critical value drivers.

The overall profitability had been low, but very different between the different brands. This was partially due to the type of products, but also due to differing market penetration and competitive situation. The separate entities were decentralized to the point that they competed fiercely on several market segments.

The analysis gave the company a clear understanding of the business as it existed. Based on our model, the company found the following facts:

- The research entities were developing highly promising products which would be a key point to reinvent the business;
- With a few exceptions the manufacturing plants were old and inefficient. External contract manufacturers often had more modern equipment and were underutilized. It would be viable and efficient to outsource parts of manufacturing;
- The distribution entities performed routine and non-routine activities;
- The remunerations and transfer prices not being in relation to the value generation at all.

The existing supply chains had not been optimized in light of customs duties. This had extreme repercussions, as the goods were moved cross-border several times in the production process, and customs rates between Europe and Latin America and Southeast Asia were high.

We therefore optimized the supply chains in a way that the goods were delivered at low prices from the manufacturing entities to the customs areas in the region of distribution. When optimizing customs duties we had to deal with:

- High profits in the region of distribution, taxed at high corporate tax rates; and
- Low profits in the region of manufacturing, scrutinized by local tax authorities as regards location savings – primarily in China, India, Indonesia, and Brazil.

The restructuring of the global supply chains required improvement of the entire manufacturing process, a closure of many inefficient factories, an expansion of a few key remaining factories, the engagement of external contract manufacturers, and an optimization of the worldwide logistics.

Transfer Pricing Treatment

From a tax perspective the question became how to determine transfer prices, values, and exit taxes that would be satisfactory for all tax authorities.

First, we split the existing fully fledged companies into several pieces: Contract R&D, contract manufacturing, and stripped sales. All pieces worked for, and were coordinated by, three principal companies for various subsectors. The management and control of R&D, manufacturing and distribution were centralized in these three principal companies, while all other companies conducted routine activities. A few of the companies performed only one routine activity, while others performed a combination of contract R&D, contract manufacturing, and distribution.

The split-off from the original MNCs had been less difficult than usual, because these businesses had been divested from other companies by using asset deals. In addition, the companies had not been profitable at all. The foreseeable profits of this business had been regarded as low by the stock market, so the need for a restructuring was evident for stakeholders and tax authorities alike.

In light of these facts, we came to the conclusion that the new value chain and supply chain management had been created by the Swiss principal and rolled out to the Singapore and Latin American principals. No know-how in this regard had existed in the old MNCs. Every knowledge and know-how and also every related activity had been developed from scratch by the new principal entities. Only a few existing managers had been transferred from other group companies to these principal companies. These managers had no experience in value chain and supply chain optimization from the old firms. Only some know-how on R&D, in manufacturing processes and a few marketing intangibles had been transferred and had to be valued.

The principal functions for R&D, contract manufacturing and distribution had to be separated from the old companies. But these functions had not been profitable and therefore had no positive net present value at the time of transfer. The contribution to

the newly created values had been limited and the bargaining power low.

The few profitable elements of the functions and intangibles could be separated by creating "usage rights." We separated the usage of a multitude of formulas, patents, marketing intangibles, and other know-how and transferred only the usage rights to the principal companies, while the legal and economic ownership remained as it was.

We separated the value created by the management of the three principal companies and determined their contribution to the new value and supply chains.

Finally we used game theory and bargaining theory and determined all contributions to the new value chains and supply chains in the context of a residual profit split system.

We calculated the margins on the basis of the values created by the parties. This automatically led to high arm's length profit shares of the three principal companies. Finally, the margins had been reconverted into a relative margin on the costs for everyday handling purposes.

We discussed the rather complicated structure with the management of the companies. After a series of meetings with the management we came to a compromise on which value and supply chains should be transferred first and which ones later.

The client has implemented this system step by step, leading to increased revenues, reduced costs, greatly reduced customs duties, and significantly reduced effective taxes. The earnings after tax of this business increased on average to approximately 20 percent of net sales.

We are confident that this system will be in line with current and foreseeable rules on BEPS, despite the usage of low-taxed principal companies.

Topical News Briefing: Caught In The Net

by the Global Tax Weekly Editorial Team

If awards were handed out to tax authorities based on the number of new taxpayers they managed to coax into the tax net every year, the South African Revenue Service (SARS) would surely win hands down every time.

There has been a huge enlargement of South Africa's tax base, which, thanks to the work of the SARS, grew from just 1.7m registered individual taxpayers in 1994 to 15.4m in 2013 (although only 6.7m of those paid personal income tax). Additionally, in the 2012 tax year, nearly 2.2m companies were registered for the different tax types that apply to businesses, compared with 422,000 two decades ago. Commensurate with this expansion of the tax-paying population, tax revenues have grown at a compound rate of about 15 percent per year.

This phenomenal growth in the tax base doesn't appear to be tailing off yet either. On December 4, 2014, while reviewing the preliminary outcome of the 2014 tax season, the SARS confirmed that there had again been a consistent increase recorded in the levels of tax compliance in the country, with a total of 5.32m income tax returns submitted. It noted that 4.05m taxpayers, or 95 percent, filed a return this year on time, which was almost 10 percent more than the 3.69m returns that were submitted in 2013.

Indeed, the South African Government has a lot to thank the SARS for, because if it wasn't for the revenue agency's almost herculean efforts to bring in more tax, the state of the public finances would be considerably worse than it is at present.

In actual fact, it is astonishing that the Government admitted in the recently announced Budget for 2015 that its budget deficit has grown structural, given the 20-year surge in tax revenues, which must be the envy of tax authorities in most parts of the world. One mitigating factor is that South Africa's economy has been steadily decelerating – a trend that is expected to continue in 2015, and is at least in part due to an increasingly uncertain global economic outlook.

These fiscal results indicate that government spending has been outstripping tax revenue for some time. And while the 2015 Budget includes a substantial cut of about ZAR30bn (USD2.5bn) in the public sector wage bill, overall spending is projected to increase. Over the next three years, the total amount of money owed by the Government is projected to rise by about ZAR550bn, to ZAR2.3 trillion in 2017/18.

Given that Finance Minister Nhlanhla Nene warned in last October's Medium Term Budget Policy Statement that additional revenue would have to be found to cover the growing shortfall

between tax and spending, his decision to hike the top rates of income tax in Budget 2015 came as no surprise. Certainly, the damage could have been a lot worse, and the cut in tax for micro businesses came as an unexpected announcement.

Nevertheless, the fiscal situation is a worry, and with the Government reluctant to rein in spending in any meaningful way, taxpayers in South Africa should probably brace themselves for higher taxes in the years ahead.

Denmark Introduces General Anti-Abuse Provision – Moving From SAAR To GAAR?

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Introduction

On January 26, 2015, the Danish tax authorities issued a draft bill which sets out to deal with certain potential abuses recently encountered by the tax authorities as well as the enactment of the general international anti-abuse initiatives currently considered at EU and OECD level.

The new bill includes three main elements:

- Introduction of a new international anti-abuse tax rule which denies tax treaty and EU tax directive benefits in cases of deemed abuse;
- Introduction of a new "CFC type" rule for trusts;
- Introduction of limited duration of tax rulings on exit tax values, targeting post-exit asset or business transfers.

New International Anti-Abuse Tax Rule

The bill introduces a new general anti-abuse provision (GAAR) into Danish tax law. This is an early Danish attempt to adopt the expected amendments to the EU Parent-Subsidiary Directive (2011/96) as well as the reasoning behind Action Point 6 of the BEPS initiative (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) in Danish domestic law. The new provision marks a possible change in the traditional Danish anti-abuse tax legislation doctrine which, in the past, has targeted specific practices which have been deemed to be abusive and therefore been countered by specific anti-abuse rules (SAAR).

The new rule in Section 3 of the Danish Tax Assessment Act (*ligningsloven*) contains two provisions: an EU tax directive anti-abuse provision, and a tax treaty anti-abuse provision. Despite differences in the wording, no specific difference in the contents

is pursued between the directive anti-abuse provision and the tax treaty anti-abuse provision.

The EU tax directive anti-abuse provision mainly attempts to implement the anti-abuse or misuse amendment to the Parent-Subsidiary Directive which was agreed at the meeting of the European Council held on January 27, 2015. The Danish anti-abuse provision more or less mirrors the wording of the amended Directive, stating that Denmark "shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances." Furthermore, "an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."

Unlike the anti-abuse provision in the Parent-Subsidiary Directive, the Danish domestic provision is also intended – in addition to the Parent-Subsidiary Directive – to apply as an anti-abuse rule to all EU Direct Tax Directives, specifically the EU Merger Directive (2009/133) and the Interest-Royalty Directive (2003/49).

The tax treaty anti-abuse provision aims at implementing the expected outcome of the BEPS project, specifically Action Point 6 regarding Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. As the final report on Action Point 6 has not yet been released, it is arguably somewhat premature to introduce a provision which incorporates the outcome of the project. However, the bill nevertheless aims at applying the new provision on both existing and new Danish tax treaties based on the alleged general agreement among the OECD countries implying that states are not obliged to grant treaty benefits from participation in arrangements that entail abuse of treaty provisions.

The new provision states that treaty benefits will not be granted if (our translation): "it is reasonable to establish, taking into account all relevant facts and circumstances, that obtaining the benefit is one of the most significant purposes of any arrangement or transaction which directly or indirectly leads to the benefit, unless it is established that granting the benefit under such circumstances would be in accordance with the content and purpose of the tax treaty provision in question."

Since Denmark has not previously operated with a general anti-abuse provision and due to the very general nature of its wording, a level of uncertainty as to the obtaining of tax directive or tax treaty benefits will be introduced with the entering into force of the new proposed provisions. At least, uncertainty will exist pending specific administrative or court practice regarding the use of both provisions. Accordingly, caution should be shown as to the application of such provisions, and specific tax advice thereon should be obtained, in particular when implementing financial or organizational

structures, even if legitimate business reasons exist to implement the structure in question, in so far as they may also be deemed to be tax-motivated.

The new anti-abuse provision is set to take effect from May 1, 2015. No grandfathering rule will apply.

"CFC Taxation" Of Trusts

The use of foreign trusts has in recent years has come to the attention of the Danish tax authorities, mainly due to the possibilities, which have turned out to exist, of retaining a *de facto* control of assets in a trust, although such assets have formally been irrevocably separated from the assets of the settlor.

Therefore, the draft bill introduces a CFC type of taxation of income of trusts set up by Danish tax resident individuals or individuals who have been Danish tax residents within the past ten-year period and move back to Denmark after setting up a trust abroad. The provision will also apply to assets contributed to existing trusts after the settlor (or another contributor to the trust) becomes a Danish tax resident person.

Under the proposed provision, income generated from assets transferred to a trust by a settlor or a company controlled by one or more settlors will for Danish tax purposes be considered as income in the hands of the Danish resident settlor(s) of the trust. A tax credit will, however, be available for tax paid by the trust on the same income. Income which has been taxed in the hands of the settlor(s) pursuant to the rule will not also be taxed upon distribution from the trust.

A notable aspect of the new provision is that assets in a trust comprised by the provision will be subject to an inheritance tax of an effective percentage of 36.25, even if the heirs would have been tax-exempt or subject to a reduced inheritance tax if the same assets had been inherited from the settlor(s) directly.

It is also noteworthy that the new provision does not contain a definition of "trust," not least when considering that the trust concept does not exist in Danish law. Certain generic features are, however, set out in the *travaux préparatoires* to the draft bill.

If the means of the trust are used exclusively for charitable purposes or other non-profit purposes (subject to definition) to benefit a large group of persons, or if the trust is set up for pension purposes to benefit a large group of persons, the new provision does not apply.

While the current draft provision gives rise to uncertainties regarding interpretation and application in practice, it is nevertheless our expectation that, if enacted, the use of traditional trusts in Danish wealth planning and succession planning will cease or be reduced significantly for all practical purposes.

The new trust rules are set to take effect from July 1, 2015.

Tax Ruling On Exit Values

In order to avoid unpleasant surprises when moving out of Denmark, it is common practice to obtain a binding ruling from the tax authorities on the exit

tax payable on certain types of assets, including – as is often the case in practice – unlisted shares, as a result of moving out of Denmark. However, in the experience of the tax authorities, these binding rulings have, on some occasions, led to an asset valuation upon exit which is lower than the valuation subsequently determined upon a third party sale thereof.

The draft bill therefore includes a reduction of the reliance period in respect of a binding ruling to a maximum of six months (currently, the reliance period is five years provided that the circumstances remain unchanged.) Furthermore, if the tax authorities, on the basis of any subsequent sale or subsequent yield on the assets assessed in the binding ruling, may make it probable that the actual value at the time of exit exceeded the binding ruling value by at least 30 percent and at least DKK1m (approx. EUR135,000), the binding ruling will not be binding on the tax authorities.

The draft provision will, in practice, transfer the risk of unknown relevant concurrent or subsequent circumstances within at or after exit from the tax authorities to the taxpayer, even when a binding ruling is obtained precisely to avoid uncertainty. From a practical perspective, it may therefore be advisable to carefully document the basis for the valuation applied at the time of exit, whether or not a binding ruling is obtained, and giving due consideration to the documentation requirements set out under Danish transfer pricing rules.

European Commission v. United Kingdom (Case C-172/13): ECJ Judgment

by Alexander Goldsmith, Mayer Brown

In a short judgment, the EU Court of Justice ("**ECJ**") has added another twist to the labyrinth of cases on cross-border group relief in the EU.

The minotaur in the labyrinth is a case first brought over ten years ago by Marks & Spencer ("**M&S**"), a prominent UK retailer. The case concerned HM Revenue & Customs' ("**HMRC**") denial of relief for losses suffered by M&S's EU subsidiaries, on the grounds that UK group relief rules did not cater for foreign losses. In a 2005 judgment ("***M&S***"),[1] the ECJ found that the UK rules restricted M&S's freedom of establishment, and that the restriction could not be justified if the subsidiary had exhausted the possibilities of the loss being used in its state of residence and there was "*no possibility*" of the subsidiary or a third party using it there in the future.[2]

The UK was not generous in its implementation of *M&S*,[3] provoking the referrals by the European Commission ("**Commission**") to the ECJ that have led to the present case. The Commission's arguments turned on two aspects of the UK's implementation:

(a) UK law requires a company to determine "*as at the time immediately after the end*" of the relevant accounting period whether a loss could be taken into account outside the UK.[4] This meant it would be "*virtually impossible*" to get relief.[5]

(b) Since the rules only had effect from April 1, 2006, earlier losses were excluded from relief, contrary to *M&S*.[6]

Advocate General ("**AG**") Kokott delivered a detailed Opinion on October 23, 2014, calling for the Court to abandon the principle in *M&S* in light of subsequent case law, the difficulty in interpreting the case, and preservation of the symmetry of taxing profits and relieving losses in a single state.[7] As with previous activist Opinions of AG Kokott on *M&S*-related cases, the Court seems to have ignored her.[8]

Discussion of judgment

The second argument raised by the Commission – that the UK was infringing in respect of pre-2006 losses – was dealt with quickly by the ECJ, which recognized that the UK courts had ruled on how such losses were to be dealt with.

However, the first argument required more analysis. The Commission argued that assessing whether losses could be used "*immediately after the end*" of the relevant accounting period meant that use would be possible only if either (a) "*no provision is made under the legislation of the State of residence of the non-resident subsidiary for losses to be carried forward*" or (b) the subsidiary is liquidated before the end of the relevant year.[9]

The ECJ disagreed with the Commission that losses could only be used in the two situations identified. In respect of the first scenario, the Court states that "*losses sustained by a non-resident subsidiary cannot be characterized as definitive* [*i.e.*, and therefore fall within the principles developed in *M&S*] *by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward.*"[10] It is stated that the Court's conclusion follows from "*settled case law*", in particular a passage in *K*[11] and the cases cited there. In *K*, the ECJ held that Finland had not infringed EU law by not allowing for "*the possible adverse consequences arising from particularities of legislation of another Member State*";[12] this is the theme shared by the other cases referred to in the part of *K* highlighted by the ECJ.[13] This suggests that the ECJ had in mind, as the "*particularity*" here, another state not permitting loss carry forward in any situation. In other words, for *M&S* to apply, the ECJ has held that the "other" state must have a system allowing losses to be carried forward. If it does not, then the UK is not required to recognize losses which would not be recognized in that state.

The second argument – that the subsidiary would need to be put into liquidation for the losses to be carried forward – is dealt with more simply as a matter of statutory interpretation: it is "*clear from the wording of* [the relevant UK law] *that it does not, on any view, impose any requirement for the subsidiary concerned to be wound up before the end of the accounting period in which the losses are sustained.*"[14]

Implications for current UK law

The case leaves the UK with an extremely restrictive implementation of *M&S*, as recognized by HMRC in its guidance on the UK law: "*Taken together* [the conditions regarding other possibilities of relief] *form a stringent test, which is likely to apply only in extremely restricted circumstances.*"[15]

The implications for ongoing claims are less clear. The UK Supreme Court held in 2013 that the time for applying the "no possibilities" test should be at the time at which the claim is made, not as at the time when the relevant accounting period came to an end, on the basis that the approach contended for by HMRC – and held to be correct by the ECJ – "*would mean that there would be no realistic chance*" of satisfying the conditions in *M&S* at all.[16] Given that the ECJ makes reference to this outcome of the Supreme Court judgment,[17] it is unfortunate that it did not go on to give a reason for reaching a different answer. The judgment suggests that HMRC accept that pre-2006 claims will be governed by "*the legislation applicable to those earlier periods, construed in accordance with EU law.*"[18] However, HMRC's reported statement that they

"*will review all outstanding claims for cross-border group relief in light of this very favorable judgment*"[19] appears more ominous.

There is a potentially more positive aspect for prospective UK claimants, namely the statement that evidence "*of an intention to wind up a loss-making subsidiary and initiation of the liquidation process soon after the end of the account period would be factors to be taken into account*"[20] by HMRC. Current HMRC guidance suggests a more restrictive reading, making reference in examples to a company that is "*dissolved*" obtaining relief and one that "*continues to exist*" and which therefore "*might have been given relief*" in its state of residence not obtaining relief.[21]

Implications for EU law

As the AG discussed in her Opinion, how *M&S* fits with subsequent ECJ jurisprudence is not altogether clear. As the present decision narrows the scope of *M&S* even further than previous cases have, it may be that the ECJ intends to effectively achieve the result advocated by the AG – *i.e.*, to abolish the principle altogether – by circumscribing it to such an extent that it is almost never applicable.

A strange aspect of the decision is the way in which it does not tackle head-on the specific way in which the UK group relief system works. The system only allows a loss-making company to surrender losses incurred during the same period as the claimant profit-making company which wishes to use those losses. This domestic system forms the basis for cross-border relief, which also only permits losses to be used on a year-by-year basis. However, this produces an unfair result if the rules are applied as the ECJ suggests. Take, for instance, a foreign subsidiary of a UK company which makes a massive loss in year x, realizes in that year that it must close, winds down its trade in year x and year x+1 while making a very small profit in year x+1 on the sale of its remaining assets, and closes in year x+1. Although HMRC claimed in the present case that intentions to wind up a company will be "*taken into account*", strictly read the UK cross-border loss relief regime will not allow the UK parent of the company in our example to access its year x losses, even though it will not in practice be able to use more than a fraction of them, on the basis that there was a possibility that those losses could be used in year x+1. So, even if losses can be carried forward from year x, they will not be available in the UK.

The fact that the case did not deal with this aspect of UK law is particularly surprising given that, in the original *M&S* case, the ECJ recognized that M&S should be able to use losses from several years before the overseas businesses ceased. This would not be possible under the current UK regime for the reasons described above. At both UK and EU level, then, *M&S* is likely to remain the "*virtually inexhaustible source of legal disputes between taxpayers and the Member States' tax administrations*" that AG Kokott complained of.[22]

Endnotes

1 *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* (Case C-446/03).

2 *M&S*, para. 55.

3 Section 111 *et seq.*, Corporation Tax Act 2010 ("**CTA**").

4 Section 119(4) CTA.

5 *Commission v. UK* (Case C-172/13) ("***Commission v. UK***"), para. 14 *et seq*.

6 *Commission v. UK*, para. 41 *et seq*.

7 For a discussion of the Opinion, see my article "European Commission v. United Kingdom (Case C-172/13): AG Kokott Calls For The End Of The 'Marks & Spencer' Principle" in *Global Tax Weekly*, Issue 110, December 18, 2014.

8 *Cf. Nordea Bank Danmark A/S v. Skatteministeriet* (Case C-48/13) and *A Oy* (Case C-123/11).

9 *Commission v. UK*, para. 15.

10 *Commission v. UK*, para. 33.

11 *K* (Case C-322/11).

12 *K*, para. 78.

13 *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt* (Case C -298/05) (*cf.* paras 51–53); *Deutsche Shell GmbH v. Finanzamt für Grossunternehmen in Hamburg* (Case C-293/06) (*cf.* paras 42–44); *Finanzamt für Körperschaften III in Berlin v. Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (Case C-157/07) (*cf.* paras 48–50).

14 *Commission v. UK*, para. 35.

15 HMRC's Corporation Tax Manual at CTM81525.

16 *Commissioners for HMRC v. M&S* [2013] UKSC 30, para. 30.

17 *Commission v. UK*, para. 7.

18 *Commission v. UK*, para. 42.

19 http://www.bloomberg.com/news/articles/2015-02-03/u-k-wins-eu-top-court-challenge-over-m-s-exception

20 *Commission v. UK*, para. 18.

21 *Cf.* HMRC's Corporation Tax Manual at CTM81535 and CTM81620.

22 *Commission v. UK,* Opinion, para. 44.

Topical News Briefing: Plucked And Hissing

by the Global Tax Weekly Editorial Team

The world watches on nervously as the tense negotiations between the new Greek Government and its creditors continue. But perhaps the eurozone's real concern is France.

Indeed, the Greeks could be forgiven for wondering why the EU is so reluctant to give the embattled and austerity-weary country any leeway in its bid to release the fiscal shackles when France has just been given an extra two years to reach its deficit target of 3 percent of gross domestic product (GDP), especially as France had previously been granted extra time by Brussels to put its house in order.

Even though it has been shown regular leniency by the European Commission on meeting the terms of the EU Stability Pact, it is difficult to see where France goes from here. With the tax burden hiked to unprecedented and painful levels, the French Government has seemingly proved that a country cannot tax its way out of a fiscal crisis. A point has been reached where most of the feathers have been plucked from the goose, and the bird is demonstrably hissing, so the Government now really only has one option: public spending cuts, and not token ones.

Unfortunately for President Hollande, paring back the state is only going to make his already historically low popularity ratings plunge further. The good news for the President is that the 2017 presidential election is more than two years away. On the other hand, by the time the election comes round, any spending cuts announced now will be starting to bite, and, as we have seen in Greece, harsh austerity is not a recipe for electoral success.

Despite the growing international concerns about France's solvency, and the almost unthinkable consequences of the eurozone's second-largest economy becoming the new Greece, the French Government is relaxed about its deficit-cutting commitments – outwardly at least. Finance Minister Michel Sapin said last week that the Government's existing budget plans already target a 3 percent fiscal deficit by 2017, so austerity measures won't be needed.

So everything will be okay then? Don't bet on it. After failing to bring the fiscal deficit below 3 percent of GDP in 2013, France has now twice received two-year extensions on its deficit-cutting commitments.

It would help the French Government's cause if the economy was growing. But it is stagnant – an outcome partly brought about by the Government's tax policies – and, as the Commission pointed out, France is becoming increasingly uncompetitive. The Government, belatedly perhaps, has begun to address this. The so-called Responsibility and Solidarity Pact includes a progressive reduction in business taxes. It will gradually eliminate the *Contribution sociale de*

solidarité des sociétés (C3S) from 2015 to 2017. The corporate tax rate, currently 33.3 percent, will be cut in 2017, and will be lowered to 28 percent in 2020. The 10.7 percent corporate income surtax implemented in 2011 will be eliminated from 2016.

It is too early to say whether these business tax cuts will bear fruit in terms of new jobs and investment. Given that their benefit may not be felt for a number of years yet, they may come too late to save President Hollande.

Is Making A 'Quiet Disclosure' In Today's Environment A Smart Choice For A Foreign Taxpayer With An Undisclosed Foreign Account?

by Michael DeBlis, Esq., DeBlis & DeBlis, Bloomfield, New Jersey

The environment that taxpayers with unreported offshore bank accounts find themselves in today is downright frightening. Some have likened it to "McCarthyism," the term that has its origins in the period of US history known as the "Second Red Scare." Beginning in 1950 and lasting until 1956, McCarthyism was characterized by heightened political repression against communists, as well as a campaign spreading fear of their influence on American institutions and of espionage by Soviet agents.

Originally coined to criticize the anti-communist pursuits of Republican US Senator Joseph McCarthy (Wisconsin), "McCarthyism" soon took on a broader meaning. The term is now used more generally to describe reckless, unsubstantiated accusations, as well as demonized attacks on the character or patriotism of political adversaries.

Some believe that McCarthyism has been reincarnated today, through the Government's aggressive pursuit of US taxpayers with undisclosed foreign accounts. This level of heightened scrutiny can mean but one thing: the Government is branding every taxpayer with an unreported offshore account with the letter "C" for "Criminal."

While many voices have been crying out for change, the one that stands out in front of all others is that of Nina Olson's, the National Taxpayer Advocate. In her annual report to Congress, Ms. Olson made it clear that this is 2015, not 1931, and that not every taxpayer with an unreported offshore account is the modern-day equivalent of Al Capone, the American gangster whose seven-year reign as Chicago crime boss came to an abrupt end in 1931 when he was convicted of tax evasion and sentenced to 11 years in prison.

Caught between FATCA and the draconian penalties looming over their heads like the Sword of Damocles, those who have been branded with the "Scarlett Letter" find themselves in the untenable position of having to choose between a limited number of choices, none of which is popular. Not surprisingly, the fear of what could happen if they make the "wrong choice" is so palpable that

the thought of disclosing their foreign accounts by any means other than the IRS's compliance-driven initiatives or the offshore voluntary disclosure program (OVDP) doesn't even enter their minds.

Those who are brave enough to ask the question usually couch it in a way that pre-supposes a negative answer: "Is making a 'quiet disclosure' a wise choice in such a hostile environment?" By "quiet disclosure," I am specifically referring to filing delinquent Foreign Bank Account Reports (FBARs).

My answer to this question is that "one size does not fit all." Indeed, certain cases are ripe for quiet disclosure, while others aren't. While the necessary ingredients needed to make a quiet disclosure are not a "hallmark" of the typical undisclosed foreign bank account case, just because the moon and stars do not align for the vast majority of cases does not mean that it should be abandoned altogether.

Before throwing out the idea of making a quiet disclosure with the bathwater, consider this. A quiet disclosure furthers the IRS's mission of encouraging voluntary compliance and self-policing by allowing taxpayers to self-correct. Thus, by overlooking the delinquent FBAR submission procedures, you might be making a huge mistake.

Cases that are ripe for quiet disclosure can be broken down into two main categories. For each category, assume that the taxpayer is a US person with an offshore bank account that meets the definition of "foreign financial account" for purposes of triggering an FBAR-reporting requirement. Assume also that the failure to report the account was accidental and inadvertent:

(a) *Failure to file FBARs, but foreign accounts were fully disclosed on a US income tax return and all taxable income was properly reported (along with payment of US taxes resulting therefrom):* The taxpayer properly reported his foreign financial accounts on his US income tax return and paid all tax on the interest generated by those accounts. However, he neglected to file FBARs.

(b) *Failure to file a US tax return and failure to file an FBAR – but corresponding US tax liability is negligible:* The taxpayer is a non-resident who has failed to file US tax returns and FBARs to report her financial interest in a personal foreign checking account at ABC Bank in Country B. However, she complied with Country B's tax laws and properly reported all of her income on Country B's tax returns. After taking into consideration the foreign tax credit for taxes paid to Country B, not to mention the light interest income generated by the account, even if she had properly disclosed these accounts, her corresponding US tax liability would have been negligible.

Below are two common fact patterns that are custom-tailored for each category. As many of you know, my motto is "learning by doing." Merely reading about what steps to take to solve a tax problem is no different than reading about how to ride a bicycle. Unless you get on the bicycle and fall off

a few times, all the reading in the world isn't going to teach you how to ride it. Similarly, the only way to become proficient at solving tax problems is by trudging through hypotheticals that stretch your knowledge and understanding of the arcane and nebulous rules that have come to define the US international tax regime.

Let's begin with a fact pattern that is custom-tailored to fit the first category. Joan is a US citizen who lived abroad for three years from 2011 to 2013. While living abroad, Joan opened a personal checking account with a bank located in Country X in 2011. Assume that the highest balance in that account during the three years (2011, 2012, and 2013) was USD150,000.

Joan never filed an FBAR. However, she filed US income tax returns for all three years. In doing so, she disclosed her foreign account on Schedule B and properly reported all of the interest income generated by that account. Thus, Joan reported, and paid tax on, all taxable income resulting from her unreported foreign account.

Joan just recently learned that she should have been filing FBARs in prior years after hiring an accountant to prepare her 2014 return. She wants to come into compliance. What should she do? According to the IRS's recent bulletin entitled "Options Available to Help Taxpayers With Offshore Interests," Joan should file delinquent FBARs for the last three years and attach a statement explaining why they were filed late. Specifically, she should state that she was previously unaware of her obligation to report this account, but that as soon as she became aware, she acted swiftly to fix the problem.

Will the IRS impose a penalty for Joan's failure to file these FBARs? So long as there is no tax liability and Joan has not previously been contacted by the IRS – *i.e.*, no audit has commenced and/or no request was made by an IRS agent for delinquent FBARs – the answer is "no." Because neither of these events has occurred, no FBAR penalty will be asserted.

A variation of this theme also applies to situations where the taxpayer failed to file other international information forms, besides the FBAR, but no tax was due.

Consider the following example. Tommy is a US citizen who owns a controlled foreign corporation (CFC) and a foreign trust. He has been living overseas since 2011. Tommy failed to file the necessary international information forms, specifically Form 5471 (for CFCs) and Form 3520 (for foreign trusts). However, Tommy did file US tax returns where he reported, and paid US tax on, all income resulting from these transactions.

Just as in the case of Joan's failure to file FBARs, the bulletin recommends that Tommy file delinquent forms – here, Forms 5471 and 3520 – according to their respective instructions. In addition, Tommy should attach a statement explaining why they were filed late.

Cutting to the chase, will the IRS impose penalties for Tommy's failure to file Forms 5471 and 3520? So long as there is no tax liability and Tommy has not previously been contacted by the IRS – *i.e.*, no audit has commenced and/or no request was made by the IRS agent for delinquent Forms 5471 or 3520 – the answer is "no." Because neither of these events has occurred, no penalties for failing to file Forms 5471 or 3520 will be asserted.

The following is a fact pattern that is custom-tailored to fit the second category. Trevor is a US citizen who works and lives in Country A. He has a brokerage account in Country A that he opened in 2008. The account had a high balance of USD150,000 and generated interest income of USD2,000 (US) each year. Trevor complied with Country A's tax laws and properly reported all of his income on his Country A tax returns.

Unfortunately, Trevor did not do the same when it came to his US tax obligations. Not only did Trevor fail to file US income tax returns, but he failed to file FBARs disclosing his financial interest in this account. This was due to the fact that he mistakenly assumed that he only had to report the account on his Country A tax return.

After reading recent press releases and learning about his US income tax return and FBAR-reporting obligations, Trevor hired a tax preparer to assist him in coming into compliance with his US tax obligations.

After applying the foreign tax credit for taxes paid to Country A, Trevor's US tax liability – resulting from the interest generated by his unreported County A account – amounted to less than USD1,500 per year for each of the last six years.

What should Trevor do? According to the IRS's bulletin, Trevor must do the following:

(a) File delinquent US income tax returns for the past three years (*i.e.*, 2011 thru 2013);
(b) File delinquent FBARs disclosing his foreign account for the past six years (*i.e.*, 2008 thru 2013);
(c) Attach a statement to the FBAR explaining why the FBARs were filed late. For example, Trevor might state that he was previously unaware of his obligation to report this account, but that as soon as he became aware, he acted swiftly to fix the problem.
(d) Payment of all tax and interest due must accompany the submission.

The Risks Associated With Making A Quiet Disclosure

What happens if the IRS disagrees with Joan, Tommy or Trevor's explanation for filing late FBARs? In other words, what if the IRS believes that their failure to file FBARs was not inadvertent or accidental, but instead willful?

This could result in any one of a number of "parade of horribles," the most serious of which is a referral to Criminal Investigation. While that is generally the exception and not the rule, taxpayers should be

mindful of the fact that, unlike OVDP, a quiet disclosure does not guarantee immunity from prosecution.

At the same time, if you thought that you could "change horses in midstream" and seek shelter in the OVDP bunker the moment the IRS questions your explanation, you are sadly mistaken. Unfortunately, it is too late. At the risk of sounding crass, the message that the IRS is sending is this: "You've made your bed so sleep in it!"

Taxpayers looking for guidance need look no further than the eminent archaeologist, Indiana Jones. In the same way that "Indie" had to choose between the "real" Holy Grail and the "fake" Holy Grail with the latter resulting in a gruesome death (*i.e.*, decaying into dust) and the former resulting in eternal life, you must choose "wisely."

Outside of criminal prosecution, what other risks could a taxpayer face? None other than FBAR penalties, the 800-pound gorilla of civil tax penalties. To the extent that a penalty is warranted, there are two types: non-willful and willful.

Both types have varying upper limits, but no floor. For example, the maximum non-willful FBAR penalty is USD10,000. And the maximum willful FBAR penalty is the greater of (a) USD100,000 or (b) 50 percent of the closing balance in the account as of the last day for filing the FBAR.

There are two critical points to keep in mind when it comes to FBAR penalties. First, FBAR penalties are determined per account, not per unfiled FBAR. And second, penalties apply for each year of each violation. Taken together, this means that FBAR penalties can be aggregated, one on top of the other, catapulting one's liability into the stratosphere.

Those who think that the likelihood of the IRS asserting multiple FBAR penalties, let alone multiple *willful* FBAR penalties, is ever so slight are sadly mistaken. If recent cases are any indication, not only has the IRS shown a willingness to assert multiple willful FBAR penalties that were enough to make Warren Buffet cry "uncle," it has done so with impunity.

For as malicious and mean-spirited as it might seem, the IRS has support for its position. Indeed, it has wrapped itself in the "invisibility cloak" (the magical garment from the world of Harry Potter which makes anyone who wears it invisible) of recent circuit court decisions that have diluted the quantum of proof needed to establish "willfulness." Therefore, it should come as no surprise that the IRS has been asserting willful FBAR penalties more aggressively now than it has ever done so before.

While the IRS could theoretically assert a willful FBAR penalty for any reason whatsoever – including for something as arbitrary and capricious as a dislike for the color of your shoes – keep in mind that just because the IRS thought that it was appropriate does not make it "official." For example, you could challenge the assertion. In doing so, you'd be putting the IRS's feet to the fire, by holding

them up to their burden of proving "willfulness" in court. As illustrated in the *Zwerner* case, the IRS must prove willfulness to the satisfaction of a jury. And while willfulness need only be proven by clear and convincing evidence in the civil context, the fact remains that proving the existence of a mental state is easier said than done.

Even if the IRS can make out a colorable claim of willfulness, the taxpayer can mount a defense. Such defenses are grounded in "reasonable cause."

The authority for the reasonable cause exception is found in the IRS Manual. The IRM approves of the "reasonable cause" guidance provided under 26 C.F.R. Section 1.6664, Reasonable Cause and Good Faith Exception to the Section 6662 penalties.

Whether a taxpayer's FBAR noncompliance was due to reasonable cause is based on a consideration of all the facts and circumstances. Factors that weigh in favor of a determination that an FBAR violation was due to reasonable cause include the following:

- The sophistication and education of the taxpayer;
- Whether there were recent changes to the tax forms or to the law that the taxpayer could not reasonably be expected to know;
- The level of complexity of the tax or compliance issue;
- Reliance upon the advice of a professional tax advisor who was informed of the existence of the foreign financial account;
- Evidence that the unreported foreign account was established for a legitimate purpose and that no effort was made to intentionally conceal the reporting of income or assets; and
- That there was no tax deficiency related to the unreported foreign account (or, if there was a tax deficiency, it was *de minimis*).

Other factors, in addition to those listed here, might weigh in favor of a determination that the failure to file an FBAR was due to reasonable cause. No single factor is determinative. It is a "facts and circumstances" test.

Factors that weigh against a determination that an FBAR violation was due to reasonable cause include the following:

- Whether the taxpayer's background and education indicate that he should have known of the FBAR reporting requirements;
- The taxpayer's compliance history (*i.e.*, whether the taxpayer had been penalized before);
- Evidence that the unreported foreign account was established for an illegitimate purpose (*i.e.*, sheltering money from the US Government);
- That the taxpayer failed to disclose the existence of the account to his tax preparer; and
- That there was a tax deficiency related to the unreported foreign account.

As with factors that weigh in favor of a determination that an FBAR violation was due to reasonable cause, there may be other factors that weigh against a determination that a violation was due to reasonable cause.

For those who think that the meaning of "reasonable cause" is as clear and precise a term as a modern household appliance, think again. Reasonable cause is a legal term of art that has spawned a substantial amount of case law. It is for this reason that taxpayers should always consult with a tax professional before relying upon reasonable cause as a defense to a civil penalty asserted by the IRS.

The takeaway is this: Taxpayers should carefully weigh their options before deciding to enter one of the IRS's compliance-driven initiatives or the OVDP. Because the stakes are so high, this should never be done alone, but instead by consulting with an experienced tax professional.

Those who are feeling overwhelmed and perhaps even discouraged by this process can seek comfort in the words of the famous poet, Dylan Thomas. They offer inspiration to those who have raised their masts and begun their maiden voyage into the "choppy seas" of foreign asset reporting:

> Do not go gentle into that good night.
> Rage, rage against the dying of the light.

Challenging Times For Obamacare Tax Reform

by Stuart Gray, Senior Editor, Global Tax Weekly

The US Patient Protection and Affordable Health Care Act[1] represents perhaps the largest ever legislative shake-up of the US health care industry in the country's history. However, "Obamacare," as it has come to be known, isn't just a major health reform. It is also a tax reform. And far from making matters simpler, taxpayers, tax advisers, and the Internal Revenue Service (IRS) alike are struggling to come to terms with its requirements.

Obamacare: An Outline

The Patient Protection and Affordable Health Care Act, often shortened to the Affordable Care Act (ACA), was signed by the President in March 2010 and is widely seen as Obama's most significant achievement to date on the domestic front. The legislation is intended to address a major shortfall in affordable health care coverage, especially for the poor and the middle classes, and drive down spiraling health care costs essentially by subsidizing health care.

Under the Act, the federal government, state governments, insurers, employers, and individuals "share responsibility" for improving the quality and availability of health insurance coverage in the US. It is supposed to reform the existing health insurance market by prohibiting insurers from denying coverage or charging higher premiums because of an individual's preexisting conditions.

The ACA has created the Health Insurance Marketplace, also known as the Marketplace or the Exchange. The Marketplace is designed to help taxpayers find information about health insurance options, purchase qualified health plans, and, if eligible, obtain financial assistance to pay premiums and out-of-pocket costs. A new tax credit, the premium tax credit (see below), is available only if the taxpayer purchased a qualified health plan through the Marketplace. This credit helps eligible taxpayers pay for coverage.

Shared Responsibility

One of the more controversial aspects of the ACA is its "shared responsibility" provisions. These require individuals to have qualifying health care coverage (also known as "minimum essential coverage") for each month of the year. Those who are deemed to have failed the minimum essential coverage test face paying a "shared responsibility payment" when

filing a federal income tax return. In general, all US taxpayers are subject to the individual shared responsibility provision. They are also potentially liable for any individual the taxpayer could claim as a dependent for federal income tax purposes.

Obamacare's "employer mandate" is a requirement that all businesses with 50 or more full-time equivalent (FTE) employees provide health insurance to at least 95 percent of their full-time employees and their dependents, up to age 26, or pay a fee. Firms with 100 or more FTE employees, and average annual wages above USD250,000, will need to insure at least 70 percent of their full-time workers by 2015 and 95 percent by 2016. Small businesses with 50–99 FTE employees will need to start insuring full-time workers by 2016. The mandate does not apply to employers with 49 or fewer FTE employees.

Employers with fewer than 25 FTE employees and with average annual wages of less than USD50,000 qualify for employer tax credits. Those with 10 or fewer FTE employees with average annual wages of less than USD20,000 qualify for the full credit of up to 50 percent of their share of employer premiums.

If an employer doesn't provide coverage, or provides coverage that doesn't offer "minimum value" or is unaffordable, then they must make a per employee, per month "Employer Shared Responsibility Payment." For employers who don't provide coverage, the fee is USD2,000 per full-time employee (minus the first 30 full-time employees). For employers who do provide coverage, but that coverage doesn't provide minimum value or isn't affordable, the fee is the lesser of: USD3,000 per full-time employee receiving the subsidy, or USD2,000 per full-time employee (minus the first 30). For plan years beginning in 2015 only, the penalty is USD2,000 for each full-time employee minus the first 80 employees. For plan years beginning in 2016 and beyond, employers can exclude 30 full-time employees from the penalty calculation. In general the fee is "triggered" only if at least one employee shops on the marketplace and is eligible for a federal premium subsidy. The fee does not apply if a dependent shops on the marketplace and receives a subsidy.

A Health Reform And A Tax Reform

All in all, Obamacare legislation contains USD-438bn in revenue provisions that are in the form of new taxes and fees, and at least 42 of these add to or amend the Internal Revenue Code. These include, among other provisions:

- An annual fee on pharmaceutical firms based on sales and market share;
- A 2.3 percent excise tax on manufacturers of medical devices;
- A 10 percent excise tax on indoor tanning services, collected by tanning salons and passed on to the Government;
- An annual fee on health insurance providers based on net premiums written;
- A 40 percent tax on so-called "Cadillac" health insurance plans, or high-value plans, which, from 2018, kicks in when the cost exceeds USD10,200 for individuals and USD27,500 for families; and

- Two tax hikes on high-income taxpayers, including a 0.9 percent Medicare tax on wages earned above USD250,000 by couples (USD200,000 for singles), and a 3.8 percent Medicare tax on investment income earned by couples earning more than USD250,000 in modified adjusted gross income (USD200,000 for singles).

In the words of J. Russell George, the Treasury Inspector General for Tax Administration, it is the largest set of tax law changes in 20 years, and, as it adds to the IRS's ever-expanding range of responsibilities, it "represents a significant challenge to the IRS."

The Premium Tax Credit – Taxpayers Beware!

In the past few days alone, a series of developments suggest that the IRS is struggling to meet this challenge, with implementation of the premium tax credit proving particularly problematic.

As part of the ACA, eligible taxpayers have had the option of receiving a tax credit to help pay monthly health insurance premiums since 2014. The credit, worth USD5,000 per year on average, is paid directly as a subsidy to the health insurance carrier and is based on estimated household size and income. Generally, individuals and families with an estimated household income of between 100 percent and 400 percent of the federal poverty level (FPL) for their family size are eligible for the subsidy. That is equivalent, using 2015 FPL figures, to annual household income between USD11,770 and USD47,080 for a single individual; between USD15,930 and USD63,720 for a family of two; and between USD24,250 and USD97,000 for a family of four. It is estimated that as many as 18m uninsured Americans will be eligible for the premium tax credit.

A taxpayer does not have to wait until his or her earnings are verified by the IRS when filing an annual tax return to benefit from the tax credit, but may choose to apply it to health insurance premiums each month. However, if, for example, actual 2014 household income exceeds the FPL-based amounts and a subsidy was granted, the subsidy will need to be repaid on the recipient's 2014 federal tax return.

Last year, the US Association of Enrolled Agents recommended that taxpayers urgently review their tax situation and make any necessary adjustments to withholding or estimated tax payments in response to the ACA. Otherwise, said Mary Olson, Enrolled Agent and Manager of The Iola Tax Place in Wisconsin, taxpayers who obtained health insurance through the ACA Marketplace "may be in for a big surprise at tax time."

The Tax Foundation has noted that the problem lies when actual income differs from previous estimates. "If, for instance, a family got an unexpected bonus or raise, pushing them out of the household income range, the full amount of the subsidies would have to be repaid on their income tax return. This can be a substantial and unexpected change in tax liability. Earning one dollar more can lead to an infinite marginal tax rate for disallowed taxpayers."

The Tax Foundation observed that, while not all taxpayers will face this issue, "it is a potential problem with the ACA's subsidy structure. These subsidies are expected to become the largest refundable tax credit, as much as all other refundable tax credits combined." It added, however, that "for those who did make more than expected this year, the extra income could be bittersweet."

There are concerns also that the systems put in place to process the health tax credits are just as error-prone as taxpayers themselves, and the Centers for Medicare & Medicaid Services (CMS) has disclosed that an estimated 800,000 individuals who purchased health insurance on the federal health marketplace have received tax forms with incorrect information regarding their health insurance premium costs.

This was a problem foreseen by Senator Orrin Hatch (R – Utah) in 2013, when he wrote to IRS Principal Deputy Commissioner Daniel Werfel questioning whether the agency is "equipped to process the subsidies which are both advanceable and refundable – meaning pay out first and verify later."

More recently, and in response to the CMS's revelation, Hatch and Peter Roskam (R – Illinois), the Chairman of the House of Representatives Ways and Means Oversight Subcommittee, wrote to the administration demanding answers as to why many individuals have been sent incorrect information about their 2014 premium costs under the ACA.

"These mistakes will impose an unnecessary burden on affected taxpayers," Hatch wrote. "All taxpayers who received incorrect information must now wait for the IRS to provide corrected forms. Additionally, CMS estimates that about 50,000 taxpayers who received incorrect forms have already filed their taxes using incorrect information, and must now wait for corrected forms before filing amended returns."

"This process will delay the processing of returns for 800,000 taxpayers, postpone expected tax refunds, and further add to what IRS Commissioner John Koskinen has called a 'miserable' tax filing season," Hatch said, requesting more information on how the errors occurred and when they were discovered. He asked also what effect the mistakes will have on the IRS's administration of the 2015 tax filing season.

Indeed, there is widespread concern about possible chaos arising from the agency having to recoup overpayments from a substantial number of individuals who may struggle to repay unexpected amounts to the IRS at short notice.

It has since come to light that – of those taxpayers who enrolled in health insurance through a state or federal marketplace – more than half of those that received an overpayment of the advance premium tax credit (APTC) have now made repayment.

H&R Block, a tax services provider, has found that a majority of year-end marketplace-enrolled clients, when reconciling their income, underestimated

their household income and therefore had to repay a portion of the APTC. The average amount to be paid back to the IRS is USD530, decreasing the tax refund of those taxpayers on average by 17 percent, according to analysis undertaken almost six weeks into the 2015 tax season.

In recognition of such difficulties, the IRS issued Notice 2015-9 in January, which provides that, if a taxpayer meets certain requirements, he or she will be relieved of the penalty payable under the US Income Tax Code. However, individuals will have to ask for the waiver and pay their tax debts later in the year, plus interest, and the relief applies only to the 2014 tax year.

Relief From Penalty Trap

Another key pillar of Obamacare is the penalties on individuals who do not obtain "minimum essential" health care coverage for themselves or their families, administered through the tax code on their tax returns each year. However, there is a major snag in the way the system has been set up.

As many people wait until the end of the tax season in April to file their 2014 tax returns, an estimated three to six million taxpayers may only find out that they are subject to a tax penalty at that time. In addition, many of these individuals may want to enroll in coverage to avoid the penalty again in 2015, only to find that open enrollment for 2015 coverage closed on February 15.

In response to requests from Democrat lawmakers, the CMS announced a special enrollment period on February 20 to provide those individuals with an opportunity to purchase health insurance coverage from March 15 to April 30 this year. However, the special enrollment period will only be available to those in states with a federally facilitated marketplace for ACA health coverage. Consumers in states with their own marketplaces will need to rely on separate extensions given by each of those states.

For individuals, the tax penalty will be equal to the greater of USD95 plus USD47.50 per child, or 1 percent of their taxable income up to the average national cost of getting basic insurance coverage for all family members, whichever is the greater. In 2015, the calculation will be USD325 or 2 percent, and, from 2016 onwards it will be USD695 or 2.5 percent.

It was calculated by the Tax Policy Center last year that, for a single person who has enough income to file a tax return in 2014, the penalty can be as little as USD95 or as much as USD3,600, depending on income. However, for families, the penalty is much larger – a couple with two children could owe between USD285 and USD11,000, before increasing to a much higher level in subsequent years.

In 2014, a report from the Congressional Budget Office and the Joint Committee on Taxation concluded that four million US taxpayers will be forced to pay USD4bn in ACA individual mandate noncompliance penalties to the IRS in 2016, increasing to USD5bn annually in 2017–24.

Small Business Excise Tax Relief

The IRS has also provided transitional relief from an excise tax assessment under the ACA for small businesses who reimburse or pay a premium under an individual health insurance policy for an employee.

Such health reimbursement agreements (HRAs) require that employees pay for insurance or other medical needs themselves and submit (income tax excluded) claims to be paid by their employers. It has been confirmed that these are not considered to provide the ACA's "minimum essential" health care coverage. HRAs are regarded as lacking the unlimited requirements of an ACA group plan.

As a consequence, the IRS had previously announced that any employer continuing with an HRA on or after January 1, 2014, would face penalties of up to USD100 per day for each employee not covered.

However, Notice 2015-17, issued on February 18, 2015,[2] confirms that the penalty will be waived until July 1, 2015, for those employers with fewer than 50 full-time employees, after which they will need to have changed their health insurance arrangements.

Employers with 50–99 employees will have to report on their workers' coverage in 2015, but they have until 2016 before any excise tax would apply.

Notice 2015-17 is due to be included in Internal Revenue Bulletin 2015-10, dated March 9, 2015.

The "Cadillac Tax"

In another recent Obamacare roll-out development, on February 23, 2015, the IRS issued Notice 2015-16[3] on the development of future regulatory guidance regarding the excise tax imposed by the ACA on high-cost employer-sponsored health coverage from 2018.

The ACA imposes a 40 percent tax on the "excess benefit" of so-called "Cadillac" health insurance plans, or high-value plans paid by employers. The tax kicks in when a plan's annual premium cost exceeds the threshold of USD10,200 for individuals and USD27,500 for families after a "health cost adjustment percentage." The threshold is also to be adjusted for inflation after its entry into force.

While the excise tax will not be in force until taxable years beginning after December 31, 2017, employers have been questioning a number of issues with respect to its future operation.

Those questions primarily relate to the definition of the "applicable employer-sponsored coverage" to which premium cost relates; the determination of the cost of that applicable coverage; and the application of the annual statutory dollar limit to the cost of applicable coverage.

The Notice therefore describes potential approaches with regard to those issues that could be incorporated in future proposed regulations and invites comments on them by no later than May 15, 2015.

A further notice will be issued by the IRS in due course to invite comments on certain additional issues, including procedural issues relating to the calculation and assessment of the excise tax, which are not addressed in the current notice.

Medical Device Tax – Bipartisan Opposition

While the strongest criticisms of Obamacare have tended to come from the Republican Party and their supporters, there is one ACA tax that has drawn bipartisan opposition: the medical device tax.

Repeal of the tax was one of the provisions discussed in the October 2013 negotiations over ending the federal government shutdown and increasing the federal debt ceiling, and then it was included in the Jobs for America Bill of 2014 that the Republican-led House of Representatives passed in September 2014.

Indeed, one of the first pieces of legislation introduced in the 114th Congress in January 2015 was a bill to repeal the tax, which is sponsored by a bipartisan group of ten US senators.

The Medical Device Access and Innovation Protection Act would repeal the 2.3 percent excise tax, introduced in 2013 on manufacturers of medical devices such as artificial hips, MRI scanners, and cardiac defibrillators. The tax is levied on gross sales receipts in excess of USD5m.

While it has been projected that nearly USD28.5bn in net additional revenue will be raised over the ten years to 2022, there have been fears that it will represent a heavy burden for the 8,000 companies in the USD140bn US medical devices industry.

"Every dollar medical device manufacturers spend on this onerous tax is a dollar taken away from American innovation, job growth, and the ability to provide groundbreaking medical technologies to patients in need," said Hatch. "Both Republicans and Democrats understand just how bad this tax really is, and we owe it to the American people to ensure the development of life-saving medical devices [is] not plagued by high-costs that will, ultimately, be passed on to patients."

Arguments in favor of repealing the medical device tax were weakened by a recent study by the Congressional Research Service (CRS), which claimed that the levy will have "a fairly minor" effect on medical device makers, with output and employment in the industry expected to fall by no more than 0.2 percent.

The CRS pointed out that the tax was justified partly because the medical device industry was among the commercial interests that stood to benefit from unanticipated profits post-ACA as more individuals enroll in health care insurance.

Nevertheless, the CRS concluded that the tax "is challenging to justify" when "viewed from the perspective of traditional economic and tax theory."

It added that "the tax also imposes administrative and compliance costs that may be disproportionate

to revenue." A report released by the Treasury Inspector General for Tax Administration in August 2014 noted that, while the IRS is attempting to develop a compliance strategy to ensure that businesses are compliant with the tax's filing and payment requirements, it has been unable to calculate how many medical device manufacturers are required pay the tax.

Supreme Court Review – Government Faces An Anxious Wait

While devolving so much of the oversight of the ACA to the under-resourced IRS could undermine the health care reforms, Obamacare still faces a deeper existential threat.

Almost from the word go, Republicans tried to expunge the legislation in Congress and through the courts, but without success. But they haven't given up.

The latest attack is focusing on the legitimacy of the premium tax credits. The ACA specifies that the tax credits are available only to individuals who purchase insurance through a state-run health insurance exchange. But, since only a small handful of states have opted to run their own exchanges, the IRS interpreted the law as also authorizing the IRS to grant tax credits to individuals who purchase insurance on a federally facilitated exchange.

This interpretation of the legislation and the IRS's powers to make it have been examined in various courts, with mixed results.

Washington's Appeals Court for the District of Columbia overturned a District Court ruling and concluded that the ACA "unambiguously restricts the subsidy" to insurance purchased on exchanges established by a state.

In contrast, the 4th Circuit Appeals Court in Richmond, Virginia, found that "the applicable statutory language is ambiguous and subject to multiple interpretations. Applying deference to the IRS's determination, however, we uphold the rule as a permissible exercise of the agency's discretion."

But the District Court for the Eastern District of Oklahoma upheld the Act "as written." Congress "is free to amend the ACA to provide for tax credits in both state and federal exchanges, if that is the legislative will," the judgment said.

Then, in a surprise announcement last November, the US Supreme Court accepted a petition to determine whether the IRS's interpretation should be declared null and void.

Needless to say, if that "doomsday scenario" transpires for Obamacare, it would have a significant impact on the effectiveness of the legislation. With only a small minority of states running their own exchanges, those looking to obtain insurance from the 36 federally run exchanges in the remainder of the US would be cut off from tax credit assistance.

Unsurprisingly, the view of congressional Democrats in an amicus brief to the Supreme Court is

that the ACA's tax credits are available for every eligible person in every state across the US – "any other reading of the law does violence to the intent of Congress," said House of Representatives Ways and Means Committee Ranking Member Sander Levin (D – Michigan).

The Supreme Court is expected to rule on the matter in June 2015.

The Republican Alternative

Ideologically opposed to the notion of subsidized healthcare, the Republicans had initially seemed only interested in destroying Obamacare, rather than replacing it. But a bill introduced in Congress last year indicates that the GOP, or at least the party's moderate wing, is planning for a simplified version of the ACA.

The Patient Choice, Affordability, Responsibility, and Empowerment (CARE) Act, introduced in January 2015,[4] would eliminate the dozens of tax or tax-related provisions that the ACA has, or will in the future, impose to pay for Obamacare.

The GOP proposal would provide a targeted tax credit to certain individuals that could solely be used for the purpose of helping to buy health care. American citizens with annual incomes up to 300 percent of the FPL (see above) would be eligible to receive an age-adjusted, advanceable, refundable tax credit to buy health coverage or health care services.

The value of the tax credit would be reduced in value as an individual's income increased to between 200 to 300 percent of the FPL. Individuals with annual income above 300 percent of the FPL would not be eligible for a credit – a threshold lower than in the ACA, which provides help for those earning up to 400 percent of FPL.

The proposal also envisages the establishment of an Office of Health Financing at the Treasury Department to administer the health tax credit (rather than the IRS). By law, there would be a prohibition on the agency sharing personal health information with any other federal office or agency.

The CARE Act's health coverage would be financed, not by abolishing the current unlimited exclusion from an employee's taxes of employer-provided health coverage, as some have recommended, but by capping it to 65 percent of an average plan's costs. It was said this would provide for more equitable tax treatment of health insurance.

While the GOP's proposals have not been evaluated by the Congressional Budget Office, its three authors have suggested that it would be "roughly budget-neutral over a decade" and establish a level of health care coverage equivalent to Obamacare.

Hatch, who is the Ranking Member of the Senate Finance Committee, confirmed that the proposal the three senators "have put forward is sustainable

and achievable – and without the tax hikes, mandates, and budget-busting spending that have made Obamacare so unpopular with the American people."

However, while Republicans are united in their opposition of Obamacare, they are far from united on what should replace it, should the courts strike down critical parts of the ACA, or if Congress repeals them. Therefore, the CARE Act is unlikely to become a reality any time soon, in spite of the Republican majority in Congress.

The Contingency Plan, Or Lack Of

And what does the Government intend to do if the Supreme Court rules against the IRS? Judging by Health and Human Services Secretary Sylvia Burwell's muted responses to questioning on this matter at a Senate Finance Committee hearing on February 4, the Government doesn't know.

Ominously, when repeatedly pressed on whether there is a contingency plan in place should the Supreme Court think the unthinkable, Burwell was not forthcoming with a specific answer.

If President Obama could count on the support of Congress, the solution should the Supreme Court go against him would be a relatively straightforward legislative fix. However, Congress is now in Republican hands, and most of them are hostile to Obamacare.

The Government could attempt an administrative fix, but this would probably lead to yet more protests that the agencies overseeing Obamacare are overstepping their constitutional powers.

The ACA is perhaps President Obama's greatest achievement, and he is not going to stand by and watch it unravel before his eyes. But the health reforms are divisive, and as the problems continue to stack up for Obamacare, there is going to be increasing pressure for change.

Endnotes

1 http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf

2 http://www.irs.gov/pub/irs-drop/n-15-17.pdf

3 http://www.irs.gov/pub/irs-drop/n-15-16.pdf

4 http://murphy.house.gov/uploads/FINAL%20Patient%20CARE%20Act%20Plan.pdf

India To Cut Corporate Tax Rate By 5 Percent

In his 2015 Budget speech, India's Finance Minister, Arun Jaitley, set out his roadmap for accelerating growth and enhancing prospects for investment, including plans for a 5 percent cut to the corporate income tax rate.

The tax cut, which would lower the rate to 25 percent within four years, would be funded in part by a review of various tax exemptions and incentives.

In his speech, Jaitley said that while there had been a feeling of "doom and gloom" ahead of his Government taking office, India now has "reason to feel optimistic," with real gross domestic product (GDP) growth thought to have reached 7.4 percent in 2014/15 and with projections that growth will rise to between 8 and 8.5 percent in 2015/16.

A number of other salient measures were introduced in the Budget:

- The service tax plus education surcharge will rise to 14 percent from 12.36 percent, ahead of the introduction of the Goods and Services Tax next year;
- The wealth tax will be abolished and replaced with a 2 percent surcharge on those with annual incomes above INR10m (around USD161,000); and
- A new tax evasion bill will be introduced to toughen rules and penalties for those with undeclared offshore holdings.

As part of the "Make in India" scheme, which aims to support growth and investment in domestic manufacturing, a number of new tax measures have been announced, including:

- The rationalization of capital gains incentives for the listing of Real Estate Investment Trusts (REITs) and Infrastructure Investments Trusts (INViTs);
- Modification of Permanent Establishment (PE) rules to encourage fund managers to relocate to India;
- The deferral of the General Anti Avoidance Rule (GAAR) for two years;
- The introduction of an additional investment allowance (of 15 percent) and an additional depreciation allowance (of 35 percent) for certain new manufacturing units during the period April 1, 2015, to March 31, 2020, in designated areas;
- A depreciation allowance for new plant and machinery used for less than six months by a manufacturing unit engaged in the generation and distribution of power that can be set off against tax liability in the following year;
- A cut to the rate of tax on royalty income and fees for technical services from 25 percent to 10 percent; and
- A reduction in basic customs duties on 22 items.

The threshold for the application of transfer pricing rules to "specified domestic transactions" also rose from INR50m to INR200m.

South African Budget Hikes Personal Income Tax

On February 25, South Africa's Minister of Finance, Nhlanhla Nene, presented a 2015 Budget that was said to be constrained by a slowing economy and lower-than-expected tax revenues.

Nene indicated that the Government now has to rebalance its fiscal policy to reduce the "structural gap" that exists between spending on investment and economic development and the amount of tax it expects to collect.

South African economic growth for 2015 is projected to total only 2 percent, down from indications of 2.5 percent growth in October last year. The Government is aiming for 3 percent growth in 2017, Nene said, and so "it is now clear that we can no longer postpone consideration of additional revenue measures."

The main tax proposals include a 1 percent increase to personal income tax rates for all taxpayers earning more than ZAR181,900 (USD15,900) a year. Under the changes, the rates above this threshold will range from 26 percent for taxable incomes between ZAR181,901 and ZAR284,100, to 41 percent on annual earnings above ZAR701,300.

However, with tax brackets, rebates, and medical scheme contribution credits also being adjusted for inflation, the net effect is that there will be tax relief for those earning below ZAR450,000 a year. Those with higher incomes will pay more tax.

There will also be an increase in the general fuel levy and excise duties on alcoholic beverages and tobacco products from April. The rates and brackets for transfer duties on the sale of property will be adjusted to provide relief to middle-income households. Transfer duty will be eliminated on properties below ZAR750,000, and the rate on properties worth more than ZAR2.2m will increase.

Based on the recommendations of the Davis Tax Committee, a more generous tax regime is proposed for businesses whose annual turnover is below ZAR1m. Qualifying businesses with a turnover below ZAR335,000 a year will pay no tax, and the maximum rate is to be reduced from 6 percent to 3 percent.

Nene also added that the Government is to take further steps to combat revenue leakages "through erosion of the tax base, profit shifting, and illicit money flows. … Drawing on advice of the Davis Tax Committee, amendments will be proposed to improve transfer pricing documentation and revise the rules for controlled foreign companies and the digital economy."

It was stressed that these proposals will be in line with the work of the OECD on base erosion and profit shifting (BEPS). Tax returns may also be changed to allow the collection of more information to help better identify BEPS risks.

The measures are expected to reduce the consolidated deficit to 3.9 percent of gross domestic product for 2015/16, and to 2.5 percent in 2017/18.

Hong Kong Budget Ups Tax Relief

In his 2015/16 Annual Budget, announced on February 25, Hong Kong's Financial Secretary John C. Tsang proposed a number of tax relief measures intended to preserve longer-term economic stability and provide a short-term boost.

Tsang has included both individual income and profits tax relief measures that are expected to have the fiscal stimulus effect of boosting gross domestic product (GDP) by 1 percent this year.

These measures include a further 75 percent reduction in salaries tax and tax under personal assessment for 2014/15, with a doubled ceiling of HKD20,000 (USD2,580). This should benefit 1.82m individuals and will reduce government revenue by HKD15.8bn.

In addition, there will also be another 75 percent reduction in profits tax for 2014/15, again with a doubled ceiling of HKD20,000. This should benefit some 130,000 taxpayers and will reduce government revenue by HKD1.9bn.

Taxpayers are being advised that they should file their profits tax and individual tax returns as usual when they are issued in the April and May 2015, respectively. Upon enactment of the relevant legislation, the Inland Revenue Department will make a reduction in the final assessment.

Other measures to help individual taxpayers include an increase in basic and additional child allowances, from HKD70,000 to HKD100,000, beginning in 2015/16; a waiver of rates (property tax) for the first two quarters of 2015/16, with a ceiling of HKD2,500 per quarter for each ratable property; and an extra allowance, equivalent to two months of the standard rate of Comprehensive Social Security Assistance, Old Age Allowance, Old Age Living Allowance, and Disability Allowance payments.

Tsang also proposed to amend the Inland Revenue Ordinance to allow, under specified conditions, interest deductions for corporate treasury centers and a 50 percent tax reduction for treasury activities, so as to attract multinational and Mainland enterprises to perform treasury services for their group companies in Hong Kong.

With regard to the tax deduction for capital expenditure incurred on the purchase of intellectual property (IP) rights, he also disclosed that he will consider extending the scope to cover more types of IP rights, with the intention of improving Hong Kong's position as a premier IP trading hub in the region.

Overall, Tsang confirmed the Government's relatively sound fiscal position in the short to medium term. A fiscal surplus of HKD63.8bn is forecast for 2014/15, with a further surplus of HKD36.8bn being budgeted for 2015/16. Hong Kong's fiscal reserves are expected to reach HKD856.3bn by the end of March 2016, representing 36.8 percent of GDP and equivalent to 23 months of government expenditure.

The revised estimate for government revenues in 2014/15 has reached HKD470.7bn, 9.4 percent higher than the original estimate. This was mainly due to over 60 percent more stamp duty being collected than the original estimate, plus 15.8 percent more in profits tax. The estimated target for government revenue in 2015/16 has been put at HKD477.6bn.

Commission Gives France More Time To Reduce Deficit

The European Commission has reviewed the progress being made by France, Italy and Belgium to comply with the Stability and Growth Pact.

All three countries were at risk of being deemed non-compliant when their fiscal policies were last reviewed in the autumn of 2014.

In a statement on February 25, the Commission expressed particular concern over the position of France. It was noted that greater efforts to reform the economy are needed, and France has been given until 2017 to reduce the budget deficit to below 3 percent of gross domestic product (GDP). Commission Vice-President Valdis Dombrovskis stated: "It's clear that France needs to step up its efforts both on fiscal and structural reforms."

The situation is to be reviewed after three months, and Dombrovskis warned that "there is a possibility of stepping up [the] excessive deficit procedure."

In May 2014, the French Government set out its plans for reforms, aimed at encouraging economic recovery and thereby reducing the deficit. These included cuts and simplifications to both corporate and personal taxes, and further cuts to public spending.

Italy Approves Self-Employed Tax System Change

The Italian Government has responded to protests in Italy over the new reduced tax regime introduced for self-employed individuals from January 1 this year, announcing that all taxpayers will be allowed the option of being taxed under either the old or new regime.

Both regimes offer a flat rate of tax on turnover, replacing the individual income tax (federal, regional, and local), value-added tax, and the regional tax on production. However, protests began immediately after Parliament's approval of the 2015 Budget over the perceived lower benefits for some taxpayers under the new regime compared with previous arrangements.

The new 15 percent fixed tax regime is seen to be complicated, with eligibility dependent on a business's annual turnover. Maximum turnover caps range from EUR15,000 (USD16,840) to EUR40,000, depending on the sector in which the self-employed person is engaged. Next, the flat tax rate applies to a notional amount of that business's turnover, again depending on the sector, ranging from 40 percent to 86 percent.

The tax rate of the previous system had been fixed at 5 percent and was simply based on an individual's business turnover, up to a maximum of

EUR30,000. However, the option was not available to those over 35 years of age.

Under the 2015 Budget law, self-employed individuals that were subject to the old regime could already elect to continue to be taxed under that regime, unless they were over 35 years of age.

Italy's recently approved 2015 *milleproroghe* decree, which provides for the annual renewal of a package of government measures, has now stipulated that that option should be freely available to all eligible taxpayers, who will be able to choose whether to enter into the old or new regime, for this year at least.

In addition, the pre-tax reduction to employment or business income for eligible graduates who retake Italian residency and domicile has been extended to 2017. Under the tax break, tax applies to just 30 percent of the income of men and 20 percent for women.

Northern Ireland Eyes 12.5 Percent Corporate Tax Rate

Northern Ireland's First Minister, Peter Robinson, has hinted that the corporation tax rate could be lowered to 12.5 percent from April 2017.

Speaking at an event in West Belfast, Robinson said that he anticipates the Northern Ireland (Corporation Tax) Bill's passage through the UK Parliament by March 17, 2015. The Northern Ireland Executive will make a decision on the rate "shortly after that."

The First Minister added that the "working assumption" is that Northern Ireland will apply a 12.5 percent rate, bringing it into line with that charged by the neighboring Republic of Ireland. The Executive will seek to introduce the new rate at the earliest possible date of April 2017.

Last week, the UK's Northern Ireland Secretary, Theresa Villiers, said that legislation to devolve corporate tax powers "holds out the realistic prospect that the Northern Ireland Executive could reduce the rate of corporation tax to the 12.5 percent currently enjoyed by the Republic of Ireland, or – as some ministers in the Executive would like – an even lower level."

Irish Prime Minister Enda Kenny has welcomed the Bill. He said recently that the initiative would "be very helpful in allowing Northern Ireland to develop its economy, which will in turn help the prospects for everyone on this island."

France Allows UK To Share Stolen Bank Data

France has agreed that the UK tax authority, HM Revenue & Customs (HMRC), can share certain stolen customer account data with other law enforcement agencies to tackle fiscal crime.

HMRC's Chief Executive, Lin Homer, confirmed the agreement during a Treasury Select Committee hearing on February 25, 2015.

HMRC received stolen customer bank account data from French authorities in April 2010 under

strict international treaty conditions. This data has led to controversy, surrounding the activities of a UK-based bank's operations in Switzerland and the data's misappropriation. HMRC said that the conditions attached by France limited the data's use to matters relevant to tax collection only and prevented the UK from sharing the data with other law enforcement authorities.

HMRC asked for the conditions to be relaxed in August 2010 and made a series of subsequent requests. The French authorities gave written confirmation on February 23, 2015, that they were lifting these restrictions specifically for that data.

HMRC announced plans to meet with the Serious Fraud Office, the Financial Conduct Authority, the Crown Prosecution Service, the City of London Police, the National Crime Agency, and EuroJust to discuss the sharing of such data.

UK Banking Association Warns Against Tax Hike

The British Bankers Association (BBA) has criticized the announcement from the Liberal Democrat party that it will push for the inclusion of a new supplementary corporation tax charge on banks in the upcoming Budget.

The Liberal Democrats, the junior partner in the UK's Coalition Government, said that if its efforts are resisted by the Conservatives, the proposal will feature in the Liberal Democrat election manifesto.

According to Chief Secretary to the Treasury Danny Alexander, an 8 percent supplementary charge, imposed in addition to the existing bank levy, could raise up to GBP1bn (USD1.5bn).

Alexander said: "With the final stage of deficit reduction requiring around GBP30bn of savings, it would be totally wrong for all of that to be found from cuts to public services as the Conservatives propose. Liberal Democrats believe that we must balance the books and do so fairly, so it is only right to reconsider whether banks are making a fair contribution to deficit reduction. This tax would remain in place until that job is complete."

Responding to the announcement, a spokesperson for the BBA said: "Banks in the UK already pay more tax than any other industry. The tens of billions of pounds the banking sector pays each year make a major contribution to funding schools and hospitals across the country. Introducing yet another tax on banks will not improve financial stability."

Obama's Minimum Tax Proposals Criticized

President Barack Obama's proposal to impose a minimum tax on the overseas earnings of US multinational companies (MNCs) has attracted criticism from Laura Tyson, an economic adviser to the Alliance for Competitive Taxation.

Testifying before a Senate Finance Committee hearing on "Tax Reform, Growth, and Efficiency," Tyson first highlighted the outdated nature of the US corporate tax code.

"Our corporate tax system was designed for an economy in which US MNCs earned most of their revenues at home, international competition was relatively unimportant, and most corporate profits were produced by tangible assets, such as machinery and buildings," she said. "This is not 'today's' world."

She emphasized the need for tax reform and warned the Administration that its proposed foreign minimum tax would be counterproductive.

In addition to a 14 percent one-time tax on previously untaxed foreign income accumulated overseas, Obama's 2016 Budget also included proposals for a 19 percent minimum tax on the foreign income of US MNCs, reduced by 85 percent of the effective foreign tax rate imposed on that income. She said this would end deferral and require that the foreign earnings of a US company be taxed at an effective rate of at least 22.4 percent in every foreign jurisdiction in which the company operates or else it would have to pay an additional tax to the US at the time this income is earned.

Tyson expressed concern that the "adoption of a minimum tax of this magnitude and structured in this manner would harm the global competitiveness of American companies that earn a large share of their income in global markets."

In particular, she pointed out that such a measure would vary from the incentives being offered in European countries like the UK. "These countries are using tax policy as a 'carrot' to attract the income and the operations of US companies with significant intangible assets" through such offers as patent boxes, promising MNCs tax rates of between 5 and 15 percent on their intangible income.

She added that, under the President's proposals, "US companies would be at a competitive disadvantage in acquiring foreign companies with desirable intellectual property," and "existing US companies with such property would become attractive targets for foreign acquirers and would have even stronger incentives to move their headquarters, their research and development, and their future intellectual property to lower-tax foreign locations with territorial systems."

"The tax disadvantages of a very high statutory rate, and a worldwide system, perhaps with a minimum tax attached to that, is basically an incentive to not incorporate here," Tyson concluded.

Australian Firms Challenge Labor's Anti-Avoidance Plans

Some of the company tax measures announced by the Australian Opposition have the potential to slow economic growth and further diminish the country's competitiveness, according to Jennifer Westacott, Chief Executive of the Business Council of Australia (BCA).

The Labor Party has announced a package of reforms it says would generate at least AUD1.9bn (USD1.5bn) in tax from multinational firms over the next four years.

Among the measures proposed is a reduction in the amount of debt that multinationals can claim deductions for in Australia under the thin capitalization rules. Under a Labor Government, deductions would be assessed on the debt-to-equity ratio of a company's entire global operations.

Labor would also seek to "better align" Australia's rules on hybrid entities and instruments with tax laws in other countries, and bring forward the start date for third-party reporting and data-matching requirements from July 2016 to July 2015. The Australian Taxation Office (ATO) would be allocated more funding for the investigation of profit-shifting arrangements.

Andrew Leigh, Shadow Assistant Treasurer, said: "We've been working carefully, engaging through papers coming out of the [OECD] through the G20 process, on a series of measures that are entirely consistent with our international tax treaties. A series of measures that are modest and well calibrated and which aim to address the issue of debt shifting, which so many experts acknowledge is one of the chief ways in which multinationals manage to avoid tax."

Responding to Labor's announcement, Westacott said: "Australia's suite of tax integrity measures are already considered some of the toughest in the world, with companies paying AUD70bn a year in tax. As a share of total tax paid, this is the second highest in the OECD. The OECD is considering proposals similar to those being proposed by the Opposition. If Australia moves ahead of the rest of the world, we need to put in place a thorough domestic process, including widespread consultation, to assess the risk of unintended consequences."

Westacott added that the BCA has serious concerns that the proposed changes to the thin capitalization laws "risk undermining major capital and infrastructure projects and deterring investment." She pointed out that the thin capitalization rules were tightened in October 2014 and cautioned against the introduction of *ad hoc* changes before the impact of last year's reforms can be fully assessed.

The previous amendments, effective for income years commencing from July 1, 2014, lowered the

maximum debt limit from 3:1 to 1.5:1 (on a debt-to-equity basis) for general entities, and from 20:1 to 15:1 (on a debt-to-equity basis) for non-bank financial entities. They also reduced the "outbound" worldwide gearing ratio, and increased the safe harbor capital limit for authorized deposit-taking institutions. To minimize costs for small businesses, the *de minimis* threshold for the thin capitalization limits was increased from AUD250,000 to AUD2m of debt deductions.

"The [BCA] is acutely aware that the community must have confidence in the integrity of the corporate tax system if it is to support broader tax reform. This is why a careful and well-informed debate is a national imperative," Westacott concluded.

Treasurer Joe Hockey said of Labor's scheme: "Everyone has panned it because it's not credible; it doesn't stack up, like so much of what they did in taxation, it doesn't stack up."

Czech Republic Steps Up Transfer Pricing Scrutiny

The Czech Republic's Specialized Tax Office (STO) has confirmed that it has undertaken a nationwide control operation to scrutinize multinationals' related-party transactions to ensure they are being taxed based on arm's length prices.

A first phase of the operation took place during January and February, with a second phase now underway. The Czech Financial Directorate said the initiative is intended to prevent the intentional or unintentional transfer of profits from the Czech Republic abroad, through the misallocation of taxable income between Czech-based companies and their overseas subsidiaries or an overseas parent company.

Taxpayers were selected based on data received from questionnaires voluntarily completed by taxpayers last year and data obtained from the STO's investigations.

The STO's activities are limited to those Czech companies with an annual turnover exceeding CZK2bn (USD81.7m) and also banks, insurance companies, and other financial institutions.

Cyberonics Merges With Sorin, Domiciles In UK

Two medical device companies, Cyberonics Inc. from the US and Italy's Sorin SpA, have agreed to form a joint medical devices company with a combined equity value of USD2.7bn and will take advantage of the lower tax rate in the UK.

Under the terms of the proposed transaction, which is expected to be completed towards the end of this year, Houston-based Cyberonics and Milan-based Sorin will combine, and will apply for dual-listing on NASDAQ and the London Stock Exchange.

The all-stock transaction will be implemented through two mergers, after which Cyberonics shareholders will own about 54 percent of the new company and Sorin shareholders will own about 46 percent.

It has been stressed that the merger is being driven by strategic and industrial factors, rather than by its tax advantages. However, it will also be seen as evidence that US multinationals still have an appetite for using tax inversions to move their tax residences abroad – in this case, away from the 35 percent US corporate tax rate, to instead take advantage of the 21 percent headline UK rate (20 percent with effect from April 2015) and also its patent box regime.

Under current law, despite the US Treasury Department's anti-inversion measures announced in September last year, a company that merges with an offshore counterpart can move its headquarters and tax residence abroad (even though management and operations remain in the US), and take advantage of lower taxes, as long as at least 20 percent of its shares are held by the foreign company's shareholders after the merger.

China Expands Small Business Tax Break

China's State Council has doubled the threshold for small companies to benefit from a lower corporate tax rate to those with taxable incomes of up to RMB200,000 (USD32,000), effective from January 1, 2015.

The tax break, which has also been extended by one year from the end of 2016 to the end of 2017, allows eligible companies to reduce their taxable income by 50 percent.

The tax break has been extended many times in recent years. The previous threshold of RMB60,000 was raised to RMB100,000 from January 1, 2014.

The State Council pointed out that, in 2014, micro and small businesses in China benefited from tax reductions of RMB61.2bn and RMB40bn, respectively, through a combination of tax breaks and fee exemptions worth more than RMB100bn.

NZ, China Hold Talks To Upgrade Free Trade Pact

New Zealand's Trade Minister, Tim Groser, traveled to China on February 28, 2015, to engage in talks on expanding the nations' free trade agreement (FTA).

The customs authorities of New Zealand and China recently agreed to establish a system to enhance trade facilitation under the existing FTA between the two countries.

"The FTA continues to serve us well, with strong bilateral trade flows," Groser said ahead of his meeting with Chinese Trade Minister Gao Hucheng. "The meeting will be the first preliminary discussion to discuss areas where potential improvements can be made."

Since the FTA came into force in 2008, two-way trade has doubled, and New Zealand's exports to China have more than quadrupled. The New Zealand Government said the FTA provides the two countries with the institutional structure and enhanced official relationships to support the broader development of the nations' economic relationship.

Total exports to China in 2014 accounted for one-fifth of New Zealand's annual global exports, and China is New Zealand's largest source of imported goods.

Hong Kong Reviewing Property Tax Measures

Anthony Cheung Bing-leung, Hong Kong's Secretary for Transport and Housing, has disclosed that the Government will next month present the findings of a review into the impact of stamp duty measures to the Legislative Council's Panel on Housing.

In addition to the increased Special Stamp Duty (SSD) rate (from 10 percent to 20 percent on

properties held for less than 36 months) and the 15 percent Buyer's Stamp Duty (BSD) on purchases of residential properties that were introduced in 2012, the Government also doubled, in February 2013, the rates of the existing ad valorem stamp duty (AVD) applicable to both residential and non-residential properties.

These measures, Cheung said, "aim to combat speculative activities, ensure healthy and stable development of the property market, and accord priority to the home ownership needs of Hong Kong permanent residents in the midst of the present tight housing supply."

He stated that the increase in property prices was moderated after the introduction of the doubled AVD in February 2013, with price rises, during the period March 2013 to April 2014, of just 0.1 percent on average. However, he noted that prices in Hong Kong have gradually picked up again since then. Overall property prices rose by 13 percent in 2014.

Cheung pointed out that if demand-side management measures had not been introduced at the end of 2012 and early 2013, real estate prices "might have been even more exuberant, affecting our economic and financial stability." He said "the Government closely monitors developments, and will continue to adopt necessary measures to stabilize the property market."

Monitoring is being carried out "with reference to a series of indicators, including property prices, home purchase affordability, transaction volume, the supply of residential properties, as well as changes in the local and external economic situations," he said.

China, South Korea Initial FTA

On February 25, 2015, China and South Korea initialed the text of their free trade agreement (FTA), negotiations towards which began in May 2012 and were completed in November last year during a meeting in Beijing.

A statement at that time from China's Ministry of Commerce (MOFCOM) revealed that the two countries have agreed to eliminate import tariffs on over 90 percent of all products traded between them and over 85 percent of their annual trade by value. Import duties on non-sensitive products will be canceled either immediately or within ten years, and those on sensitive products will be abolished within 10–20 years of the FTA becoming effective.

However, the two sides have also decided to exclude certain ultra-sensitive items from the agreement. There had been particular concerns in China regarding opening its manufacturing sector to South Korean imports, and in South Korea on the effect of Chinese exports on its agricultural markets.

South Korea has agreed to a part-opening of its agricultural sector, while continuing to exclude such products as rice, pork, and beef. Meanwhile, it sought access to Chinese industrial sectors with the most opportunities for its small and medium-sized

enterprises. Trade barriers for their automotive industries have been maintained however.

The FTA covers not only trade in goods and services, but also e-commerce, competition policy, and government procurement, while both sides have committed to further talks on financial services and investment in the future.

According to the South Korean Ministry of Trade, Industry, and Energy, the two governments have agreed to work towards an official signing of the FTA within the first half of this year.

China is already South Korea's primary trading partner, receiving over a quarter of its exports. According to MOFCOM figures, total trade between South Korea and China reached over USD270bn in 2013 and is expected to reach USD300bn in 2015.

The FTA will be the most substantial deal South Korea has ever signed. When it comes into effect, it is to expand the value of the country's trade outflows covered by trade treaties from the current 60.9 percent to about 73.2 percent.

Canada Extends Mining Tax Breaks

The Canadian Government has announced a one-year extension to the 15 percent Mineral Exploration Tax Credit (METC) for investors in flow-through shares.

The credit was scheduled to expire on March 31, 2015. The Government proposes to extend eligibility for the METC to flow-through share agreements entered into on or before March 31, 2016.

Under the "look-back" rule, funds raised in one calendar year with the benefit of the credit can be spent on eligible exploration up to the end of the following calendar year. Therefore, funds raised with the credit during the first three months of 2016 could support eligible exploration until the end of 2017.

Since 2006, the METC has helped junior mining companies raise over CAD5.5bn (USD4.4bn) for exploration. In 2013, more than 250 companies issued METC eligible flow-through shares to around 19,000 individual investors.

It is estimated that the extension of the credit will result in a net reduction of federal revenues of CAD35m over the 2015/16 to 2016/17 period.

The Government has also announced that the costs associated with undertaking the environmental studies and community consultations required to obtain an exploration permit will be now eligible for treatment as Canadian Exploration Expenses (CEE). As CEE, these costs would be immediately deductible for tax purposes and eligible for flow-through share treatment. Eligible projects could therefore also qualify for the METC.

Finance Minister Joe Oliver said: "Mining is key for Canada's prosperity. About 380,000 Canadian jobs are in the mining and mineral processing industries, with the highest wages and salaries of all of Canada's industrial sectors. When we strengthen this industry, we create jobs, growth, and long-term prosperity from coast to coast to coast. We are doing exactly that by cutting red tape, lowering taxes, and expanding free trade across the globe."

"Today, we are doing even more, by renewing the [METC] and expanding [CEE]. The mining industry has no stronger partner than this Government, under the leadership of Prime Minister Stephen Harper."

Commenting on the announcement, Rod Thomas, President of the Prospectors & Developers Association of Canada (PDAC), said: "The METC is a financial catalyst for investment in Canadian companies and helps them to remain competitive in the international marketplace. We welcome the Government's decision to renew this vitally important program. The Government of Canada is an important partner in creating conditions that allow Canada's mineral industry to flourish and we look

forward to continuing to work together to improve policies and programs that support the industry, including the METC."

Kenyan Guide Released On Natural Resources WHT

The Kenya Revenue Authority has issued guidelines on the new withholding tax on natural resource income, which became effective on January 1, 2015.

An amended section in the country's tax code now states:

> "Where a resident or a person with a permanent establishment in Kenya makes a payment in respect of natural resource income, the amount thereof will be deemed as having been accrued or derived in Kenya. Accordingly, tax is to be withheld at source on that income."

The withholding tax rate is 20 percent when payment is made to non-residents and 5 percent when payment is made to residents. The withholding tax does not, however, apply if the recipient of the natural resource income is exempt from income tax.

Natural resources income is defined as "an amount, including a premium, or such other like amount, paid as consideration for the right to take minerals or a living or non-living resource from land or sea; or an amount calculated in whole or in part by reference to the quantity or value of minerals or a living or non-living resource taken from land or sea."

NZ Overhauls GST Rules For Bodies Corporate

New Zealand's Minister of Finance, Todd McClay, announced on February 26, 2015, that bodies corporate will no longer be required to register for goods and services tax (GST) following the introduction of the Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Bill.

Included in the omnibus tax bill are a number of proposed measures to clarify the GST position of bodies corporate, following on from a consultation on the issue last year.

According to KPMG, concerns have been raised about whether fees for services provided to members of bodies corporate (such as building maintenance, insurance, and security) are subject to GST and, accordingly, whether a body corporate can claim back the GST on costs incurred. The Inland Revenue Department released a view last year saying they were, which caused concern as some bodies corporate were claiming and paying GST while others were not. In response, the Government consulted on a possible legislative change in June 2014.

"As I signaled last year, requiring bodies corporate to be GST registered would have placed excessive administration costs on them," McClay said.

Revised rules have been included in the tax bill that will give assurance to bodies corporate that their past GST positions are correct, and give them the option to register for GST in future, but will not require them to do so.

"This is a considerable improvement over the Government's original proposal, which was to treat bodies corporate members' fees as GST exempt in all cases and deny GST claims on bodies corporate expenditure," said Peter Scott, KPMG GST Partner. "That would have resulted in considerable compliance costs, including having to repay GST refunds and/or claim back GST already paid. We therefore welcome the change of approach."

Special rules have also been included to ensure that GST is neutral for bodies corporate that decide to register, as well as ensuring that output tax is not payable on common property held by a body corporate if it decides to deregister.

Italy Simplifies VAT Intrastat Forms

Italy has cut the amount of information required to be included on Intrastat forms, which are required from value-added tax (VAT)-registered businesses that undertake cross-border trade in goods in the EU.

The changes were introduced through the Tax Simplification Decree (Law Decree No. 175/2014), which was gazetted in November last year and has now been brought into operation.

Article 23 of the Decree reduced the necessary data on those forms to the VAT number of the trading counterparty, the total value of the transactions, the code identifying the type of good, and the country of payment.

On February 19, the Italian Customs Agency, with the prior agreement of the Italian Revenue Agency and the National Statistical Institution, published Protocol 18978/RU, which amended Intrastat forms and instructions in line with the Decree with effect from January 1, 2015.

Italy has also introduced improved software, Intr@ Web 2015, for forms to be submitted to the Revenue Agency. It was developed with support from Eurostat, the EU statistical office.

BARBADOS - ISRAEL

Negotiations

Barbados and Israel are engaged in negotiations towards the conclusion of a DTA, it was confirmed at a meeting on January 22, 2015.

BELGIUM - UZBEKISTAN

Signature

According to preliminary media reports, Belgium and Uzbekistan signed a protocol amending their DTA on February 18, 2015.

COLOMBIA - CZECH REPUBLIC

Ratified

Colombia approved a law ratifying the DTA with the Czech Republic on February 11, 2015.

CZECH REPUBLIC - COOK ISLANDS

Signature

The Czech Republic on February 24, 2015, signed a TIEA with the Cook Islands.

GERMANY - NORWAY

Into Force

The protocol amending the existing DTA between Germany and Norway entered into force on

February 3, 2015, and is effective retroactively from January 1, 2015.

HONG KONG - GERMANY

Negotiations

Hong Kong and Germany are holding a second round of DTA negotiations over five days concluding on March 6, 2015.

JAPAN - QATAR

Signature

Japan signed a DTA with Qatar on February 20, 2015.

SWITZERLAND - ITALY

Signature

Switzerland and Italy signed a DTA on February 23, 2015.

TURKEY - MEXICO

Ratified

Turkey approved a law ratifying the DTA with Mexico on February 4, 2015.

UNITED KINGDOM - ALGERIA

Signature

The United Kingdom signed a DTA with Algeria on February 18, 2015.

A guide to the next few weeks of international tax gab-fests (we're just jealous - stuck in the office).

THE AMERICAS

THE 4TH OFFSHORE INVESTMENT CONFERENCE PANAMA 2015

Offshore Investment

Venue: Hilton Panama, Esquina de Avenida Balboa y Aquilino de la Guardia, Av Balboa, Panama

Chair: Derek R. Sambrook (Trust Services)

3/11/2015 - 3/12/2015

http://www.offshoreinvestment.com/media/uploads/Panama%20Brochure-%20Final.pdf

INTRODUCTION TO US INTERNATIONAL TAX

Bloomberg BNA

Venue: Morgan Lewis Conference Center, 1 Market Street, Spear Street Tower, San Francisco, CA 94105, USA

Chair: TBC

3/16/2015 - 3/17/2015

http://go.bna.com/intro_SF2015/

INTERMEDIATE US INTERNATIONAL TAX UPDATE

Bloomberg BNA

Venue: Morgan Lewis Conference Center, 1 Market Street, Spear Street Tower, San Francisco, CA 94105, USA

Chair: TBC

3/18/2015 - 3/20/2015

http://www.bna.com/inter2015_sanfrancisco/

4TH FATCA COMPLIANCE FORUM

3/25/2015 - 3/26/2015

The Canadian Institute

Venue: One King West Hotel and Residence, 1 King St W, Toronto, ON, M5H 1A1, Canada

Key Speakers: TBC

http://www.c5-online.com/2015/283/4th-fatca-compliance-forum

TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS 2015 - CHICAGO

PLI

Venue: Skadden, Arps, Slate, Meagher & Flom LLP, 155 N. Wacker Drive, Suite 3500, Chicago, IL 60606-1420, USA

Co Chairs: Stephen D. Rose (Munger, Tolles & Olson LLP), Eric B. Sloan (Deloitte Tax LLP), Clifford M. Warren (Internal Revenue Service)

4/28/2015 - 4/30/2015

http://www.pli.edu/Content/Seminar/Tax_Planning_for_Domestic_Foreign_Partnerships/_/N-4kZ1z129zc?ID=223947

US INTERNATIONAL TAX COMPLIANCE WORKSHOP

BNA

Venue: Bloomberg BNA, 1801 South Bell Street, Arlington, VA 22202, USA

Key Speakers: Jon Brian Davis (Ivins Phillips & Barker Chtd), Adam Halpern (Fenwick & West LLP), Matthew Harrison (PwC LLP), Meg Hogan (KPMG LLP), Josh Kaplan (KPMG LLP), among numerous others

5/4/2015 - 5/5/2015

http://www.bna.com/uploadedFiles/BNA_V2/Professional_Education/Tax/Live_Conferences/IntlTaxWorkshopDynamicsEPMay2015.pdf

TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS 2015 - NEW YORK

PLI

Venue: The Roosevelt Hotel, 45 East 45th Street, New York, NY 10017, USA

Co Chairs: Stephen D. Rose (Munger, Tolles & Olson LLP), Eric B. Sloan (Deloitte Tax LLP), Clifford M. Warren (Internal Revenue Service)

5/12/2015 - 5/14/2015

http://www.pli.edu/Content/Seminar/Tax_Planning_for_Domestic_Foreign_Partnerships/_/N-4kZ1z129zc?ID=223947

4TH CROSS BORDER PERSONAL TAX PLANNING

Federated Press

Venue: Courtyard by Marriott Downtown Toronto, 475 Yonge Street, Toronto, Ontario M4Y 1X7, Canada

Chairs: Jonathan Garbutt (Dominion Tax Law), Martin J. Rochwerg (Miller Thomson LLP)

5/26/2015 - 5/27/2015

http://www.federatedpress.com/pdf/HGLegal/CBP1505-E.pdf

TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS 2015 - SAN FRANCISCO

PLI

Venue: PLI California Center, 685 Market Street, San Francisco, California 94105, USA

Co Chairs: Stephen D. Rose (Munger, Tolles & Olson LLP), Eric B. Sloan (Deloitte Tax LLP), Clifford M. Warren (Internal Revenue Service)

6/9/2015 - 6/11/2015

http://www.pli.edu/Content/Seminar/Tax_Planning_for_Domestic_Foreign_Partnerships/_/N-4kZ1z129zc?ID=223947

14TH ANNUAL INTERNATIONAL MERGERS AND ACQUISITIONS CONFERENCE

International Bar Association

Venue: Waldorf Astoria New York, New York, NY 10022, USA

Key Speakers: TBC

6/10/2015 - 6/11/2015

http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7ca03d57-41c9-44ba-b1a4-7434572160e9

GLOBAL TRANSFER PRICING CONFERENCE

BNA

Venue: Fairfax Embassy Row, 2100 Massachusetts Avenue Northwest, Washington, DC 20008, USA

Key Speakers: TBC

6/11/2015 - 6/12/2015

http://go.bna.com/transfer-pricing-conference-primer/

U.S. INTERNATIONAL TAX COMPLIANCE WORKSHOP

BNA

Venue: Manchester Grand Hyatt, One Market Place, San Diego, CA 92101, USA

Key Speakers: TBC

6/15/2015 - 6/16/2015

http://www.bna.com/compliance_sd/

INTERNATIONAL TAX ISSUES 2015 - CHICAGO

9/9/2015 - 9/9/2015

Practicing Law Institute

Venue: University of Chicago Gleacher Center, 450 N. Cityfront Plaza Drive, Chicago, Il 60611, USA

Chair: Lowell D. Yoder (McDermott Will & Emery LLP)

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2015/_/N-4kZ1z12a24?ID=223915

ASIA PACIFIC

INTERNATIONAL CORPORATE TAX PLANNING ASPECTS

IBFD

Venue: Conrad Centennial Singapore, Two Temasek Boulevard, 038982 Singapore

Key Speakers: Chris Finnerty (ITS), Julian Wong (Ernst & Young), Tom Toryanik (RBS)

4/20/2015 - 4/22/2015

http://www.ibfd.org/Training/International-Corporate-Tax-Planning-Aspects-0

THE 6TH OFFSHORE INVESTMENT CONFERENCE HONG KONG 2015

Offshore Investment

Venue: Conrad Hong Kong Hotel, One Pacific Place, Pacific Place, 88 Queensway, Hong Kong

Chair: Michael Olesnicky (KPMG China)

6/17/2015 - 6/18/2015

http://www.offshoreinvestment.com/pages/index.asp?title=The_Offshore_Investment_Conference_Hong_Kong&catID=12190

WESTERN EUROPE

INTERNATIONAL TRANSFER PRICING SUMMIT 2015

TP Minds

Venue: Millennium Gloucester Hotel, 4-18 Harringdon Gardens, Kensington, London, SW7 4LH, UK

Key Speakers: Samuel Maruca (IRS), Joseph Andrus (OECD), Michael Lennard (United Nations), Peter Steeds (HMRC), Ian Cremer (WCO), among numerous others

3/10/2015 - 3/11/2015

http://www.iiribcfinance.com/event/International-Transfer-Pricing-Summit/speakers

PLANNING FOR THE INTERNATIONAL OLDER CLIENT

IIR & IBC

Venue: Grange City Hotel, London, 8-14 Cooper's Row, London, EC3N 2BQ, UK

Chair: Chris Belcher (Mills & Reeve)

3/12/2015 - 3/12/2015

http://www.iiribcfinance.com/event/Planning-International-Older-Client

BERLIN WORKSHOP MARCH 2015

ITPA

Venue: Hotel Adlon Kempinski, Unter den Linden 77, 10117 Berlin, Germany

Chair: Milton Grundy

3/15/2015 - 3/17/2015

https://www.itpa.org/?page_id=9801

INTERNATIONAL TAX ASPECTS OF CORPORATE TAX PLANNING

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Jeroen Kuppens (KPMG), Boyke Baldewsing (IBFD), Frank Schwarte (Abel Advisory), Luis Nouel (IBFD)

3/18/2015 - 3/20/2015

http://www.ibfd.org/Training/International-Tax-Aspects-Corporate-Tax-Planning-0

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3/18/2015 - 3/20/2015

http://www.ibfd.org/Training/International-Tax-Aspects-Corporate-Tax-Planning-0

THE 37TH ANNUAL OFFSHORE TAXATION CONFERENCE

IIR & IBC financial Events

Venue: TBC, London, UK

Key Speakers: Emma Chamberlain (Pump Court Tax Chambers), Patrick Soares (Field Court Tax Chambers), Giles Clarke (Offshore Tax Planning)

3/24/2015 - 3/24/2015

http://www.iiribcfinance.com/event/offshore-tax-planning-conference

THE 9TH ANNUAL FORUM ON COLLECTIVE INVESTMENT SCHEME (CIS) TAXATION

Infoline

Venue: TBC, London, UK

Key Speakers: Malcolm Powell (Investec Asset Management), Kevin Charlton (KPMG), Teresa Owusu-Adjei (PWC), Lorraine White (Bank of New York Mellon), Jorge Morley-Smith (Investment Management Association), Christopher Mitchell (BNY Mellon)

3/25/2015 - 3/25/2015

http://www.infoline.org.uk/event/Collective-Investment-Scheme-Taxation

SPRING RESIDENTIAL CONFERENCE 2015

Chartered Institute of Taxation

Venue: Queens' College, Silver Street, Cambridge CB3 9ET, UK

Chair: Chris Jones (Chartered Institute of Taxation)

3/27/2015 - 3/29/2015

http://www.tax.org.uk/Resources/CIOT/Documents/2014/11/v4Spring%20Conference%20 2015%20-%20brochure.pdf

INTERNATIONAL TAX ASPECTS OF MERGERS, ACQUISITIONS AND CORPORATE FINANCE

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Jan-Pieter Van Niekerk, Daan Aardse (KPMG), Rens Bondrager (Allen & Overy LLP), Marcello Distaso (Van Campen Liem), Piet Boonstra (Van Campen Liem), Paulus Merks (DLA Piper LLP)

3/30/2015 - 4/1/2015

http://www.ibfd.org/Training/International-Tax-Aspects-Mergers-Acquisitions-and-Corporate-Finance

GLOBAL TAX POLICY CONFERENCE

Maastricht University

Venue: Royal Netherlands Academy of Arts and Sciences, Kloveniersburgwal 29, 1011 JV Amsterdam, Netherlands

Chair: Prof. Dr. Hans van den Hurk (Maastricht University)

4/9/2015 - 4/9/2015

http://www.ibfd.org/sites/ibfd.org/files/content/pdf/INVITATION-Global-Tax-Policy-Conference-2015.pdf

15TH ANNUAL TAX PLANNING STRATEGIES - U.S. AND EUROPE

American Bar Association

Venue: Hotel Bayerischer Hof, Promenadeplatz 2-6 80333 Munich, Germany

Chairs: Carol P. Tello (Sutherland Asbill & Brennan LLP), Pia Dorfmueller (P+P Pöllath + Partners)

4/15/2015 - 4/17/2015

http://www.ifcreview.com/eventsfull.aspx?eventId=242

STEP TAX, TRUSTS & ESTATES CONFERENCE 2015 - EXETER

STEP

Venue: Sandy Park Conference & Banqueting Centre, Sandy Park Way, Exeter, Devon, EX2 7NN, UK

Key Speakers: Helen Clarke, George Hodgson (STEP), Helen Jones (BDO LLP), Lesley King (LK Law Ltd), Lucy Obrey (Higgs and Sons), Peter Rayney (Peter Rayney Tax Consulting Ltd), Chris Whitehouse (5 Stone Buildings).

4/16/2015 - 4/16/2015

http://www.step.org/tax-trusts-estates-step-conference-2015

PRINCIPLES OF INTERNATIONAL TAXATION

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Laura Ambagtsheer-Pakarinen (IBFD), Roberto Bernales (IBFD), Piet Boonstra (Van Campen Liem), Marcello Distaso (Van Campen Liem), Carlos Gutiérrez (IBFD)

4/20/2015 - 4/24/2015

http://www.ibfd.org/Training/Principles-International-Taxation-1

DIVERTED PROFITS TAX

IBC

Venue: Millennium Hotel London Knightsbridge, 17 Sloane Street, Knightsbridge, London, SW1X 9NU, UK

Key Speakers: Philip Baker QC (Field Court Tax Chambers), Timothy Lyons QC (39 Essex Street), Steve Edge (Slaughter and May), Jonathan Schwarz (Temple Tax Chambers), among numerous others.

4/21/2015 - 4/21/2015

http://www.iiribcfinance.com/event/Diverted-Profits-Tax-Conference

PRIVATE WEALTH CYPRUS 2015

IBC

Venue: Four Seasons Hotel, Limassol, 3313, Cyprus

Speakers: Andrew Terry (Withers), Rose Carey (Charles Russell Speechlys), Theo Parperis (PwC Cyprus), Celia Pourgoura (CA Advocates), among numerous others

4/22/2015 - 4/23/2015

http://www.iiribcfinance.com/event/Private-Wealth-Cyprus-Conference

INTERNATIONAL BUSINESS TAXATION: INCREASING TRANSPARENCY

ERA

Venue: ERA Conference Centre, Metzer Allee 4, Trier, Germany

Key Speakers: Raquel Guevera (MNKS), Howard M. Liebman (Jones Day), Prof. Jacques Malherbe (Liedekerke Wolters Waelbroeck Kirkpatrick), Alain Steichen (Bonn Steichen & Partners)

4/23/2015 - 4/24/2015

https://www.era.int/upload/dokumente/16950.pdf

STEP TAX, TRUSTS & ESTATES CONFERENCE 2015 - BIRMINGHAM

STEP

Venue: Crowne Plaza Birmingham City Centre, Central Square, Birmingham, B1 1HH, UK

Key Speakers: Helen Clarke, George Hodgson (STEP), Helen Jones (BDO LLP), Lesley King (LK Law Ltd), Lucy Obrey (Higgs and Sons), Peter Rayney (Peter Rayney Tax Consulting Ltd), Chris Whitehouse (5 Stone Buildings).

4/24/2015 - 4/24/2015

http://www.step.org/tax-trusts-estates-step-conference-2015

STEP TAX, TRUSTS & ESTATES CONFERENCE 2015 – LEEDS

STEP

Venue: Hilton Leeds City, Neville Street, Leeds, LS1 4BX, UK

Key Speakers: Helen Clarke, George Hodgson (STEP), Helen Jones (BDO LLP), Lesley King (LK Law Ltd), Lucy Obrey (Higgs and Sons), Peter Rayney (Peter Rayney Tax Consulting Ltd), Chris Whitehouse (5 Stone Buildings).

4/29/2015 - 4/29/2015

http://www.step.org/tax-trusts-estates-step-conference-2015

STEP TAX, TRUSTS & ESTATES CONFERENCE 2015 - LONDON

STEP

Venue: The Queen Elizabeth II Conference Centre, Broad Sanctuary, London, SW1P 3EE, UK

Key Speakers: Helen Clarke, George Hodgson (STEP), Helen Jones (BDO LLP), Lesley King (LK Law Ltd), Lucy Obrey (Higgs and Sons), Peter Rayney (Peter Rayney Tax Consulting Ltd), Chris Whitehouse (5 Stone Buildings).

5/8/2015 - 5/8/2015

http://www.step.org/tax-trusts-estates-step-conference-2015

INTERNATIONAL TAXATION OF E-COMMERCE

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Bart Kosters (IBFD), Tamas Kulcsar (IBFD)

5/11/2015 - 5/13/2015

http://www.ibfd.org/Training/International-Taxation-e-Commerce#tab_program

INTERNATIONAL CROSS BORDER ESTATE PLANNING

IBC

Venue: Grange Tower Bridge Hotel, 45 Prescott Street, London, Greater London, E1 8GP, UK

Key Speakers: Steven Kempster (Withers), Michael Wells-Greco (Speechly Bircham), Dominic Lawrence (Speechly Bircham), Edward Stone (Collas Crill), Jon Edmondson (Mourant Ozannes), Richard Dew (Ten Old Square), among numerous others.

5/15/2015 - 5/15/2015

http://www.iiribcfinance.com/event/International-Cross-Border-Estate-Planning

PRINCIPLES OF INTERNATIONAL TAX PLANNING

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Chair: Boyke Baldewsing (IBFD)

6/1/2015 - 6/5/2015

http://www.ibfd.org/Training/Principles-International-Tax-Planning-0

THE INTERNATIONAL TAX PLANNING ASSOCIATION 40TH ANNIVERSARY CONFERENCE

ITPA

Venue: Sofitel Legend The Grand Amsterdam, Oudezijds Voorburgwal 197, 1012 EX Amsterdam, Netherlands

Chair: Milton Grundy

6/7/2015 - 6/9/2015

https://www.itpa.org/?page_id=9907

INTERNATIONAL TAXATION OF EXPATRIATES

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Bart Kosters (IBFD)

6/10/2015 - 6/12/2015

http://www.ibfd.org/Training/International-Taxation-Expatriates

INTERNATIONAL TAX ASPECTS OF PERMANENT ESTABLISHMENTS

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Andreas Perdelwitz (IBFD), Bart Kosters (IBFD), Hans Pijl, Roberto Bernales (IBFD), Walter van der Corput (IBFD), Madalina Cotrut (IBFD), Jan de Goede (IBFD)

6/16/2015 - 6/19/2015

http://www.ibfd.org/Training/International-Tax-Aspects-Permanent-Establishments

TAX PLANNING WORKSHOP

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Shee Boon Law (IBFD), Tamas Kulcsar (IBFD), Boyke Baldewsing (IBFD), Carlos Gutiérrez (IBFD)

7/2/2015 - 7/3/2015

http://www.ibfd.org/Training/Tax-Planning-Workshop

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - LONDON

CCH

Venue: Sofitel St James Hotel, 6 Waterloo Place, London SW1Y 4AN, UK

Key Speakers: Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others.

7/8/2015 - 7/9/2015

https://www.cch.co.uk/AIC

INTERNATIONAL TAX SUMMER SCHOOL

IIR & IBC Financial Events

Venue: Gonville & Caius College, Trinity St, Cambridge, CB2 1TA, UK

Key Speakers: Timothy Lyons QC (39 Essex Street), Peter Adriaansen (Loyens & Loeff), Julie Hao (EY), Heather Self (Pinsent Masons), Jonathan Schwarz (Temple Tax Chambers), among numerous others

8/18/2015 - 8/20/2015

http://www.iiribcfinance.com/event/International-Tax-Summer-School-2015

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - BRISTOL

CCH

Venue: Aztec Hotel and Spa, Aztec West, Almondsbury, Bristol, South Gloucestershire BS32 4TS, UK

Key Speakers: Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others.

9/9/2015 - 9/10/2015

https://www.cch.co.uk/AIC

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - MILTON KEYNES

CCH

Venue: Mercure Abbey Hill Hotel, The Approach, Milton Keynes MK8 8LY, UK

Key Speakers: Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others.

9/15/2015 - 9/16/2015

https://www.cch.co.uk/AIC

INTERNATIONAL TAXATION OF BANKS AND FINANCIAL INSTITUTIONS

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Ronald Aw-Yong (Beaulieu Capital), Peter Drijkoningen (French BNP Paribas bank), Francesco Mantegazza (Pirola Pennuto Zei & Associati), Omar Moerer (Baker & McKenzie), Pedro Paraguay (NautaDutilh), Nico Blom (NautaDutilh)

9/16/2015 - 9/18/2015

http://www.ibfd.org/Training/International-Taxation-Banks-and-Financial-Institutions

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - MANCHESTER

CCH

Venue: Radisson Blu Hotel Manchester, Chicago Avenue, Manchester, M90 3RA, UK

Key Speakers: Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among numerous others

9/22/2015 - 9/23/2015

https://www.cch.co.uk/AIC

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - OXFORD

CCH

Venue: Oxford Thames Four Pillars Hotel, Henley Road, Sandford-on-Thames, Sandford on Thames, Oxfordshire OX4 4GX, UK

Key Speakers: Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among numerous others

10/6/2015 - 10/7/2015

https://www.cch.co.uk/AIC

INTERNATIONAL TAX STRUCTURING FOR MULTINATIONAL ENTERPRISES

IBFD

Venue: IBFD head office, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: Boyke Baldewsing (IBFD), Tamas Kulcsar (IBFD)

10/21/2015 - 10/23/2015

http://www.ibfd.org/Training/International-Tax-Structuring-Multinational-Enterprises#tab_program

THE AMERICAS

United States

The US Tax Court heard the case of a (deceased) US taxpayer who resided and submitted tax returns in the US Virgin Islands after becoming a consultant with, and a limited partner of, a company established there.

The US Internal Revenue Service (IRS) contended that the taxpayer was not a *bona fide* resident of the Virgin Islands for tax purposes, and therefore accused him of failing to file US tax returns for the 2002–2004 tax years.

In addition to arguing that the defendant had fulfilled his tax obligations under existing arrangements between the US and the US Virgin Islands, counsel for the taxpayer claimed that because the accusation against him was made by the tax authority more than three years after the tax returns were filed, it was not valid and could not be enforced.

The IRS countered that if he was not a *bona fide* resident, then he did not file the proper tax returns and therefore the time limit could not apply. The Tax Court found from the facts of the case that the taxpayer had correctly and accurately submitted his Virgin Island tax returns, and therefore if indeed he was a *bona fide* resident of the Virgin Islands then he would have completely fulfilled his tax responsibilities.

A listing of key international tax cases in the last 30 days

Conditions for determining whether a claimed residency is *bona fide* have been established from a variety of past US court judgments and "grouped into four broad categories: intent; physical presence; social, family, and professional relationships; and the taxpayer's own representations." The Tax Court ruled that because the taxpayer intended to live in the Virgin Islands for a long period of time, was employed and married in the Virgin Islands, and considered himself a Virgin Islands resident taxpayer, he was a *bona fide* resident for tax purposes, and therefore the claim made by the IRS that he was required to submit US tax returns was invalid.

The judgment was delivered on January 29, 2015.

Tax Court: *Estate of Travis L. Sanders et al. v. Commissioner (144 T.C. No.5)*

http://www.ustaxcourt.gov/InOpHistoric/EstateofSanders.Div.Kerrigan.TC.WPD.pdf

WESTERN EUROPE

Czech Republic

The European Court of Justice (ECJ) has ruled illegal the Czech Republic's decision to impose a tax on greenhouse gas (GHG) emission allowances that were distributed free of charge to electricity producers, to the extent that the tax applied to more than 10 percent of those allowances.

The Emissions Trading Directive (Directive 2003/87/EC) provided that member states should, during the period 2008–2012, allocate at least 90 percent of GHG allowances free of charge.

In 2011 and 2012, the Czech authorities introduced a gift tax on electricity producers' acquisition of the free-of-charge allowances, at a rate of 32 percent, with the intention of supporting operators of photovoltaic power stations.

Bringing an action before the Czech courts, ŠKO-ENERGO, a Czech electricity producer which was subject to that tax, argued that its imposition was incompatible with the Emissions Trading Directive. The Supreme Administrative Court of the Czech Republic (*Nejvyšší správní soud*), hearing an appeal in the case, referred the matter to the ECJ.

The ECJ said that, in light of the restriction that just 10 percent of allowances could be allocated for consideration, the Directive precludes both the direct fixing of a price for the allocation of emission allowances and the subsequent levying of a charge in respect of their allocation.

The tax under consideration is incompatible with the Directive to the extent that it does not respect that ceiling, the ECJ explained, leaving it to the national court to determine the extent that this was the case.

The ECJ also found that the application of that tax cannot be justified by the aim of generating additional revenue for certain producers of green energy, as that is not one of the aims of the Directive.

The ECJ concluded:

> "Article 10 of Directive 2003/87/EC … must be interpreted as precluding the imposition of a gift tax, such as that at issue in the main proceedings, if it does not respect the 10 percent ceiling on the allocation of emission allowances for consideration laid down in that Article, which is a matter for the referring court to determine."

The judgment was delivered on February 26, 2015.

European Court of Justice: *ŠKO-ENERGO s.r.o. v. the Czech Tax Appeal Board (C-43/14)*

http://curia.europa.eu/juris/document/document.jsf?text=&docid=162532&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=30973

Ireland

Ruling on February 5, the General Court of the European Union delivered a partial annulment of a European Commission decision to recover state aid deemed incompatible with the EU internal market from Irish airlines.

In March 2009, the Irish Government introduced a two tier Air Travel Tax (ATT) regime, to be imposed on "every departure of a passenger on an aircraft from an airport" in Ireland, with a lower rate of EUR2 applying to short domestic flights (to no more than 300km from Dublin Airport), with a higher rate of EUR10 applying to all other flights. Transit and transfer passengers were exempted from the tax. Following a complaint by Ryanair and an investigation by the Commission on the grounds of infringement of the freedom to provide services, the tax was subsequently adjusted, such that from March 2011, a single rate of EUR3 was imposed on all departures.

Ryanair also filed complaints to the Commission on the following grounds:

- That the lower rate of EUR2 mainly benefited those domestic airlines the majority of whose flights were within 300km from Dublin airport
- That the flat rate was discriminatory as it represented a significantly higher proportion of the ticket price for low-fare airlines than for traditional airlines, and
- That the exemption for transit and transfer passengers constituted unlawful state aid to two other airlines that had a relatively higher proportion of passengers and flights in those categories.

In July 2011, the Commission declared that the flat rate and the exemption for transit and transfer passengers did not constitute state aid; however, it stated that the lower EUR2 rate did look to constitute state aid, and that it would investigate further.

In July 25, 2012, the Commission found that the lower rate did constitute illegal state aid, and ordered Ireland to recover that aid from those airlines deemed to have benefited from it, at a rate of EUR8 per passenger, representing the difference between the two rates. Ryanair (as applicant) and Aer Lingus (as intervener), both named as beneficiaries of the aid in question, applied to the General Court to plea, among other aspects, that "neither the EUR2 rate nor the EUR10 rate could be regarded as the 'normal' rates of the reference system … the appropriate reference rate as regards the ATT was the EUR3 rate adopted by the Irish authorities in March 2011."

The General Court observed that while the Commission had not erred in applying the higher rate as the reference rate, or in its decision that the imposition of the lower rate on shorter flights constituted incompatible state aid, it was in error regarding its contention that an economic advantage was

unfairly enjoyed by the airlines and therefore that the amount to be recovered was automatically, and in every case, EUR8 per passenger. It further argued that the extent to which the airlines subject to the lower rate had passed the advantage on to their customers should have been taken into account, as this would affect the amount that they had benefited.

Annulling the European Commission decision, the General Court argued:

> "… the Commission has not established to the requisite legal standard, in its decision, that the recovery of EUR8 per passenger was necessary in order to ensure the re-establishment of the *status quo ante*, that is to say the restoration, as far as possible, of the situation which would have prevailed if the operations in question had been carried out without the tax reduction or, in other words, if the flights subject to the rate of EUR2 per passenger had been subject to the rate of EUR10 per passenger."

It went on to state:

> "The recovery of an amount of EUR8 per passenger from the airlines could not ensure the re-establishment of the situation which would have prevailed if the operations in question had been carried out without the grant of the aid concerned, since it is not possible, for the airlines, to recover retroactively from their customers the EUR8 per passenger which should have been collected. The recovery of an amount of EUR8 per passenger from the airlines is therefore not necessary in order to eliminate the distortion of competition caused by the competitive advantage which such aid affords … On the contrary, the recovery of such an amount would be liable to create additional distortions of competition, as the applicant rightly notes, since it could lead to the recovery of more from the airlines than the advantage they actually enjoyed."

The judgment was delivered on February 5, 2015.

General Court of the European Union: *Ryanair v. European Commission (T-500/12)*

http://curia.europa.eu/juris/document/document.jsf?text=&docid=162087&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=17867

Poland

The European Court of Justice (ECJ) was asked for a preliminary ruling concerning a Polish company which imported lubricating oil from within the EU to sell in Poland. The company asked the tax authority for an interpretation of national legislation regarding whether its products were subject to the excise duty imposed on energy products, and the authority confirmed that they were.

However, the company argued before an Administrative Court that this decision was in violation of EU law that provides for exempt treatment for

"energy products used for purposes other than as motor fuels or as heating fuels," which it said should include lubricating oils.

After the court agreed with the company's argument and the tax authority appealed, the second court deliberated over whether Poland could choose to impose a tax on lubricating oils that is similar to the excise duty laid out in the relevant EU law. The court decided to approach the ECJ for an interpretation of EU law regarding whether or not excise duty could be levied on lubricating oils as an energy product that is not used as a motor or heating fuel.

The ECJ stated that, under the relevant EU legal provisions, lubricating oils are considered energy products but are specifically excluded from the application of the excise duty. However, member states are permitted to levy a tax on products that fall outside the scope of the relevant provision as long as the tax "does not, in trade between member states, give rise to formalities connected with the crossing of frontiers."

The ECJ looked at the Polish legislation and, although the final decision was left to the national court, stated that the provisions applying to the domestic purchase and importation of lubricating oils appear not to give rise to a formality connected with the crossing of frontiers. In addition, it said that the obligation on importers to declare the transaction and guarantee payment of excise duty is proportionate to the EU rules for excise duty, which are intended to ensure tax payment.

The judgment was delivered on February 12, 2015.

European Court of Justice: *Poland v. Oil Trading Poland sp. z.o.o. (C-349/13)*

http://curia.europa.eu/juris/document/document.jsf?text=&docid=162248&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=33047

Portugal

The European Court of Justice (ECJ) was asked for a preliminary ruling concerning a group member company, Surgicare, which constructed and fitted out a hospital (activities that are not taxable under Portuguese VAT law, which resulted in the company accumulating a VAT credit), and then transferred the operation of the hospital to another company in the group, Clínica.

Surgicare regarded the transaction to Clínica to be subject to VAT, and offset the VAT due on the rent paid by Clínica against the VAT credit accumulated from the construction and fitting out. Following a review of Surgicare's activities, the tax authority regarded the company had abused the right to a VAT refund.

The authority was of the opinion that the hospital had been constructed so as to be transferred to Clínica for the sole aim that Surgicare could establish the existence of a right deduct the input VAT it had paid during construction and fitting out, even though Surgicare would not have been able to benefit from making

such deductions had it operated the hospital (which is exempt from VAT) itself. The authority therefore raised a notice of assessment against Surgicare for the VAT deducted, plus interest for late payment. Following two appeals by Surgicare against the assessment, the Supreme Administrative Court referred the case to the ECJ on the basis of whether the procedure that must be followed by the tax authority when abuse of the rules is suspected (as laid down in Article 63 of Portugal's Code of Taxation Procedure and Proceedings) complies with EU VAT law. The ECJ, in determining whether the referral was admissible, stated:

> "By its question, the referring court asks, in essence, whether Directive 2006/112 [on the common system of VAT] precludes the mandatory preliminary application of a national administrative procedure, such as that laid down by Article 63 …, in the event that the revenue authorities suspect the existence of an abusive practice."

The ECJ held that, "to adopt the measures necessary to ensure the correct collection of VAT and to prevent evasion, the directive does not lay down any provision specifying in concrete terms the contents of the measures that must be adopted by Member States for that purpose." Therefore, it is for each member state's legal system to lay down detailed procedural rules to combat VAT fraud, "provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by EU [law] (principle of effectiveness)." Therefore, the referring court should "determine whether the national measures are compatible with those principles, having regard to all the circumstances of the case."

Regarding the principle of effectiveness and the special procedure laid down by Article 63 of the Portuguese Code, the ECJ considered that it allowed the accused their rights including the right to be heard due to the requirements for evidence and reasons for the accusation, and therefore the company's access to fundamental rights under EU law had not been made more difficult by application of that special procedure.

As regards the principle of equivalence, because the Article 63 special procedure applied to accusations of tax abuse no matter the method, the ECJ decided that it did not unfairly distinguish between infringements of EU law and domestic law, and therefore it adhered to the EU objective of preventing tax abuse while ensuring that the accused has access to their rights. Although the ECJ could not decide the lawfulness of the VAT deduction from the tax paid on the hospital transaction, it ruled that Directive 2006/112 does not preclude the Article 63 special procedure being employed by the Portuguese tax authority during accusations of abuse involving VAT.

The judgment was delivered on February 12, 2015.

European Court of Justice: *Surgicare – Unidades de Saúde SA v. Portugal (C-662/13)*

http://curia.europa.eu/juris/document/document.jsf?text=&docid=162245&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=250010

United Kingdom

The European Court of Justice (ECJ) on February 3 ruled that the UK Government had not breached EU legislation on freedom of establishment with changes made to its group tax relief rules in the wake of the ECJ's ruling in *Marks and Spencer* (C-446/03).

Following the delivery of the ruling in that case, the UK changed its laws to permit cross-border loss relief, subject to certain restrictions, namely that the non-resident member of the group had exhausted all possibility of the loss being taken into account in either the present, past, or future accounting periods. It also required the determination of the latter prospect to be made "immediately" after the end of the accounting period in which the losses were sustained.

The European Commission argued that the new rules on cross-border group tax relief contained in the Corporation Tax Act (CTA) 2010 were unnecessarily restrictive, and in contravention of EU legislation on freedom of establishment.

The Commission's claimed that under the updated UK law, cross-border relief could only be claimed where (1) the legislation in the EU member state in which the subsidiary in question was resident made no provision for losses to be carried forward, or (2) the subsidiary was liquidated prior to the end of the accounting period in which the losses were sustained.

The ECJ argued:

"With regard to the conditions laid down in the CTA 2010, the Court finds the first situation referred to by the Commission is irrelevant. In a situation where the legislation of the Member State in which the subsidiary is based precludes all possibility of losses being carried forward, the Member State in which the parent company is resident may refuse cross-border loss relief without thereby infringing freedom of establishment."

Regarding the second situation, the ECJ observed that the Commission had "not established the truth of its assertion that the CTA 2010 requires the non-resident subsidiary to be put into liquidation before the end of the accounting period in which the losses were sustained in order for its resident parent company to be able to obtain cross-border loss relief."

The Commission's action was therefore dismissed.

The judgment was delivered on February 3, 2015.

European Court of Justice: *European Commission v. United Kingdom of Great Britain and Northern Ireland (Case C-172/13)*

http://curia.europa.eu/juris/document/document.jsf?text=&docid=162042&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=239270

Dateline March 5, 2015

It's little wonder that the US Internal Revenue Service is providing the worst level of service in its history – well, that is, since such things began to be measured at any rate, which was actually only 14 years ago. You need only to look at the additional responsibilities successive administrations have piled onto the much-maligned IRS. It's no longer merely a revenue agency, but is also a welfare agency and an enforcement agency, besides other things. President Obama has been especially guilty of expanding the IRS's remit, primarily with his health care reforms. Obamacare makes more than 40 changes to the Internal Revenue Code in its quest to raise money to pay for the structural changes to the US health care system and to provide the subsidies for individuals that the legislation is meant to protect. Given that the Code is now said to stretch to more than 5,000 pages, this sounds like an insignificant number. But Obamacare has only just begun, and already we are seeing evidence that the IRS isn't coping at all well with the additional workload, having sent incorrect information to an estimated 800,000 taxpayers who purchased health insurance on the federal health marketplace. Indeed, about one-half of those taxpayers who received an overpayment of the tax credit, due to miscalculations by the IRS, have already paid some of it back. And it's not as if the agency doesn't have form: about one-quarter of all Earned Income Tax Credit payments made in the 2013 fiscal year were paid in error, according to a recent report by the Treasury Inspector General for Tax Administration. That's a USD14.5bn mistake. Some, like National Taxpayer Advocate Nina E. Olson, say that the IRS's failings are a result of underfunding. I'm inclined to agree. But at the same time, merely throwing more money at the agency is not the solution. The IRS now has a budget of just short of USD11bn and a staff roster the size of a small city, despite recent reductions in personnel. Maybe it's time to downsize this jack-of-all-trades to what it does best: collecting taxes. That said, the US is by no means the only country with a supercharged tax department; more and more governments are using their revenue agencies to roll out new welfare systems. So I don't hold out much hope of this happening any time soon.

Where I come from, handling stolen goods is a crime, punishable in severe cases by serious jail time. Governments, however, are increasingly proving themselves to be above the law, especially in relation to this particular offense. I refer here to the report that France will allow the UK to share data stolen from a bank by an ex-employee. And yes – you've guessed it – the medium in question contained the details of people who used the services of a particular bank allegedly to avoid tax. Doubtless the more well-heeled and high-profile clients will be named and shamed into paying back taxes and more. "Serves them right," you might say. But hang on a minute. Suppose I broke into my neighbor's house when he was out because I suspected he was up to no good. Do you think I'd be given

a pat on the back or even a reward by the authorities when I present them with the evidence? No, I don't think so either. Two wrongs don't make a right in my book. However, when it comes to tax avoidance, it's as if all sense of proportionality gets thrown out of the window as politicians and liberal commentators whip themselves up into a frenzy of righteous indignation against tax-dodging fat cats. Nobody seems to question where the information came from, or how the authorities came by it, or how much they paid the perpetrator of the leak. It's almost incentivizing people to break data protection and privacy laws. It doesn't say much for the claims of governments that our data will be safe and secure when it's transmitted from pillar to post under automatic information exchange.

It was no surprise when South Africa's Minister of Finance, Nhlanhla Nene, announced an increase in personal income tax in the 2015 Budget. But it could have been a lot worse. Many observers had predicted that the Government would increase value-added tax, or even corporate tax, to address a budget deficit that is threatening to become structural. Doubtless the devil will be in the detail. And the phrase "the Government is to take further steps to combat revenue leakages through erosion of the tax base, profit shifting, and illicit money flows" shows that beneath the more eye-catching measures to help small businesses, a series of complex revenue raisers lurk that will keep the midnight oil burning in many a corporate tax department. There's no getting away from the fact, though, that the Government needs revenue and the Budget therefore raises tax rather than cuts it. And this isn't just a one-off event either. South Africa's economy is slowing, and despite a huge increase in the country's tax base over the last 20 years or so, taxes simply can't keep pace with spending. The current administration's ability to manage the economy, as well as its own finances, must be being called into question by some foreign investors. Let's not forget that foreign investment will also have a substantial role to play in poverty reduction and South Africa's future prosperity.

The Jester