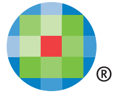

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a closer look

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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How To Avoid Becoming The Next 'Cooked Goose' Gracing The IRS's Offshore Tax Evasion Table

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

If your name was mentioned in the same sentence as Raoul Weil, Carl Zwerner, or Ty Warner, you can rest assured that you haven't been nominated for an academy award or a Pulitzer Prize. Nor did you win the Publisher's Clearinghouse Award. Instead, you'd have joined a disgraced group of taxpayers who have had the misfortune of being targeted by the US government in their crusade to stamp out offshore tax evasion.

In stark comparison is John Doe, a conflicted taxpayer who recently entered the Offshore Voluntary Disclosure Program (OVDP). Neighbors and friends who run into John are a captive audience for him as he wallows in his self-pity. John regrets the decision to enter OVDP and tells his tale of woe to anyone who will listen: "I don't know what I'm doing in this program. I know 500 people with foreign accounts like mine, and they're not coming in." These "good Samaritans" have come to know the true meaning of the expression, "misery loves company."

Obviously, John was exaggerating. However, he likely knows 50 people like him who have chosen not to enter the OVDP, deciding instead to wait it out. Who is making the right decision? In this

Department of the Treasury
Internal Revenue Service

article, I attempt to provide some clarity, not to mention some practical and sound advice, to a real-world dilemma faced by taxpayers who have failed to report their offshore accounts: "Can I be prosecuted for failing to report my foreign bank account such that I have no other choice but to seek shelter in the OVDP bunker?" This question is so pivotal that it cuts right to the heart of a taxpayer's decision to enter the OVDP.

I. Tax Crimes That The Government Relies Upon In Offshore Bank Tax Prosecutions

The government has used one or more of the following tax crimes to prosecute over 100 offshore bank tax cases. The elements of each can be found in the jury instructions for these crimes:

(a) FBAR Requirements

A brief history of the Report of Foreign Bank and Financial Accounts (FBAR) is in order. A once obscure Bank Secrecy Act form, the FBAR is not technically required by the tax code. It was first instituted as a reporting requirement for US persons with overseas accounts. Today, the IRS has breathed new life into the FBAR as a tax enforcement and

revenue-raising tool. The IRS has administered and enforced the FBAR since 2003.

Who must file an FBAR? Any US person, including individuals, corporations and trusts, who hold more than USD10,000 in a foreign account at any point during the calendar year must file annually an FBAR. An FBAR must be filed for a range of accounts, including savings and checking accounts, brokerage and securities accounts, certain types of insurance policies, and non-cash assets like gold.

The maximum value of an account is defined as the largest amount of currency – and non-monetary assets – that appear on any quarterly or more frequent account statement issued for the year.

(b) Willful Failure To File An FBAR (31 USC §§ 5314 And 5322(a), And 31 CFR § 1010.350)

Willfully failing to file an FBAR is a felony that is subject to criminal penalties under 31 USC. § 5322. A person convicted of failing to file an FBAR faces a prison term of up to ten years and criminal penalties of up to USD500,000. In order for the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt:

Those who keep their finger on the pulse of the criminal tax enforcement system know all too well that not every case involving the failure to report an offshore bank account is prosecuted. Instead, the Department of Justice (DOJ) Tax Division is very selective when it comes to deciding which cases to bring. As should come as no surprise, it prefers to cultivate "winners" and not "losers." Indeed, a conviction helps the DOJ maximize the deterrent effect of the criminal tax enforcement system while an acquittal might suggest that the taxpayer could "get off" with the "right" attorney standing by his side.

As a result, the DOJ tends to prosecute only those cases where the taxpayer's conduct was particularly egregious. The most important question faced by every taxpayer with an unreported offshore account is: "How likely is it that I will be prosecuted?" In other words, is the taxpayer's risk of prosecution *material*?

That question turns on a pestilent word: willfulness. Willfulness is such a critical element of a tax crime that its very presence often answers this vexing question. The more evidence there is of willfulness, the greater the likelihood of criminal prosecution. The less evidence there is of willfulness, the lesser the likelihood of criminal prosecution.

When dealing with willfulness, it is helpful to think of an electromagnet spectrum[1], with short-wavelength radiation at one extreme pole (*i.e.*, gamma radiation) and long-wavelength radiation at the opposite pole. Focusing on these extreme poles, let's substitute "Not willful" for the "short-wavelength" pole and "Definite willfulness" for the "long-wavelength" pole.

Sometimes, the needle is pointing so far in the direction of one of the extreme poles that determining the likelihood of prosecution is all but certain. These are what might be considered "slam dunk" cases for a specific type of disclosure. For example, a taxpayer who falls on the "Definite willfulness" end of the spectrum should not think twice about applying to the OVDP. On the other hand, a taxpayer who falls on the "Not willful" end of the spectrum might consider making a "quiet disclosure" or a streamlined submission.

Determining willfulness is not always so black and white. Instead, it can be as ambiguous as deciphering hieroglyphics. This is analogous to when the needle on the willfulness spectrum is not pointing at one of the extreme poles, but instead is vacillating in the middle. In these cases, assessing willfulness, not to mention the corresponding risk of prosecution becomes exceedingly difficult, requiring nothing short of a careful balancing of the facts both for and against. Needless to say, it should be left to the professionals.

In dealing with these gray areas, one should never forget that there will always be risk. Indeed, a "taxpayer *not* at material risk for prosecution is not the same as a taxpayer at 'no risk' of prosecution."[2] This implies that any person for whom this question is relevant must be willing to assume some risk.

(c) Filing A False Tax Return (IRC § 7206(1))

The tax charge most commonly used by the government to prosecute offshore bank tax cases is Filing a False Tax Return. And for good reason. Filing a False Tax Return requires nothing more than proof of a false item on the return and proof that the false item was material. In other words, the jury must decide whether the item was false and, if so, whether it was material.

Proving materiality is not as difficult as you might expect. Under the law, a statement on a tax return is deemed *material* if at least one of the following conditions exists: (1) it is necessary to correctly calculate the tax due, or (2) it has a direct impact on the IRS's ability to verify the tax declared or to audit the taxpayer's returns.

In order for the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt:

(1) First, the defendant made and signed a tax return that they knew contained false information as to a material matter;
(2) Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and
(3) Third, in filing the false tax return, the defendant acted *willfully*.

(d) Failure To File A Tax Return

Failure to file a tax return is a misdemeanor that carries a maximum sentence of one year in prison for each tax year.

As far as information reporting crimes go, the government's burden to prove failure to file a return is very light. The government must, of course, prove

the minimal amount of income required to invoke the duty to file. However, it need not unleash its holy wrath on the taxpayer by calling to arms a cavalry of Special Agents and Assistant United States prosecutors as would be required to guarantee a tax evasion conviction. The government must prove three essential elements beyond a reasonable doubt:

(1) Defendant was a person required to file a return;
(2) Defendant failed to file at the time required by law; and,
(3) The failure to file was willful.

There is no requirement that a tax be due. In theory, the failure to file timely would be satisfied by any delinquency – even one day. However, the government will not prosecute for a minor delay.

(e) Klein Conspiracy (18 USC § 371)

The defendant is charged in the indictment with conspiracy to defraud the IRS. In order for the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt:

(1) First, there was an agreement between two or more persons to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS of the Treasury Department, by deceit, craft, trickery, or means that are dishonest, in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes;
(2) Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
(3) Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of the members agreeing on a particular overt act that was, in fact, committed.

II. Essential Elements Of Tax Crimes

(a) Willfulness

One small word is all that distinguishes a civil tax matter from a criminal tax matter. That pestilent word is called "willfulness." It is the cornerstone to any criminal tax matter.

In the criminal setting, the government carries the heavy burden of proving – beyond a reasonable doubt – that the taxpayer acted willfully. Willfulness is defined as an "intentional violation of a known legal duty."

(i) Proving Willfulness For Purposes Of The Crime Of Failure To File An FBAR

How do courts interpret willfulness? The only thing that a person need know is that they have a reporting requirement. And if a person has that requisite knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice *not* to file the FBAR. The latter is referred to in legal circles as the theory of "willful blindness."

Under the theory of willful blindness, a jury may infer willfulness whenever a taxpayer intentionally

fails to inquire and learn about his filing obligations. Instead of proving that the defendant intentionally violated a known legal duty, the government need only show that "the defendant consciously avoided any opportunity to learn what the tax consequences were" (*United States v. Bussey*, 942 F.2d 1241, 1428 (8th Cir. 1992)).

At the outset, it is important to recognize that this theory is not widely embraced by all of the circuit courts. There are two reasons. First, it is a "watered-down" substitute for the burden of proof on what is otherwise the most critical element of a tax crime – the *mens rea* element. Very simply, willful blindness is much easier for the government to prove than an *intentional* violation of a known legal duty.

Second, for precisely this reason, willful blindness is ripe for abuse in cases where the government does not have sufficient evidence to prove willfulness under the heightened standard. This is why many courts have found its use to be "rarely appropriate" (*United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several Ninth Circuit cases)). And those that do have restricted its use to cases where the taxpayer has purposely buried his head in the sand like an ostrich to avoid learning about the reporting requirements. The fact that the defendant was negligent in failing to inquire is *not* enough.

How does the government *prove* willfulness in the prosecution of a taxpayer for failing to file an FBAR? Seldom are there any witnesses and only in a rare case would a defendant admit the required state of mind. So what does the government rely on? Indirect evidence. Specifically, conduct or acts from which a person's state of mind can be inferred. These acts are commonly referred to as "badges of fraud."

Ultimately, the jury must "look into the mind of the defendant-taxpayer to determine whether he intentionally violated the statute."[3] To the extent that the government can show the jury enough "badges of fraud" to prove willfulness beyond a reasonable doubt, the government will have satisfied its burden of proving criminal intent through circumstantial evidence.[4]

How many badges of fraud must exist in order for the government to prove willfulness? Two? Three? The premise of this question is flawed. Why? Because it is not the *quantity* of badges of fraud that is determinative of willfulness as much as it is the *quality*. Indeed, the government might have a stronger case against a taxpayer that has three badges of fraud, if those badges are particularly egregious, than it has against a taxpayer that has ten.

However, that's not to suggest that a single badge of fraud, by itself, is enough to prove willfulness, especially if that badge is just as much a characteristic of a legitimate business transaction as it is a fraudulent one. For example, consider an offshore account that is in the name of a foreign shell corporation or foreign trust. Setting up an account in such a form has any one of a number of legal purposes aside

from the fraudulent purpose of concealing ownership in order to evade the reporting of taxes.

(ii) Proving Willfulness For Purposes Of The Crime Of Failure To File A Tax Return

Willfulness is often the battleground in failure to file cases. And it is a battleground where the odds are stacked against the taxpayer who has failed to file. When willfulness exists, it is like the "Helen of Troy," in the sense that the government will mount an offensive as aggressive as the "launching of one thousand ships."

While the government must establish that the taxpayer knew of his duty to file the return, how many taxpayers can legitimately argue that they did not know that they had a duty to file? To the extent that the taxpayer asserts such a defense, it can easily be overcome by a showing that the taxpayer filed returns in earlier years.

How does the government prove willfulness in a failure to file prosecution? The most common way is by a pattern of failing to file tax returns for consecutive years in which returns *should* have been filed. There is also an element of common sense in establishing willfulness. For example, courts will look at such "human factors" as those listed below to determine whether the taxpayer was willful in failing to file: the background of the taxpayer; the filing of returns in prior years; whether the taxpayer was a college graduate with accounting knowledge; whether the taxpayer was familiar with books and records and operated a business; and what type of income the taxpayer earned.

How about defenses? The case of *United States v. McCorkle*, 511 F.2d 482 (7th Cir. 1975) (*en banc*) furnishes a list of defenses that have previously been asserted but which have gone down in flames. They can be grouped in the catch-all category of "factors beyond the control of the taxpayer." As such, they range from the sublime to the ridiculous: the defendant had no funds available to pay his taxes, the defendant feared that the IRS was going to attach a lien on his property, the defendant was going through a bitter divorce, the defendant did not keep accurate records, and the defendant was contemplating suicide.

(iii) No Willfulness Required For *Klein* Conspiracy

Unlike Code Sec. 7206(1) and 31 USC §§ 5314 and 5322(a), the *Klein* conspiracy does not have a similar willfulness element. Rather, the *Klein* conspiracy merely requires that the taxpayer intentionally enter the conspiracy and utilize deceit, craft or trickery, or at least means that are dishonest. The taxpayer need not know that defrauding the IRS was a "no-no." However, the government must prove that the taxpayer acted dishonestly. In this sense, the *Klein* conspiracy may be easier for the government to prove than the other two crimes.

(iv) Practical And Sound Advice Regarding Willfulness

The ease with which willful blindness can be proven is a stark reminder to taxpayers of the risks inherent in making a quiet disclosure. It is the flashing neon sign in the store window. And if that sign could speak, it

would say: "A quiet disclosure is not an exercise for the faint of heart, the risk-averse, or for anyone without some tolerance for risk."[5] The only guaranteed result is to get in the OVDP and stay in it.

(b) Criminal Tax Deficiency

The second critical element to any criminal tax case is a tax deficiency. Tax deficiency is defined as "additional tax due and owing." You might be wondering why there is so much fuss about tax deficiency when tax deficiency is *not* a required element of any one of the tax crimes discussed above.[6] Indeed, only tax evasion requires tax deficiency as an element of the crime and to date, the government has never charged tax evasion in connection with a foreign bank prosecution.[7]

(i) Tax Deficiency In Connection With The Crime Of Failure To File An FBAR

Although willful failure to file an FBAR does not require a tax deficiency, the government usually does not prosecute taxpayers unless it has evidence of a substantial tax deficiency.[8] Why? There are two reasons. First, criminal tax prosecutions usually result in jail time,[9] thus depriving citizens of what our founders intended to be the most fundamental right protected by the US Constitution: our freedom. And second, the potential backlash from the public. As a preliminary matter, one of the government's primary goals in bringing a criminal tax prosecution is deterrence – in other words, to make an example out of the taxpayer in order to deter others from engaging in similar conduct. But if the government targets a taxpayer with a small tax deficiency, there is a real risk that this strategy will backfire, resulting in a backlash from the public. For example, it may reinforce the public's perception of Uncle Sam as a greedy "big brother" who picks on the little guy. In that sense, the government risks exacerbating the public relations nightmare that has already put it on the defensive in connection with the FATCA controversy.

For this reason, the IRS is often willing to *overlook* the failure to file FBARs, even for consecutive years, so long as the taxpayer has reported and paid tax on *all* offshore income. However, just the opposite is true for a taxpayer who has *failed* to report and pay tax on all offshore income: such taxpayers are pursued as aggressively as an arctic fox chasing a hare.

How much of a tax deficiency must there be before the government will bring a tax prosecution? The unofficial rule is that there must be a USD40,000 tax deficiency for all of the years in question.[10]

(ii) Tax Deficiency In Connection With The Crime Of Filing A False Tax Return

In theory, a false statement could have no effect whatsoever on calculating tax liability, yet still be considered *material* for purposes of violating Code Sec. 7206(1).[11] For example, consider an offshore account that generates no interest and no taxable income (or if it does generate interest, that interest is completely offset by the foreign earned income exclusion and/or the foreign tax credit). Further, assume that the taxpayer fails to report the account on Schedule B not

due to any oversight, but instead because they didn't want the government to know about it.

If you thought that was harsh, it doesn't even come close to taking the prize. As ridiculous as this might sound, a taxpayer could be found to have violated Code Sec. 7206(1) even by over-reporting income and tax. How is that possible? Because filing a false tax return requires a material false statement and over-reporting income is just as much a misrepresentation that could adversely impact the correct amount of tax due and owing as under-reporting income could.

(c) Remaining Elements Of These Crimes

Proving the remaining elements of these crimes is as effortless for the government as lifting a feather. For example, to prove that the taxpayer made and signed a return, the prosecutor need only point to the taxpayer's signature on the return while citing Code Sec. 6064, which states that a taxpayer's signature is *prima facie* evidence – for *all* purposes – that the return was signed by him.[12]

Similarly, to prove that the return contained a written declaration that it was signed subject to the penalties of perjury, the prosecutor need only highlight the jurat beneath the signature space which states that the taxpayer is signing the return under penalty of perjury.[13]

III. Shorthand Formula For A Criminal Offshore Bank Account Tax Case

At the end of the day, an offshore account tax fraud case comes down to proving two key elements:

(1) A substantial tax deficiency, and
(2) Badges of fraud (*i.e.*, acts of concealment concerning the non-reporting of the offshore bank account).[14]

The larger the tax deficiency and the more badges of fraud it can prove, the stronger the government's case becomes.

IV. Government's Standard Of Review For A Criminal Tax Case

The US Department of Justice Tax Division must authorize the prosecution of any and all tax offenses.[15] Before doing so, it must satisfy the following conditions:

(1) There must be evidence supporting a *prima facie* case; and
(2) There must be a reasonable probability of conviction.[16]

This is a trial standard.[17] The entire case is "investigated, reviewed, and processed" with an eye toward how likely a conviction would be if the case proceeded to trial.[18] Assuming the government has a *prima facie* case, that is, the slightest bit of evidence needed to support each element of the crime, then the case will survive a taxpayer's motion to dismiss and proceed to trial.[19] Then, if there is a "reasonable probability" that the prosecutor will obtain a guilty verdict, "the prosecution will be authorized."[20]

V. A Hypothetical Involving A Typical Offshore Bank Case

This hypothetical is based on the one presented in the article entitled "What's Your Client's Criminal

Exposure on His Undeclared Foreign Bank Account," with a few modifications.[21] John is a US citizen. He is a successful businessman with a history of filing individual income tax returns. John is also the owner of an undisclosed foreign bank account which he inherited from his father ten years ago. The account is with Grosser Schweizer Bank, a Swiss bank.

The account was funded with pre-taxed foreign assets that John's father liquidated over a number of years. Presently, the account contains a balance of USD1m and earns interest at the average rate of 2 percent per year.

John has never deposited or withdrawn any significant amounts of money from the account. He does not receive statements, as per his father's arrangement with the Swiss bank, but he visits the bank when he is on vacation in Switzerland. During his last visit, he reviewed account statements and withdrew small amounts of spending money for dinner, wine, and a three-night stay at a five-star hotel.

While John has timely filed his individual income tax returns for the last ten years, he has withheld all information pertaining to his Swiss bank account from the IRS. Specifically, he never disclosed the bank or the interest earned on the account on Schedule B. In fact, he consistently checked the "no" box on Schedule B, which asks the taxpayer if he has a foreign bank account. Nor has John ever filed an FBAR. Finally, John never disclosed his foreign account to his tax return preparer or sought independent legal advice about how to properly report the foreign account.

The IRS subsequently learned about John's undisclosed foreign account. Suspecting that there was some tax "hanky panky" going on, it issued Grosser Schweizer Bank a summons, requesting all of John's account statements for the last ten years. The bank obliged, turning everything over. After reviewing it, the revenue agent referred the matter to CI. CI, in turn, conducted an independent investigation. That investigation culminated in a Criminal Reference Letter being sent to the Department of Justice Tax Division, with a recommendation for prosecution.

The issue is: "How likely is the Department of Justice to prosecute this case?" As a preliminary matter, this case involves inherited funds in a foreign financial account. Generally, having inherited funds in a foreign financial account, without more, is not deserving of willful status by the IRS.

But, as should be obvious, this case involves a lot more than just inherited funds. Very simply, it is just the type of case that is likely to result in a referral to the Department of Justice Tax Division for prosecution. The potential charges include the following:

- Filing a False Tax Return (IRC § 7206(1)); and
- Willful Failure to File an FBAR (31 USC §§ 5314 and 5322(a), and 31 CFR § 1010.350).

The government's case would be built around the two essential elements of these crimes:

- **Substantial Tax Deficiency**: The government is likely to satisfy this element. The account statements prove 2 percent unreported interest income every year on a USD1m deposit.[22] That translates into USD20,000 per year. Over ten years, that is a total of USD200,000 of unreported income.[23] At a tax rate of 35 percent, John's tax deficiency is USD70,000 (0.35 x USD200,000).[24] That is more than enough to satisfy the element of a substantial tax deficiency. Unfortunately for John, that number could grow even larger.[25] Why? In states having a state income tax, if the prosecutor wanted to go for the jugular, she could increase this tax deficiency with the state tax loss. As if that was not bad enough, the sentencing guidelines provide for a two-point enhancement whenever foreign bank accounts are used to perpetuate tax fraud.[26] These two points have the effect of driving the criminal offense level, not to mention the actual sentence itself, into the sentencing stratosphere. What this means is that it is all but certain that John will become a guest of "Club Fed".
- **Badges of Fraud**: Turning to the second and last factor, the government appears to easily satisfy this element too.[27] The government will argue the following:
  - "John lied when he signed his return under penalty of perjury that it was true and correct."[28]
  - "John lied when he checked the box 'no' on Schedule B, failing to disclose that he had a foreign bank account."[29]
  - "John lied when he failed to disclose on Schedule B, the country where his foreign bank account was located."[30]
  - "John lied when he failed to report on Schedule B that he had interest income from a foreign bank account."[31]
  - "John knew he was required to file an FBAR by virtue of the fact that he had been alerted to the FBAR requirement by the information on Schedule B."[32]
  - "John intentionally failed to file the FBAR."[33]
  - "John concealed USD1m in income producing assets and over USD70,000 in unreported income from the IRS by hiding the assets and the income in an undisclosed offshore bank account."[34]
  - "John never told his tax preparer about his 'secret' Swiss bank account."[35]
  - "John never sought any independent legal advice about how to handle his 'secret' foreign bank account."[36]

Of the badges of fraud listed above, none bears on the issue of willfulness more significantly than the size of the account. As one prominent tax attorney has said:

> "The amount of money at stake is critical. In the real world, the biggest factor determining willfulness is the size of the account. If a person has a USD10m account, I don't want to hear he was non-willful, and neither does the government."

To understand how the above badges of fraud could be introduced at trial and how damaging they can be, imagine John taking the stand and being

subjected to a relentless "cross-examination by a skilled prosecutor."[37] To say that it would be the equivalent of placing an infant in the middle of a highway at rush hour would be an understatement.

So what is the answer to the rhetorical question, "How do you know when there is criminal tax 'hanky panky' going on in an undisclosed foreign bank case?" Very simply, when the badges of fraud are such that the prosecutor can look the jury in the eye convincingly and with all of the confidence – or should I say, "cockiness" – of a NASCAR driver who just won the Daytona 500, and state the following: "The only reason why John did not report his Swiss account was so that he could fleece the government out of paying his fair share of taxes." The last sentence of the prosecutor's closing argument would be the coup de grace: "Ladies and gentlemen, if this wasn't willful, then I don't know what is."

As bad as this case might be for John, it could get a lot worse with just a few more bad facts. The following badges of fraud are just as likely to get the attention of the revenue agent examining John's offshore bank account as waving a red flag in front of a bull at a rodeo:

- John maintained his Swiss account in the name of a "foreign shell corporation or foreign trust,"[38] or some other entity typically used to conceal ownership.
- John made several wire transfers from his Swiss account to a US-based investment account.
- Grosser Schweizer Bank was not the original bank to hold the assets. Instead, it was established at "Swiss Miss Bank." John transferred the account from Swiss Miss to Grosser Schweizer Bank after reading a press release in "The Wall Street Journal" announcing that Swiss Miss had been issued a summons by the US government requesting information about US taxpayers who held financial accounts there (or that Swiss Miss had become the target of an investigation launched by the US government).
- Before transferring the account to Grosser Schweizer Bank, John had a private discussion with the bank manager regarding bank secrecy. The manager assured John that Swiss bank secrecy was "impenetrable" and that Grosser Schweizer would never release any information pertaining to his account to the IRS.[39]
- John, with the assistance of personnel at Grosser Schweizer Bank, held the account in the name of a fictitious person or entity.[40]
- John, with the assistance of personnel at Grosser Schweizer Bank, set up a "standby letter of credit or some other loan arrangement with the US branch" of Grosser Schweizer Bank so that he could "use the money in his foreign account as collateral for a loan without bringing it into the US."[41]
- John gave Grosser Schweizer Bank instructions "to hold his bank statements and not to send them to him in the United States."[42]
- John "skimmed taxable income from his business and deposited it into his Grosser Schweizer account without reporting it to the IRS."[43]
- John "survived an earlier civil examination by lying to the IRS" about his Swiss bank account.[44]

You get the idea. The point is that unreported foreign bank cases are not difficult for the government to prosecute. Tax returns and bank returns, by themselves, give the government sufficient ammunition to prove a substantial tax deficiency as well as numerous badges of fraud.

VI. The Audit Lottery: The Government Will Not Find Me!

Many taxpayers are under that illusion that the government "will never get them, either because the government will never find out about them or because the government will never be able to prove the case."[45] Given the limited resources at the government's disposal to investigate and prosecute tax crimes, that belief may not be irrational.[46]

Others believe that even if they get caught, they can avoid being prosecuted by merely paying up and moving on – with the expectation that the criminal problem will go away. Unfortunately, that is wishful thinking. Payment of the tax doesn't necessarily avoid a criminal investigation or prosecution. In appropriate cases, payment may permit the taxpayer to argue that he really wanted to pay the taxes that he owed from the very beginning and, when first advised that he underpaid, moved promptly to pay.

However, the government is not so naïve to accept this argument "hook, line, and sinker." If it did, every target would simply pay the tax. Indeed, "the deterrent effect of the criminal justice system would be gutted if every taxpayer who under-reported his income could do so with the idea that, if caught, all that they would have to do is simply pay any taxes, penalties, and interest."[47]

Taxpayers with this cavalier attitude might just as well be playing a game of Russian roulette. Those who think they can wait until they hear the IRS's drums beating and their guns going off in the distance before acting are sadly mistaken. Indeed, that was the same trap that the holders of UBS foreign bank accounts fell into in 2009. These UBS customers were told over and over again by the Swiss bankers, "Don't worry. Swiss bank secrecy is impenetrable. The US government will never be able to obtain your account information."[48]

And they didn't have anything to worry about, at least until UBS decided that it needed to save its own hide.[49] In one fell swoop, the bank threw its US customers under the bus, "turning over the names and accountholder information of thousands of US taxpayers."[50]

The waiting game is "a dangerous one to play."[51] Indeed, like the last grain of sand passing through the bulb of an hour glass, to the extent that the IRS already knows who you are and that you are the holder of an unreported offshore account, any hope of participating in the Offshore Voluntary Disclosure Program may have been all but lost.[52]

Endnotes

1 This metaphor comes from the creative genius of Professor Jack Townsend, author of the blog, Federal Tax Crimes, available at http://federaltaxcrimes.blogspot.com.

[2] *Id*.

[3] Edward Robbins, Steven Toscher, and Dennis Perez, "What's Your Client's Criminal Exposure on His Undeclared Foreign Bank Account?", *Journal of Tax Practice & Procedure*, CCH, p. 69, October-November 2012.

[4] *Id*., *supra*, 69–70.

[5] *Id*., *supra*, note (1), Townsend, Jack, Federal Tax Crimes.

[6] *Id*., *supra*, at 69.

[7] *Id*., *supra*, at 69.

[8] *Id*., *supra*, at 69.

[9] *Id*., *supra*, at 69.

[10] *Id*., *supra*, at 69.

[11] *Id*., *supra*, at 69.

[12] *Id*., *supra*, at 70.

[13] *Id*., *supra*, at 70.

[14] *Id*., *supra*, at 70.

[15] *Id*., *supra*, at 70.

[16] *Id*., *supra*, at 70.

[17] *Id*., *supra*, at 70.

[18] *Id*., *supra*, at 70.

[19] *Id*., *supra*, at 70.

[20] *Id*., *supra*, at 70.

[21] *Id*., *supra*, 71–72.

[22] *Id*., *supra*, at 71.

[23] *Id*., *supra*, at 71.

[24] *Id*., *supra*, at 71.

[25] *Id*., *supra*, at 71.

[26] *Id*., *supra*, at 71.

[27] *Id*., *supra*, at 71.

[28] *Id*., *supra*, at 71.

[29] *Id*., *supra*, at 71.

[30] *Id*., *supra*, at 71.

[31] *Id*., *supra*, at 71.

[32] *Id*., *supra*, at 71.

[33] *Id*., *supra*, at 71.

[34] *Id*., *supra*, at 71.

[35] *Id*., *supra*, at 71.

[36] *Id*., *supra*, at 71.

[37] *Id*., *supra*, at 71.

[38] *Id*., *supra*, at 72.

[39] *Id*., *supra*, at 72.

[40] *Id*., *supra*, at 72.

[41] *Id*., *supra*, at 72.

[42] *Id*., *supra*, at 72.

[43] *Id*., *supra*, at 72.

[44] *Id*., *supra*, at 72.

[45] *Id*., *supra*, at 72.

[46] *Id*., *supra*, at 72.

[47] Tax Crimes, Townsend, John, Campagna, Larry, Johnson, Steve, LexisNexis, 2008.

[48] *Id*., *supra*, at 72.

[49] *Id*., *supra*, at 72.

[50] *Id*., *supra*, at 72.

[51] *Id*., *supra*, at 72.

[52] *Id*., *supra*, at 72.

Taxand VAT Round Up

by Roman Namyslowski, Taxand, and Par Sundberg, Skeppsbron Skatt

Vital Changes In VAT Deduction Rules For Holding Companies

by Roman Namyslowski, Taxand

Contact: Peter.Fabry@luther-lawfirm.com, Tel. +49 89 23714 24780; Karl.Ober@luther-lawfirm.com, Tel. +49 89 23714 24725; Roman.Namyslowski@taxand.pl, Tel. +48 22 591 7000; lclark@alvarezandmarsal.com, Tel. +44 20 7715 5258

The Polish Ministry of Finance is planning to introduce new regulations which will significantly change VAT deduction rules for holding companies. One of the proposed changes concerns the introduction of the so called "pre-pro-rata." Taxand Germany, Taxand Poland & Taxand UK explore these new regulations and the effect they could have on multinationals in EU member state jurisdictions.

Activities Of Holding Companies That Are Currently Taxed, Exempted And Out Of Scope Of VAT – Current Regulations

Currently, holding companies in the EU are using the pro-rata method (indirect allocation based on turnover) for the purposes of VAT deduction (or in some cases, the method of direct allocation).

Pre-pro-rata specifies the amount of VAT deduction for purchases connected with activities taxed with VAT and which remain outside the scope of VAT. For many holding companies, the pro-rata ratio is relatively high and therefore allows for the deduction of the substantial amount of input VAT from so called "mixed purchases" – purchases connected both with activities taxed with VAT (*e.g.*, management services for subsidiaries) and exempted from VAT (*e.g.*, loans for subsidiaries).

Present rules do not require the inclusion of activities beyond the scope of VAT (such as dividends, in the case of holding companies) when calculating the pro-rata. Therefore, the current VAT deduction rules are favorable for holding companies as they allow the deduction of input VAT with the pro-rata ratio that does not include the purchases remaining beyond the scope of VAT. Moreover, where the holding company does not perform activities exempted from VAT, it is entitled to deduct the whole input VAT amount (both for purchases directly and indirectly connected with taxable activities, *e.g.* lease of office space).

Pre-Pro-Rata – New Regulations And Their Impact On Holding Companies

The regulations proposed by the Ministry of Finance involve the introduction of the so called "pre-pro-rata" to the Polish VAT Act. Pre-pro-rata would specify the percentage of input VAT for purchases which should be allocated to activities subject to VAT and which remain beyond the scope of VAT. The main idea behind the proposed changes is to limit the current right to deduct input VAT connected with purchases which fall outside the scope of VAT for holding companies.

Lack Of Closed List For Activities Remaining Beyond The Scope Of VAT – Risk For Taxpayers

Given the fact that the proposed changes do not contain a closed list of activities remaining out of the scope of VAT, it will be difficult for taxpayers to determine which activities should be considered for the purposes of the pre-pro-rata. Such a conclusion stems from the fact that this list is virtually unlimited and it does not refer only to the activities explicitly specified as remaining out of the scope of VAT, but also to all other business activities performed by taxpayers which are of economic value, for example:

- Dividends;
- Contractual penalties;
- Deposits;
- Sale of receivables;
- Creation of provisions;
- Receipt of interest from banks;
- Value of the taxpayer's own work, *etc*.

Without a closed list of activities which remain beyond the scope of VAT, taxpayers will never be certain whether they have taken into account all activities remaining out of the scope of VAT when calculating the pre-pro-rata ratio.

Important – Holding Companies May Choose A Method Of Calculation For The Pre-Pro-Rata

The Polish Ministry of Finance does not plan to introduce regulations specifying the method of calculation of the pre-pro-rata. According to the Ministry, such calculations should take into account "the specific nature of the activities" performed by each taxpayer. Such wording may be dangerous for taxpayers as it leaves freedom of interpretation for the tax authorities.

On the other hand, this wording may also provide taxpayers with a certain degree of protection, as they will be entitled to create their own method of calculation of pre-pro-rata which will have to be authorized by the tax authorities. Therefore, taxpayers will be bound to use the method that was agreed with the tax authorities. The opportunity to discuss the method of calculation of the pre-pro-rata with the tax authorities, and subsequent authorization of such a method, will allow taxpayers to minimize the risk connected with the lack of a closed list of activities which remain outside of the scope of VAT.

The Polish example is not the only one – other member states have introduced, or are to introduce, similar provisions. As the subject is not clearly regulated by the EU Directive, the approach of

particular member states could be different. However, all countries will definitely see an impact on the level of VAT deduction.

The UK tax authorities, for instance, have just updated their guidance on VAT recovery by holding companies, indicating they will pay closer attention to identifying costs that relate to shareholding activity and therefore where VAT recovery may need to be blocked.

The German Federal Tax Court (BFH) has referred questions to the European Court of Justice (ECJ) regarding VAT groups and input VAT deduction by a management holding company. The references are pending at the ECJ. In particular, the dispute questions the deduction of input VAT by holding companies in connection with the purchase of shares in its subsidiaries. Generally, the BFH has rejected a full input VAT deduction. The incoming purchases would at least – if not primarily – also serve the purchase and the keeping of the shares (out of scope of VAT).

However, the BFH questions whether such a proceeding would violate the principles of the ECJ's *Cibo Participations* (C-16/00) decision, which states that there is a direct and immediate link between the services purchased by a holding company with respect to the acquisition of shares in a subsidiary, and any output transaction or transactions in respect of which VAT is deductible.

Taxand's Take

For multinationals based in Poland, it is important to note all binding tax rulings to ensure compliance. For taxpayers, it will result in additional work and a reduction in the amount of input VAT that can be deducted. Taking into account that only a few weeks may remain between the enactment of the changes to the VAT Act and their implementation, taxpayers do not have much time to prepare themselves.

For multinationals in all member states, it should be emphasized that, as the result of planned changes, all current methods of input VAT deduction on mixed purchases will have to be verified and modified accordingly, depending on the state rules where the company operates. Multinationals should consider which model of calculation should be established by the company to maximize the amount of input VAT that could be claimed, and prepare the proper documentation of evidence for the relevant tax authority.

ECJ Focus: How Skandia Ruling Affects VAT Exempt Business Activities

by Par Sundberg, Skeppsbron Skatt

Contact: Martijn.jaegers@taxand.nl,
Tel. +31 20 43 56 414; par.sundberg@skeppsbronskatt.se, Tel. +46 8 522 441 58

The European Court of Justice (ECJ) has come to the conclusion that cross-border transactions (supply of services) within the same legal entity are a taxable supply for VAT purposes, if one fixed establishment of that legal entity is part of

a Swedish VAT group. The outcome of the court decision will likely have a huge and negative impact on the financial industry within the EU. Taxand's global indirect tax service line discusses this landmark case and how it will impact VAT exempt business activities.

Skandia America Corporation (SAC) was a US-based legal entity that was set up by the Swedish insurance group Skandia. The purpose of SAC was to act as the purchasing entity of all IT services needed by the Skandia Group, globally. After the establishment of SAC, all externally acquired IT services were supplied to SAC and SAC in turn rendered the IT services "internally" with a mark-up on its fee towards all Skandia entities, globally.

In this context, SAC also established a Swedish branch through which SAC provided its IT services to all Swedish Skandia entities. In Sweden, Skandia had also established a national VAT group in accordance with Article 11 of the European VAT Directive (Directive 2006/112). In 2007, the Swedish branch of SAC became a member of the Skandia VAT Group.

In accordance with the principles laid down in the *FCE Bank* case (C-210/04), Skandia did not account for any Swedish VAT for the IT services "allocated" between the US-based head office of SAC and its Swedish branch. Since the services supplied to the Swedish Skandia entities by the Swedish branch were supplied within the Swedish VAT group of Skandia, no Swedish VAT was charged on these supplies. Therefore, a very VAT-effective structure was established by creating the global purchasing entity outside the EU, since no European VAT from any member state would be charged towards SAC as the rendered IT services were deemed to be supplied in the US, according to the place of supply rules applicable at that time.

The Swedish Tax Agency (STA) did challenge the structure and decided to charge Swedish VAT on the supplies of IT services from SAC to the Swedish Skandia Group. The reasoning for the standpoint taken by the STA was that the IT services were rendered to a Swedish VAT group in which the Swedish branch of SAC was a member. These IT services could not be looked upon as internal services rendered between different establishments of the same legal entity (the same taxable person), but rather as services rendered between two separate taxable persons.

In short, the STA took the view that the existence of two separate taxable persons is the decisive factor when determining if services that are supplied cross-border between two establishments of the same legal entity are of a taxable nature or not.

Skandia brought an action against the decisions by the STA before the court, and the court in turn decided to refer the case to the ECJ.

The questions referred by the local county court in Sweden to the ECJ were as follows:

- "Do supplies of externally purchased services from a company's main establishment in a third country to its branch in a Member State, with an

allocation of costs for the purchase to the branch, constitute taxable transactions if the branch belongs to a VAT group in the Member State?"

- "If the answer to the first question is in the affirmative, is the main establishment in the third country to be viewed as a taxable person not established in the Member State within the meaning of Article 196 of [the VAT Directive], with the result that the purchaser is to be taxed for the transactions?"

With regards to the first question, the ECJ discussed the principles laid down in the *FCE Bank* case and again stated that transactions/allocations between two different establishments of the same legal entity do not constitute a taxable supply of services from a VAT perspective, since these establishments cannot be regarded as two separate taxable persons. After that, the ECJ stated: "However, it is common ground that Skandia Sverige is a member of a VAT group, created on the basis of Article 11 of the VAT Directive and therefore forms with the other members a single taxable person. For VAT purposes, that VAT group was allocated a registration number by the competent authority."

Based upon this, the ECJ determined that: "Therefore, for VAT purposes, the services supplied by a company such as SAC to its branch which, such as Skandia Sverige, belongs to a VAT group, are considered not to be supplied to that branch but must be regarded as being supplied to the VAT group." And the conclusion by the ECJ was that "supplies of services from a main establishment in a third country to its branch in a member state constitute taxable transactions when the branch belongs to a VAT group".

As regards the second question, the ECJ stated: "In those circumstances, and where it is also not disputed that the company which supplied those services is located in a third country and that it constitutes a separate taxable person from the VAT group, it is that group which, as the purchaser of the services for the purposes of Article 56 of that directive, is liable for the VAT pursuant to the exception in Article 196 of the VAT Directive."

The ruling given by the ECJ in the SAC case seems both very clear and straightforward. It is very likely that the tax authorities in all member states, where the concept of VAT grouping in accordance with Article 11 of the VAT Directive is utilized, will carefully analyze the ruling and implement it, increasing the VAT burden within the financial sector.

However, there is a current lack of clarity for taxpayers on how the tax authorities in different member states will apply the case. Will the case be referred for retroactive assessments? Or will the tax authorities instead only apply the case going forward? Due to local administrative policies, practice may prove that this depends on the member state involved. Much is still unclear at this point, as some member states are still reviewing their response to Skandia.

Taxand's Take

It is apparent that the consequences of the outcome in the SAC case will be costly in terms of additional

non-deductible VAT in all business sectors where VAT exempt activities are carried out. A lot of business restructuring activities must be considered in order to reduce the negative impact of the case. Although the ruling is to a certain extent clear and easy to read, there are a number of questions that remain unanswered. For instance:

- Will the same principles apply in the reverse situation where the services are provided by an EU established head office, included in a VAT group, to its branches outside the EU?
- What if third countries are not involved and the supplies are rendered between member states?
- Will taxpayers receive sufficient time to update their enterprise resource planning (ERP) systems?

The case opens many discussion points. Some of these may actually be to the benefit of the taxpayer: for example, where an EU-based VAT group provides financing to branches located outside the EU. Multinationals should think of reassessing the use of cost sharing agreements and take into account that the ERP set-up for branch VAT group supplies needs to be updated to cope with this new reality in a different way.

Topical News Briefing: Sense In Short Supply

by the Global Tax Weekly Editorial Team

After what feels like decades of discussion, preparation and globe-trotting propaganda, the EU's place of electronic supply circus has finally touched down and is in force from today. Has it all been worth it? Will it seem one day to have been worth it? As with many of the EU's grand principles, it is impossible to cavil at the declaration of intent at the topmost level: who could disagree with the principle of freedom of movement? Or with the idea that there should be rules to limit the production of carbon? Why is it then that when implemented, such self-evidently good ideas come a cropper on the rock of practicality?

The answer must be that, however correct the original principles, they were fleshed out and put into effect by a well-meaning but impractical (and above all unelected) bureaucratic elite, at the mercy of producer lobbies. The entire EU legislative process is shot-through with high-minded, dilettante angels dancing on the heads of their pins, and does not meet the real world until the two have nothing useful left to say to each other. Immigration is almost wholly a good thing; but only the EU could have opened borders between Belgravia and Belgrade without putting in place any kind of cultural bridge; or have tried to browbeat the US Congress into going along with a foreign territorial tax on jet engine emissions. The Chinese simply refused to pay it, and the EU was eventually forced into the multilateral negotiations it should have undertaken in the first place. In contrast, there are plenty of examples of balanced international treaties arrived at by informed, consenting parties, and these are usually successful in operation.

Now we come to the VAT. Regrettably, sales and consumption taxes are probably unavoidable in a modern, "developed," and therefore highly taxed economy. It is a common complaint that they are regressive (*i.e.*, that they impinge more heavily on the poor than on the rich), but this is dealt with through a combination of lower rates and exemptions. They are transparent, easy and moderately cheap to collect, and high registration thresholds limit their impact on new, small businesses.

So what's to complain about? In the case of the electronic services VAT, almost everything! First of all, it is regressive to a fault: Marie Antoinette may have thought that cake (zero-rated) is the answer, but for stay-at-home Polish software developer Patricia (seed bed for small company start-ups), top rate VAT on a high proportion of her work expenses is a disaster. Brussels will say primly: "Well, before, she and the supplier would have cheated." Quite right, and who would be surprised? Clearly, the new system is in restraint of trade, both domestic and international. There is no exemption threshold, remember: you are in Sydney and you sell a development tool to a Pole, you have to collect VAT at the full Polish rate. Not only that, you have to collect reams of data about your customers, including an IP address. Patricia is

using her husband's home computer, and no, he is not willing to give his IP address to Brussels. The whole thing is utter lunacy in the real world, and will lead to more cheating, not less. MOSS: Mini One Stop Shop – do us a favor – Missed Opportunity in SpadeS is more like it.

Recent Transfer Pricing Developments

by Duff & Phelps

Recap Of UK's December 2014 Finance Bill

by Shiv Mahalingham and Richard Newby, both are London-based Managing Directors, Duff and Phelps

The December 2014 Finance Bill issued by HM Treasury and HM Revenue & Customs (HMRC) saw the introduction of a proposed diverted profits tax (DPT). The key features are highlighted below:

- The regulations take effect for accounting periods beginning on or after April 1, 2015 (transactions entered into before this date are included where tax advantages are relevant for tax returns filed after April 1, 2015);
- The proposed DPT's focus is on multinational groups and transactions where the main purpose (or one of the main purposes) is to avoid a charge to corporation tax, which should ensure that in most cases commercially-based planning is not impacted;
- The draft legislation proposes that DPT should apply when either:
  - (1) a charging notice is issued by HMRC; or
  - (2) a group notifies HMRC that the rules apply (the draft legislation includes a self-assessment requirement).
- All businesses will need to assess the potential application of DPT to their circumstances in order to conclude whether or not they must notify HMRC of being within the charge to DPT;
- The 25 percent tax will be levied on those profits "deemed" to have been diverted (artificially) from the UK to another jurisdiction through either of the following two tests:
  - (1) the avoidance of a UK permanent establishment; or
  - (2) the transfer of profits to low-tax entities in circumstances where there is a lack of economic substance.

There is an exemption for businesses with UK sales less than GBP10m. More information on the Finance Bill can be found at https://www.gov.uk/government/collections/finance-bill-2015.

Duff & Phelps recommends that groups with UK operations review their existing transfer pricing to determine whether or not the DPT rules apply (and therefore whether they have a duty to notify HMRC, and a potential financial impact). With respect to new transfer pricing design, it has never been more critical to build pricing around legitimate business changes, demonstrate economic substance, and establish the commercial (non-tax) benefits of any changes.

Duff & Phelps is holding a series of meetings with HMRC's Policy Division to push for a no-names guidance/clearance process that can be provided to groups who are uncertain whether the regulations apply.

OECD Releases 2013 Mutual Agreement Procedure Statistics

by Sarah Stauner, Analyst, Duff and Phelps

The Organisation for Economic Cooperation and Development (OECD) recently released the annual statistics on the mutual agreement procedure (MAP) caseloads for all of its member countries as well as some partner economies. These annual statistics are provided to improve the timeliness of processing and completing MAP cases under tax treaties, and to increase the transparency of the MAP process to the public. This information will also prove useful in developing and interpreting longer-term trends within the MAP caseloads and will aim to improve dispute resolution processes.

The available MAP statistics by OECD member countries and some partner countries include:

- Opening inventory of MAP cases on the first day of reporting;
- Number of MAP cases both initiated and completed during the reporting period;
- Ending inventory of MAP cases on the last day of the reporting period;
- Amount of cases closed or withdrawn with double taxation during the reporting period; and
- Average cycle time for cases that were either completed, closed, or withdrawn during the reporting period.

These statistics, as well as additional details on the number of new MAP cases and the inventory of open MAP cases for OECD member countries and some partner countries, can be found at http://www.oecd.org/ctp/dispute/map-statistics-2013.htm.

Transfer Pricing Considerations In Africa

by Rod Koborsi, VP and Joe Sun, Analyst, Duff and Phelps

Broader transfer pricing regimes, either through the application of international guidelines and/or the development of local regulations, continue to be introduced in developing countries. This uptick has been supported by the activities of intergovernmental organizations, such as the United Nations (UN) and the OECD. Specifically, in May 2013, the UN released a *Practical Manual on Transfer Pricing for Developing Countries* (http://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN_Manual_TransferPricing.pdf), which effectively provides recommendations on how developing countries can apply the OECD Transfer Pricing Guidelines to leverage international best practices in building out local resources and capabilities. In a similar vein, in November 2014, the OECD released a *Strategy for Deepening Developing Country Engagement in the Base Erosion and Profit Shifting (BEPS) Project* (http://www.oecd.org/newsroom/developing-countries-toplay-greater-role-in-oecdg20-efforts-to-curb-corporate-tax-avoidance.htm).

Emergence Of Local Transfer Pricing Provisions In Africa

In Africa, an increasing number of countries, including Angola, Ghana, Kenya, Nigeria, Tanzania, and Uganda, have recently introduced transfer pricing provisions. The UN and the OECD continue to provide these countries with recommendations on how to focus their limited resources with respect to implementing their transfer pricing policies. In addition, African countries are receiving support from the African Tax Administration Forum (ATAF), which will represent these countries in fighting BEPS in the region. For example, ATAF has committed to helping build "toolkits" used to support the implementation of BEPS measures and address issues specific to developing countries in the African region.

Implementation Obstacles

While there has been an uptake in transfer pricing policy introduction, and continued support from interested parties, there are still many difficulties associated with implementation. One such issue was recognized by the OECD in its March 2014 paper addressing concerns about the availability and quality of financial information, which can generally be an obstacle when applying transfer pricing methodologies in developing countries, and particularly so in African countries (for further information, see http://www.duffandphelps.com/expertise/publications/pages/ArticleDetail.aspx?itemid=339&list=Articles).

Publicly available and reliable comparable companies in Africa are few and far between. Practitioners generally recommend considering comparable companies in the broader EMEA (Europe, Middle East, and Africa) region or developing a global comparable set for tested parties in Africa. In doing so, reasonable adjustments should be considered. For example, working capital adjustments employing local short-term interest rates to account for differences in risk and return between the African-based tested party and the comparables may be appropriate. In current market conditions, rates in African countries will generally be higher than in the EMEA region. For example, as of November 2014, the Nigerian short-term interest rate was approximately 13 percent, which is substantially higher than that of most European countries.

Miscommunication And Misinformation

MNCs operating in developing countries, specifically those in Africa, should keep up-to-date with the recent developments in the region and further be aware that transfer pricing measures will inevitably be implemented in most African countries in the near future. Additionally, MNCs should review current country-specific transfer pricing rules and discuss with their advisors the risks under the current transfer pricing landscape. For example, MNCs should assess whether contemporaneous documentation is required or offers penalty protection, if Advanced Pricing Agreements (APAs) are viable options, and if high penalties exist to help mitigate transfer pricing risks in Africa.

Given that transfer pricing requirements are relatively new for many jurisdictions in Africa, auditing teams are still becoming familiar with transfer

pricing. Business leaders in Africa have complained that local tax auditors' knowledge of transfer pricing is limited. As a result, miscommunication and misdirection may lead to long-drawn-out audit processes and inaccurate transfer pricing assessments. MNCs can mitigate these issues by documenting material transactions in a global or regional transfer pricing report format to reduce misinformation, clearly listing the steps taken in assessing the tested transaction.

Microsoft Files Complaint Against The IRS

by Sherif Assef, Managing Director, Duff and Phelps

The use of outside experts by the Internal Revenue Service (IRS) in transfer pricing audits is coming under some scrutiny. In September 2014, Microsoft Corporation filed a Freedom of Information Act request seeking information, including a contract and related records, regarding the IRS's engagement of the law firm Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn") to assist in a transfer pricing audit covering the years 2004–2009. As the requested information had not been fully provided by the statutory deadline, Microsoft has filed a complaint against the IRS in the US District Court for the District of Columbia, charging that the IRS had "unlawfully withheld" the relevant information.

Microsoft's concerns with Quinn's involvement may stem from the firm's emphasis on business litigation, as opposed to tax or transfer pricing, raising questions as to Quinn's proficiency with regard to the issues under review in the IRS audit. Moreover, Quinn's role seems to significantly exceed that usually assigned to outside contractors by the IRS. Rather than provide analysis or testimony in discreet and well-defined areas which may turn up during audit (*e.g.*, intercompany pricing or valuation of assets), Quinn looks to be partnering with the IRS in examining Microsoft's tax returns for the years in question, and could also conceivably participate in questioning Microsoft personnel. (In July of this year, the IRS issued new rules allowing private contractors to participate in taxpayer examinations – see http://www.irs.gov/irb/2014-28_IRB/ar09.html.) To many observers, this represents delegation of a basic governmental function by the IRS.

The hiring of Quinn in this expanded role, along with the IRS rule change that made it possible, may be linked to a perceived lack of expertise in certain matters at the IRS, lack of resources, or both. (The resource issue will not be helped by last week's federal government spending agreement which further reduces the IRS's annual budget.) In addition, given Quinn's focus on litigation, it may signal a more aggressive IRS approach to transfer pricing audits.

To review a complete copy of Microsoft's complaint, see http://www.procedurallytaxing.com/wp-content/uploads/2014/11/MS-FOIA-Complaint-11_24_14Final-Signed.pdf.

Equity Infusion Not Considered Income, Rules Bombay High Court

by Johnathan Parrish, Analyst, Duff and Phelps

Following on the heels of the Vodafone ruling, the Indian subsidiary of Royal Dutch Shell Plc, Shell

India Markets Pvt. Ltd (Shell India), won its case in the Bombay High Court against the Income Tax Department of India. Specifically, the case related to the alleged undervaluation of 870 million shares issued by Shell India to an overseas group entity, Shell Gas BV, in November 2014.

The original shares were issued by Shell India at 10 crore a share. The share valuation methodology was challenged by the Income Tax Department of India, who posited that the shares should have been priced at 180 crore a piece, a significant increase in price. As such, proposed adjustments of 15,000 crore (USD3.6bn) and 3,000 crore (USD0.6bn) were made for the periods of 2007/08 and 2008/09, respectively, to the taxable income of Shell India. Ultimately, these adjustments were denied, and the income of Shell India was reduced to its original level prior to the adjustments.

Issuing shares as a way of funding subsidiaries has become a common practice of multinational corporations (MNCs). While disputed by the Income Tax Department of India, MNCs tend to view these transactions as capital transactions that fall outside the scope of transfer pricing regulations and, to date, this practice has been upheld by India.

The UK Diverted Profits Tax: More Questions Than Answers

by Stuart Gray, Senior Editor, Global Tax Weekly

The UK Government has published draft legislation for its controversial diverted profits tax[1] (DPT) following its announcement by Chancellor of the Exchequer George Osborne earlier this month. However, while the draft was intended to clarify the Government's intentions, it seems to have had the opposite effect, and questions remain to be answered about the scope, application and legality of the DPT, as well as its potentially negative consequences for UK competitiveness.

Introduction

The DPT was announced by Osborne in the Autumn Statement on December 3, alongside tax cuts designed to pique the interest of voters as the UK gears up for a general election in 2015. The fact that the DPT won't affect voters, but will punish multinationals at a time when the public has become increasingly outraged at the international tax planning practices of multinationals, probably explains the timing of this new tax. But Prime Minister David Cameron's Government may well be creating a rod for its own back, with business groups and tax advisors warning that it could drive investment away from the UK and pre-empt the conclusions of the OECD's base erosion and profit shifting (BEPS) work — a precedent that other nations may be tempted to follow, thus undermining the goals of the BEPS project.

Affected Taxpayers

According to a guidance note issued by the Government on December 10, the DPT will affect businesses that enter into arrangements to divert profits that reduce the UK tax base by either:

- designing their activities to avoid creating a taxable presence (a permanent establishment) in the UK; or
- creating a tax advantage by using transactions or entities that lack economic substance.

An Overview Of The DPT

The DPT is a charge on "diverted profits." Its main objective is to counteract arrangements used by large groups (typically multinational companies (MNCs)) that would otherwise erode the UK tax base. DPT applies in two situations. The first is where a foreign company exploits the permanent establishment rules. The second situation is where a UK company or a foreign company with a UK taxable presence creates a tax advantage by using transactions or entities that lack economic substance.

In particular, the DPT will apply in cases where a person is carrying on activity in the UK in connection

with supplies of goods and services by a non-UK resident company to customers in the UK, provided that the detailed conditions are met. The second rule intends to prevent tax advantages obtained through the use of transactions or entities that lack economic substance. The primary function is to counteract arrangements that exploit tax differentials and will apply where the detailed conditions, including those on an "effective tax mismatch outcome," are met.

The first rule will apply only where the UK person and the foreign company are not small or medium-sized enterprises (SMEs) and the second rule where the two parties to the arrangements are not SMEs (the SME test will apply to the group). The first rule will be subject to an exemption based on the level of the foreign company's (or a connected company's) total sales revenues from all supplies of goods and services to UK customers not exceeding GBP10m (USD15.6m) for a 12-month accounting period. The DPT will not reflect any profits relating to transactions involving only loan relationships.

DPT applies to diverted profits arising on or after April 1, 2015. There are apportionment rules for accounting periods that straddle that date. Affected companies are required to notify HM Revenue & Customs (HMRC) within three months of the end of an accounting period in which it is reasonable to assume that diverted profits might arise. There is a "tax-geared" penalty for failure to do so.

Before a DPT charge is raised, a designated HMRC officer must issue a preliminary notice explaining why the officer considers the DPT applies, how the amount of diverted profits for the accounting period is calculated, who is liable for the tax and when the tax would be payable.

Following this, the company then has 30 days to make representations to the designated officer. The designated officer may consider the representations in relation to certain specified matters, such as in relation to errors or whether an exemption applies, but is not required to take into account any representations relating to transfer pricing or profit attribution in relation to permanent establishments. Such representations, though, may be considered during the review period.

Following the end of the 30-day representation period, HMRC has 30 days to issue a charging notice or confirm that no charge arises. The charging notice will include much of the information included in the preliminary notice, but updated to reflect the representations. The charge itself is at a rate of 25 percent of the diverted profit plus any true-up interest.

Where specific conditions are met and the designated HMRC officer considers that certain expenses otherwise deductible may be greater than they would have been at arm's length, the diverted profit charge will initially reflect a 30 percent disallowance of those expenses.

There can be no immediate appeal against the notice, but following the charging notice there will then be a further 12-month review period within which the group will have the opportunity, among other things,

to demonstrate that they were not liable for the charge or to provide further information to HMRC in relation to the level of the charge (*e.g.*, to show that the level of disallowance of intra-group expenditure in computing the charge is wrong on normal transfer pricing principles). The review period can be brought to a conclusion earlier either by agreement or if HMRC issues a "supplementary notice" and the company then informs HMRC that it wishes to conclude the review. After the review period, if the charge has not been withdrawn, the company will have the right to appeal the charge to a Tax Tribunal.

A company cannot postpone the payment of DPT, which must be paid in full within 30 days after the issue of a charging notice. There is provision for interest and penalties if payment is late. If a foreign company fails to pay DPT, HMRC may collect the tax from related companies.

There are some specific exemptions in the legislation that apply to one or both of the rules mentioned above, including for SMEs, companies with limited UK sales, and where arrangements only give rise to loan relationships.

The UK Government estimates that the new levy would generate GBP25m within its first year, with revenues projected to grow to GBP270m in the fiscal year 2016/17. The levy is expected to generate about GBP350m in each subsequent fiscal year.

The consultation on the draft legislation, launched on December 10, is to run until February 4, 2015. Legislation will then be introduced in Finance Bill 2015 to bring the DPT into effect.

A Problematic And Draconian Proposal

Announcing the DPT in Parliament during the Autumn Statement, Osborne said: "We will make sure big multinational business pay their fair share. Some of the largest companies in the world, including those in the tech sector, use elaborate structures to avoid paying taxes. Today I am introducing a 25 percent tax on profits generated by multinationals from economic activity here in the UK, which they then artificially shift out of the country. That's not fair to other British firms, it's not fair to the British people either, today we're putting a stop to it. My message is consistent and clear – low taxes that will be paid. Britain has led the world on this agenda and we do so again today."

However, given the range of issues that have arisen from the proposals, one wonders whether the DPT has been properly thought through by the Government.

Much has been made of the growing gap in tax competitiveness between the US and the UK, and Britain has benefited from a steady influx of companies from the US and beyond with corporate tax slashed by the current Government from its 2010 level of 28 percent, to 20 percent from April 2015. However, if the alarm bells being sounded by business groups, including from the US, and international tax advisors are anything to go by, the UK risks eliminating its hard-won advantage at a stroke with the DTP.

The United States Council for International Business (USCIB) has warned that the UK's proposal to impose a new tax on "diverted profits" would, if implemented, have a major impact on US-based MNCs. The USCIB complained that the proposed rules would, among other things, impose a new tax on non-resident companies selling goods and services to UK customers by penalizing them for avoiding a UK permanent establishment.

"The UK's proposal jumps the gun on ongoing discussions concerning the scope of taxation rights on non-resident companies," said USCIB Vice President and International Tax Counsel Carol Doran Klein. "USCIB believes that the UK's unilateral assertion of the right to tax so-called diverted profits is an undisguised attempt to bring more tax revenue into the UK, whether consistent with international norms or not."

Chas Roy-Chowdhury, ACCA's Head of Taxation, takes issue with the DPT's collection and enforcement rules, calling the tax a "highly aggressive piece of legislation."

"The process will be for the MNC to report itself to HMRC … and then somehow argue against that reporting once HMRC have imposed the 25 percent charge," he observed. "We could understand if HMRC imposed a DPT charge against the MNC and the company had to then disprove this, but we find it reputationally damaging to the UK where the company has to effectively incriminate itself upfront and then argue its way out of the situation."

Likewise, accountancy firm Moore Stephens has said that the mechanics of assessing the new tax and appealing against it are "draconian." "Companies are required to notify HMRC whether they consider that they fall within the new rules, on pain of a penalty. If HMRC then decides to assess the company to DPT, there are just 30 days to object, and the grounds on which the company can do so are extremely limited. It is then required to pay the tax charged in full within 30 days, with no grounds to appeal or postpone payment. Only after a year has passed, if the company has been unable to reach agreement with HMRC, does it finally have the right to appeal. There seems no justification for singling companies out for this kind of treatment and the balance of power appears tilted hugely in favor of HMRC."

Tax Treaties

A major flaw pointed out in the proposed legislation is that the DTC clashes with the UK's tax treaty obligations not to tax the business profits of a company unless it has a permanent establishment (PE) in Britain.

"The DPT rules are far reaching, complex and raise a number of significant issues," observes Moore Stephens. "In every treaty the UK agrees not to tax the business profits of a company resident in the other country, unless it has a PE [in the UK]. Yet these new rules say that where a foreign company has no UK PE, but certain conditions are met, the UK will tax the foreign company as if it does. This appears to be in blatant

contravention of the treaties and simply calling the new tax 'DPT' doesn't overcome that."

As the DPT would override existing tax treaties, USCIB Vice President Klein warned that the measure would "increase the likelihood of double taxation on companies, which will have a negative effect on cross-border trade and investment."

"It is intended to apply when there is no PE under the relevant rules," Klein said. "Companies should be free to structure their affairs taking into account the rules as they are. If they do not have a PE under those rules, then they should not be subject to tax on their business profits. Countries should not be able to disregard agreed-upon rules simply because they do not like the outcome."

Roy-Chowdhury also fears that other jurisdictions may not accept the UK's classification of the DPT as a non-corporate tax. "We cannot see mutual agreement being obtained from all the UK's double tax treaty partners, and hence subject to rules outside of the UK's treaty obligations. We see these rules – which have been devised to bring into the UK around GBP1bn of economic activity – being challenged by the MNCs; it impacts as being extraterritorial and wrapping-up the UK in significant levels of litigation."

"While we welcome the measure in principle, we need to ensure [that the] legislation does not drive away global companies from doing business and from making tax contributions to the UK Exchequer through the basket of taxes they already pay," he added.

BEPS

As already noted by Klein, this tax proposal is also being seen as yet another example of a unilateral response by a single country to the ongoing work by the OECD on BEPS.

"The goal of the multilateral discussions on BEPS is to reach consensus solutions to identified international tax issues," she stated. "Unilateral assertions of taxing jurisdiction by any country increase the risk that other countries will simply abandon the process and act unilaterally."

ACCA concurs with other critics of the DPT that in the context of BEPS, the UK Government's announcement is very premature. It is urging UK policymakers to instead wait out the completion of the OECD's BEPS work.

Roy-Chowdhury observed: "It would perhaps have been more productive for the UK to have waited for the OECD to have completed its work on BEPS, which will be finalized by the end of next year, before producing this legislation. The UK has jumped the gun and might pay a high cost in realizing even close to a billion pounds or so in extra revenue over a five-year time horizon. Could this be a case of too much too soon?"

Moore Stephens said that it was "surprising and disappointing" that the Government has chosen to take

unilateral action in this way when previously the UK has been a champion of the multilateral, consensual approach adopted by the G20 and the OECD.

"The areas tackled by the DPT were already squarely within the sights of the OECD's Action Plan on [BEPS], elements of which the Government plans to introduce into legislation as early as 2017. Given that the DPT is only forecast to raise GBP25m in 2015/16, and the OECD's final recommendations are due to be published next year, couldn't the Government have waited for these before acting? It is only to be hoped that this breaking of rank does not encourage other territories to adopt unilateral measures into their domestic law – that way lies chaos."

Ambiguities

And with its frequent references to "it is reasonable to assume," the draft legislation has been criticized as ambiguous, introducing a high degree of subjectivity into the tests to determine whether profits have been "artificially" shifted out of the UK. This is expected to make it difficult for a company to determine objectively whether or not it is caught by them.

John Mongan, tax partner at PwC, said: "The UK, like most other countries, has always drawn a distinction between 'trading in' the UK and 'trading with' the UK. The first is taxable here; the second has not been. The internet age has meant that multinationals could make significant profits from sales to the UK without ever being regarded as 'trading in' the UK. These new rules change that and deem such companies to be trading in the UK. The new rules are complex (they run to 28 pages) and will be difficult to operate where there are double tax treaty obligations and interactions with the taxation of the same profits in the companies' home countries. There are lots of conditions in the rules so at this point it's hard to say how many companies will be affected. For such detailed legislation to come ahead of the OECD's reforms is surprising, although the overall theme is consistent."

Copycat Moves

Another worry is that other countries may act on the UK's precedent and introduce similar taxes of their own, tailored to their own particular needs, effectively plowing up the international tax playing field before the OECD has a chance to level it.

As one of the most vocal supporters of the OECD's BEPS work, Australia has repeatedly warned against unilateral responses to the BEPS Action Plan and subsequent recommendations before the project has been fully concluded. As Andrew Mills, Second Commissioner of the Australian Taxation Office for Law Design and Practice, declared in a speech delivered at the Second Annual Tax Forum organized by the Tax Institute of Australia on October 9–10, 2014: "Unprecedented international collaboration is needed to overcome a single-, isolated-country view to tackling [BEPS] issues."

"As multinationals are operating across borders seamlessly by taking a global, top-down view to

structure their operations across countries, administrators and policymakers need to do the same."

Mills said that Australia is at the forefront of efforts to reform the international tax system to keep pace with rapid advances including with respect to globalization and the digital economy.

However, confirming Moore Stephens's fears, Canberra has been quick to jump on the UK's DPT bandwagon, with Finance Minister Joe Hockey recently disclosing that Australia is in negotiations with the UK on potentially copying its plans for a DPT.

Hockey said that he is discussing the legislative changes that would be needed to introduce the tax with Australia's Treasury and the Australian Tax Office. However, he did raise concerns that acting unilaterally may not have the intended results, which begs the question why the Australian Government is so keen to forge ahead with a DPT in the first place.

Conclusion

It remains to be seen whether the UK Government listens to the concerns of businesses and tax advisors – and these will surely be expressed in the consultation process for the DPT – and whether it will act on these concerns, either by substantially redrafting the proposals, or dropping them altogether. The latter would seem unlikely given the DPT's probable popularity with the electorate. But even if the DPT is shelved, the uncertainty caused by the proposals means that a great deal of damage has already been done to the UK's investment credibility, somewhat tragically after the Government spent its first (and possibly only) term in Government building it up. Either way, the international business community will be keenly awaiting the UK Government's next move.

Endnotes

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385741/Diverted_Profits_Tax.pdf

Topical News Briefing: Devolution Or Dissolution?

by the Global Tax Weekly Editorial Team

So the British and Northern Ireland Governments have agreed terms in principle for a Scottish-style devolution of power to the province. If it comes to pass, it will be a further step towards resolution of the Northern Irish problem comparable in scale to the establishment of the power-sharing Stormont government in 1973/74, now 40 years ago.

Historically, and unlike in Scotland, where the current British Tory party has no MPs at all, Tory governments at Westminster were supported and sometimes kept in power by Ulster Unionist MPs. The party itself was called the Tory and Unionist Party. Nowadays that is no longer the case, and the eight Northern Irish Unionist MPs have separate identity at Westminster. This long-time dependent relationship is reflected in the fact that the subvention paid by the British Government to the Northern Irish, known as the block grant, results in per capita expenditure in Northern Ireland which is 25 percent higher than in the UK itself. Of course, all nations have their impoverished regions, but such a major imbalance is seen as increasingly unfair by British voters. The fact that British regions now have their own free-spending legislatures (Stormont, The Scottish Assembly, The Welsh Assembly) and also receive handouts has led to what is known as "The English Question": why should English voters not similarly be permitted to spend their own resources? Needless to say, there would be no agreement forthcoming from English voters to a proposition that mainland taxes should be increased to finance industrial development in Belfast or Glasgow.

The more powers are devolved, the more inappropriate the block grants are going to seem, and that is especially true of Northern Ireland. Yet the sums cannot be made to add up. Needless to say, there was no mention of the block grants in last week's announcement, and it seems likely that the Tories are planning a return to a closer relationship with the Unionists, in which their support for a putative new Tory-led coalition after next May's election is swapped for continuance of the dirty "block grant" system. These are politicians we are discussing, after all. The nitty-gritty of who pays for what is therefore being kicked down the road until after the election.

The financial realities of Northern Ireland are not prepossessing. Even with the UK's newly lowered corporation tax rate of 20 percent from April 2015, Belfast will still have to compete with Dublin's 12.5 percent, and there are many other ways in which Eire has a more friendly business regime than Ulster. It would be impossibly expensive to level up the playing field in all respects; and how will English voters react to an implicit increase in the subsidy? Belfast has already made it clear that it will abolish the Air Travel Tax the moment it is allowed to do so, as has been done by Scotland. A good thing, no doubt, but how can the UK Government follow suit?

Five hundred years of imperialist history and oppression cannot be righted at a stroke, and it may be that the future will be kinder to the efforts of David Cameron and his allies to patch matters up than today's political commentators seem to allow. Downing Street needs to pray that the electorate will see matters in a favorable light, come next May, or this latest episode in the history of the United Kingdom may come to a sticky end in the committee rooms of Stormont.

French Tax Update

by Stéphane Gelin, Partner, CMS Bureau Francis Lefebvre, Paris

Contact: stephane.gelin@cms-bfl.com,
Tel. + 33 1 47 38 44 00

The 2015 Finance Act and the Rectificative Finance Act for 2014 were adopted by the French Parliament on December 18. Certain provisions are under review by the Constitutional Court.

The main provisions are as follows:

- Scope of tax consolidation is broadened: French companies which are 95 percent owned by a common foreign company resident in the EU or EEA will be able to file a consolidated tax return. One of the "sister" French companies would file as the "parent" of the group. *Such an election would terminate existing tax consolidated groups of which the French companies are members, which could have significant consequences*;
- The participation exemption will not be applicable to dividends received from foreign subsidiaries which are not subject to corporate tax locally, or which can claim a tax deduction for dividends paid out. This provision is under review by the Constitutional Court on the grounds that it would jeopardize investments "legally acquired";
- Penalties applicable in case of incomplete transfer pricing documentation are amended. Previously, the penalty could be up to 5 percent of the transfer pricing adjustment, with a minimum EUR10,000. Starting in 2015, the penalty could be up to the higher of 5 percent of the transfer pricing adjustment, or 0.5 percent of the amount of the transactions which have not been documented, with a minimum of EUR10,000. *This will require a change in the documentation approach, for certain taxpayers may have decided so far to invest little or no resources in documenting transactions which were unlikely to be adjusted*. This provision is under review by the Constitutional Court on the grounds that the penalty could be disproportionate;
- Taxpayers subject to a transfer pricing adjustment will be able to eliminate the corresponding withholding tax applicable to the corresponding deemed distribution if they accept the adjustment and obtain a refund from the foreign related party for the corresponding amount within 60 days. The request should be made before the withholding tax bill is issued. *This provision includes in the tax code a solution which was routinely implemented when a settlement was found during a tax audit. It does not preclude the taxpayer from seeking elimination of double taxation for corporate tax through the applicable Competent Authority procedure*;

- Advisors who assist taxpayers to avoid tax through transactions that would be in the scope of the abuse of law rules will be liable to a 5 percent penalty on proceeds derived from such assistance, with a minimum of EUR10,000. The provision will be applicable on transactions realized after January 1, 2015. This provision is under review by the Constitutional Court on the grounds that the advisor would not be in a position to challenge the qualification of abuse of law for the transaction realized by his clients;
- Gains derived from stock redemption after January 1, 2015 will be subject to tax as capital gains for individual and corporate shareholders. *Previously, gains were taxed either as dividend or capital gains depending on the status of the shareholder*;
- Dividends paid to non-resident investment funds will be exempt from withholding tax only to the extent that the French tax administration is effectively in a position to check through the applicable administrative assistance treaty whether the investment fund meets French requirements;
- The first bracket (5.5 percent) of individual income tax is eliminated. Now, the first bracket is 14 percent, applicable after EUR9,690;
- Real estate capital gains realized by all non-residents will be subject to tax at the 19 percent rate. Previously, such rate was applicable only to EU and EEA residents;
- EU and EEA residents will no longer be required to appoint a tax representative for corporate tax, individual tax, and wealth tax purposes.

It should be stressed that a proposal to reinstate the deferral on tax collection in case of an opening of a Competent Authority procedure (which had been withdrawn in the 2014 Finance Act) was not adopted.

Italy Approves 2015 Budget

Italy's 2015 Budget Bill (*legge di stabilità*), the fiscal deficit in which has now been agreed by the European Commission, was also passed by both Houses of Parliament when the Chamber of Deputies approved it on December 22.

Italy's draft Budget, announced after a Cabinet meeting on October 15, 2014, contained some EUR18bn (USD22bn) in tax cuts, mainly to businesses and to low-income households, in an attempt to stimulate the economy.

However, it also set a fiscal deficit-to-gross domestic product (GDP) ratio in 2015 of 0.1 percent below the 3 percent threshold originally imposed for member states by the EU, when it should have, under a previously agreed program, been only 2.5 percent of GDP. A compromise was subsequently reached to set the targeted 2015 deficit at 2.6 percent of GDP, after the Italian Government had agreed to find another EUR4.5bn in new measures.

Part of the additional funds is to be found from an extension of the reverse charge value-added tax (VAT) mechanism to the retail sector. The original Bill had already proposed further reverse charges on real estate and construction services, with all the extensions being subject to EU approval. The reverse charge shifts the obligation to account for VAT to the recipient, instead of the supplier, to counteract fraud.

With regard to VAT, the Budget includes a cut in the rate applicable to e-books and e-periodicals from the 22 percent full rate to 4 percent, and an increase in the rate on wood fuel pellets from 10 percent to 22 percent.

A precautionary measure is retained in that, if Government spending cuts fail to yield the savings anticipated, and unless the Government were then to come up with other measures, there would be a 2 percent hike to the current 10 percent and 22 percent VAT rates with effect from the beginning of 2016, with a further 1 percent increase in 2017. The headline VAT rate could also be increased by a further 0.5 percent in 2018.

The measures remaining in the Budget also include confirmation of the EUR80 (USD98) per month income tax deduction, which was first paid on a temporary basis in May this year; and the extension unchanged for a further year of the tax credits for home restructuring and energy saving expenses.

The inclusion of the labor costs of full-time employees (not on fixed-term contracts) in the calculation of the regional tax on production (IRAP) in 2015 has also been confirmed, as has also the retroactive return of the IRAP tax rate to 3.9 percent in 2014, from the previously agreed 3.5 percent. However, the Budget now includes a 10 percent tax credit for the 1.4m businesses in Italy (such as the self-employed) that have no employees and would otherwise be penalized by the return of the higher IRAP tax rate.

In addition, a new 15 percent fixed tax rate (covering individual and corporate taxes, IRAP and VAT), as against the previous 5 percent regime, is to be introduced for smaller businesses. Rather than being calculated, as previously, on net profitability, the new rate will be calculated on the basis of different coefficients depending on the various sectors of activity, including professionals.

Italy's Minister of the Economy and Finance, Pier Carlo Padoan, confirmed that, in his opinion, the Budget, as approved, is "balanced and contains important measures to stimulate economic growth and job creation."

Canadian Budget Legislation Receives Royal Assent

The Canadian Government's Economic Action Plan 2014 has received Royal Assent, the final legislative step required for the implementation of key tax measures including the new Small Business Job Credit.

The Economic Action Plan 2014 Act, No. 2 received Royal Assent on December 17, 2014. It contains measures announced by Finance Minister Joe Oliver at the Budget in May, and since.

The Small Business Jobs Credit was announced in September. It is worth the difference between the Employment Insurance (EI) premiums paid at the legislated rate of CAD1.88 per CAD100 (USD86) of insurable earnings and the reduced small business rate of CAD1.60 per CAD100 of insurable earnings. It will apply in 2015 and 2016, and any firm that pays employer EI premiums equal to or less than CAD15,000 in those years will be eligible.

The Act also introduces new reporting standards to meet Canada's 2013 G8 commitment to increase transparency for entities operating in the extractive sector. It eliminates graduated rate taxation for trusts and certain estates, and prevents the shifting of certain Canadian source income to no- or low-tax jurisdictions. It adjusts Government policy on the exchange of information, and introduces new conditions for qualifying under the regulated foreign financial institution tax rules.

In addition, the legislation aims to support families and communities by doubling the Children's Fitness Tax Credit and making it refundable, and by reducing the administrative burden on charities.

"Canada's Economic Action Plan benefits all Canadians as we head towards budget balance in 2015," Oliver said.

Luxembourg Supports EU Tax Ruling Reforms

The Luxembourg Government is to provide the European Commission with a list of the tax rulings issued by its tax authorities, along with a list of the beneficiaries of its concessionary tax regime for intellectual property (IP) income.

Luxembourg Prime Minister Xavier Bettel announced that the decision had been made in light of the Commission's intention to review the tax ruling practices of all EU member states, and in view of the proposed European Directive on the mandatory automatic exchange of information on tax rulings.

Bettel said: "The vast majority of EU member states issue tax rulings. Luxembourg is strongly in favor of the creation of a level playing field with regard to international taxation and tax rulings." He added that the Government's decision is "a clear illustration of Luxembourg's commitment to finding common solutions on a European level."

The Commission revealed on December 17 that it is to ask all member states whether they offer tax rulings. If so, they will be asked to provide information on their tax ruling practices and a list of all companies that have received a ruling between 2010 and 2013. The Commission already requested this information from Cyprus, Ireland, Luxembourg, Malta, the Netherlands, and the UK in June 2013. It also previously asked for information on so-called patent box regimes (which offer lower tax rates on IP income) from Belgium, Cyprus, France, Hungary, Luxembourg, Malta, the Netherlands, Portugal, Spain, and the UK.

The new European Competition Commissioner, Margrethe Vestager, said: "I welcome that by today's announcement Luxembourg acknowledges the Commission's powers to investigate their general tax rulings practice under State Aid rules. I understand that the Luxembourg authorities have also decided to withdraw their actions against the Commission's information requests before the European courts."

"I hope and have every reason to assume that going forward my team and I will see good cooperation by the Luxembourg authorities and all other member states in our efforts to tackle unfair tax avoidance."

Businesses Urge Greater Clarity On BEPS

The OECD's base erosion and profit shifting (BEPS) project is facing an uphill battle in reducing business skepticism on inter-governmental tax action, a recent survey has highlighted.

Two global business surveys conducted by advisory firm Grant Thornton have revealed that businesses are skeptical about the success of the BEPS project,

and want greater clarity as to what is acceptable and unacceptable tax planning, even if this provides less opportunity to reduce tax liabilities across borders. The survey of 2,500 businesses in 34 countries revealed that only 23 percent of respondents think the BEPS project is likely to be successful.

Francesca Lagerberg, global leader of tax services at Grant Thornton, said: "Many of the objectives of the BEPS Action Plan are valid … The concern is that the scope is so broad it touches almost every area of international taxation. It's as if in an attempt to get rid of some traffic black spots, the authorities have decided to overhaul the entire road network and require every driver to modify their car."

"Businesses need things in black and white," said Lagerberg. "They have a responsibility to their investors and shareholders to keep costs down. Simply telling them to pay their 'fair share' is not a viable alternative to a clear set of rules or principles."

"We applaud the OECD in taking on this much needed project but we caution the business community that finding a global solution will be very difficult and will not be speedy."

Political Agreement Paves Way For NI Tax Devolution

Plans for the devolution of corporation tax powers to the Northern Ireland Assembly took a step forward recently, after leaders of the main political parties reached an agreement on key outstanding issues.

The Stormont House Agreement was concluded on December 23, after 11 weeks of talks on a range of issues. The agreement states that, in view of the progress made, legislation will be introduced as soon as possible after the UK Parliament's Christmas break. The aim is to devolve corporation tax in April 2017.

The Northern Ireland Executive is also examining a wider range of taxes, to consider whether further devolution could result in any clear economic or social benefit for the province. The taxes under consideration include Stamp Duty Land Tax (SDLT) and Landfill Tax, and the Aggregates Levy. In the case of Scotland, SDLT and Landfill Tax have already been devolved from the UK Government to the Scottish Parliament.

UK Chancellor George Osborne said in his Autumn Statement in December that the UK Government "recognize[s] the strongly held arguments for devolving corporation tax setting powers to Northern Ireland." He pledged that, if Northern Ireland is able to provide sufficient reassurances, the UK Government would introduce legislation before the end of the current Parliament, which is to be dissolved in May 2015.

According to the UK Government, the power to set corporation tax rates could be a powerful tool to help the Executive rebalance the Northern Ireland economy, generate sustainable levels of growth, and drive private sector employment. Northern Ireland shares a border with the Republic of Ireland, which levies a 12.5 percent corporation tax rate – considerably lower than UK corporation tax rate of 21 percent (reducing to 20 percent from April 2015) applicable in Northern Ireland.

Kevin Kingston, President of the Northern Ireland Chamber of Commerce and Industry (NI Chamber), said: "NI Chamber welcomes the fact that an agreement has been reached and that legislation will be introduced as soon as Parliament returns to enable the devolution of corporation tax in April 2017. We encourage the NI Executive to work in parallel on the implementation of key measures to deliver sustainable finances."

EU Tax Commissioner Welcomes Digital Tax Changes

Pierre Moscovici, the European Commissioner for Economic and Financial Affairs, Taxation, and Customs, has welcomed the imminent introduction of new value-added tax (VAT) rules for cross-border e-services that are due to enter into force in the EU from January 1, 2015.

The new rules, which were supported unanimously by member states in 2008, aim to create fairer competition between companies selling e-services. The change concerns EU VAT place of supply rules for business-to-consumer (B2C) supplies of broadcasting, telecommunications, and electronic services, which will newly be taxed in the location of the consumer at the rate in place in that member state.

Welcoming the change, Moscovici said: "So far, a lot of VAT revenues on online cross-border purchases have gone to low-tax member states where large e-firms are based. As of January, new rules will correct this distortion and ensure fair distribution of tax revenues in Europe, as well as creating a level playing field between businesses. Many of member states will therefore see their VAT revenues rise."

Earlier this year, the Commission released a document – "Assessment of the application by member states of European Union VAT provisions with particular relevance to the mini one stop shop (MOSS)" – which may support businesses in coming to terms with the slight differences in arrangements between member states. In particular, it includes information on member states' different VAT rates and whether there is an obligation to issue a B2C invoice, and summarizes the rules in all member states with respect to use and enjoyment provisions.

Czech Republic Amends New VAT Rules

The President of the Czech Republic, Miloš Zeman, has approved last-minute amendments to the country's value-added tax (VAT) rules for 2015, revising requirements relating to the new regular "control messages" that businesses must submit to help the Government counter VAT fraud, and postponing the inclusion of construction sites into the 21 percent VAT rate.

The "control messages" are being introduced mainly to counter missing trader intra-community (MTIC) fraud, also known as carousel fraud. The scam involves the sale of goods across the EU's internal borders without VAT, and their onward sale to the domestic market inclusive of VAT, normally at a discount. MTIC occurs when VAT is collected on the sale of imported goods to the domestic market inclusive of VAT, as the tax collected is never remitted to tax authorities and the seller disappears.

The messages must contain any data that the tax authority deems necessary for tax administration purposes.

One of the new amendments specifies that businesses registered for VAT payments will have until

the 25th day of the following month to make their reports, while self-employed entrepreneurs will now only have to make their reports once every quarter rather than monthly.

Meanwhile, the tax on construction sites will not now be introduced until the start of 2016. The delay is so that construction firms will not have to revise the prices of newly constructed properties in cases where sales have already been agreed for next year.

The start of 2015 will also see the introduction of a new 10 percent VAT rate, as a lower rate for books, pharmaceuticals, and infant formula alongside the existing higher reduced rate of 15 percent. The Government says this will boost household spending, despite misgivings from the IMF.

Australia To Revisit Exemption For Online Retailers

Australia's new Assistant Treasurer, Josh Frydenberg, has said that he intends to push for a review of Australia's goods and services tax (GST)-exempt threshold for imported low-value goods sold by overseas retailers online.

Although many nations exempt imported goods of low value, Australia's exempt threshold of AUD1,000 (USD813) is substantially higher than those elsewhere. Such thresholds are intended to allow some goods to be imported free from GST or value-added tax (VAT) where the cost of collecting tax on those low-value imports could exceed the cost of collection.

However, Australia's threshold is seen as excessive, and the distortions caused by these arrangements have recently been highlighted by the OECD as part of its base erosion and profit shifting (BEPS) work. The OECD has said that greater international cooperation on VAT and customs matters can support reductions in administrative costs, thereby allowing nations to reduce or eliminate these exempt thresholds.

In fact, in a recent annual review of Australia's policies, the OECD recommended that the low-value threshold requires immediate attention. It said: "Australia's low-value threshold is particularly high at AUD1,000 on any single item and is motivating internet retailers to locate outside the country. Tackling this issue is important, not least because of internet retailing's growth potential. One possibility is to require offshore suppliers of low value parcels to charge, collect, and remit the tax, rather than the customs authorities. This could potentially reduce administrative costs and therefore allow for a lower threshold."

The Australia Bureau of Statistics has estimated that Australia's low-value threshold impacted imports worth AUD6.22bn in 2011/12, up from AUD5.375bn in 2010/11. The loss to the Treasury has therefore been put at around AUD622m per year, based on 2011/12 levels, as Australia levies a 10 percent GST rate.

EU Challenges 'Protectionist' Brazilian Tax Perks

The World Trade Organization (WTO) on December 17, 2014, established a panel to examine a complaint by the EU that several Brazilian programs in the automobile, information, communications technology and automation sectors confer tax advantages on domestic products over imports.

At present, goods manufactured in the EU and sold in Brazil face higher taxes than Brazilian products, because domestic products can benefit from exemptions from or reductions in the internal taxes imposed in various sectors. These tax breaks, which have been introduced in recent years, are aimed at encouraging the assembly of products with domestically made parts in Brazil, by subjecting imports of finished goods in particular to high tax rates.

The EU says that the tax on imported vehicles, for example, can be 30 percent higher than the tax collected on Brazilian-made vehicles. When combined with the customs duties levied at the border and other charges, the tax can reach 80 percent of the import value.

The EU also claims its exporters are hurt by a requirement that Brazilian manufacturers must use domestic components in order to qualify for the tax advantages. The EU alleges that the measures help to shield uncompetitive Brazilian manufacturers from international competition and limit the choice of affordable quality products for consumers.

The EU has said it is troubled by the continual extension and expansion of these measures to cover an increasing number of sectors. Brazil has said it regrets the EU's decision to request a panel, arguing that the measures in question are consistent with WTO rules.

WTO Rejects US Appeal In Countervailing Duty Dispute With China

On December 18, a World Trade Organization's (WTO's) Dispute Settlement Body Panel announced rulings in favor of China in a complex case dealing with countervailing duty (CVD) determinations and anti-dumping duties (ADs), mostly resulting from US treatment of China as a "non-market economy" (NME).

The case had originated in 2012, and most of China's complaints had already been upheld by the WTO last May.

The Panel was established on December 17, 2012, to address China's concern that the US was not administering its trade remedy laws in a uniform, impartial and reasonable manner and that the US Public Law 112-99 was inconsistent with the General Agreement on Tariffs and Trade 1994, the Subsidies and Countervailing Measures (SCM) Agreement, and the Anti-Dumping Agreement. The US regretted that China had chosen to pursue its request for panel establishment and noted that its measures were consistent with its WTO obligations. Australia, Canada, the EU, Japan, Vietnam

and Turkey reserved their third-party rights to participate in the Panel's proceedings.

In November, the Chinese Ministry of Commerce (MOC) had disclosed that, in accordance with WTO rules, China and the US had held unsuccessful consultations in Geneva on the latter's amendment to the Tariff Act (GPX Act). China had previously requested consultations on the US imposition, since 2006, of both CVDs and ADs at the same time on 30 of its products which it is said to subsidize – worth some USD7.2bn of its annual exports into the US market.

In March 2011, the WTO Appellate Body had found that the imposition by the US of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of ADs and CVDs, and, indeed, the application of CVDs, against a "non-market economy" (NME) such as China, was inconsistent with WTO obligations.

In addition, last December, the US Court of Appeals decided that the US Congress had also determined in the past that government payments cannot be characterized as "subsidies" in an NME, and therefore that, as had originally been held in the Trade Court in October 2010, CVDs should not apply to NME countries.

It was expected that the Court of Appeal's decision could have forced the US Department of Commerce (USDOC) to terminate the existing CVD orders against products from China, but, in March 2012, the passage of the GPX Act specifically overturned that decision, and tried to preserve the validity of the existing CVDs against NME countries.

The Act also deals with the finding of the WTO Appellate Body concerning the imposition by the US of double remedies, by providing for the USDOC to make a reduction to anti-dumping duties in NME cases where countervailing duties are simultaneously being imposed, if it can be demonstrated that domestic subsidies have inflated the dumping margin, and if the USDOC is able to reasonably estimate an adjustment.

However, according to the MOC, in a call for consultations in September 2012 concerning the passing of the GPX Act, the US had still not resolved those issues. The MOC indicated, on the contrary, that the passage of retroactive legislation in Congress to counteract a previous court decision, and try to legitimize the imposition of countervailing duties on NMEs, is a form of trade protectionism, is not in line with WTO rules, and should be rectified.

The dispute concerns several initiation decisions, as well as preliminary and final determinations in 17 countervailing duty investigations conducted by the USDOC from 2007 through 2012.

On August 22, 2014, China filed an appeal covering most of the issues on which the Panel did not rule in its favor in May. On August 27, 2014, the US filed a cross-appeal of the Panel's preliminary determination relating to the consistency of one section of

China's panel request with Article 6.2 of the Dispute Settlement Understanding. The US did not appeal the Panel's finding that the USDOC's application of a "rebuttable presumption" to determine whether certain entities can be characterized as "public bodies" was inconsistent "as such with Article 1.1(a)(1) of the SCM Agreement." Nor did the US challenge on appeal the Panel's finding that the "public body" determinations made by the USDOC in 14 countervailing duty investigations were inconsistent with the same provision, or the Panel's findings regarding the USDOC's treatment of certain export restraints in two of the investigations at issue.

It appears that China has comprehensively won this tussle with the US; but it is not clear whether the US will readily give in.

New Zealand–South Korea FTA Initialed

The free trade agreement (FTA) between New Zealand and South Korea was initialed by the Chief Negotiators on December 22, 2014.

"Initialing marks the end of the text's legal verification process. It's another milestone as we progress towards bringing the FTA into force," New Zealand Trade Minister Tim Groser said. "The next step is translation of the text into Korean, which will be completed early next year. Following translation, the FTA will be signed."

Groser said that the FTA will deliver real economic benefits to both countries. "It will secure our position in the Korean market and will create more opportunities for traders as tariffs are gradually removed," he said.

On entry into force, tariffs will be eliminated on 48 percent of current New Zealand exports, which will create an estimated duty saving of NZD65m (USD50.3m) in the first year alone. Duties on more than 96 percent of New Zealand's exports, and particularly dairy products, meat, wine, fish and forestry products, will be eliminated within 15 years. In addition, New Zealand will completely remove its duties on all South Korean products within seven years of the agreement coming into force.

The treaty is expected to encourage further exports of electronics, automotive parts, and other manufactured goods from New Zealand, but some sensitive agricultural products, such as rice, have been excluded by South Korea from the agreement. New Zealand imports from South Korea are mainly refined oil, vehicles, electrical goods, iron and steel, and heavy machinery.

Korea is New Zealand's sixth largest export destination for goods and services, and eighth largest import source of goods and services, with total two-way trade of NZD4bn in the year ending June 2014.

Mexico, US Sign Sugar Trade Agreements

On December 19, the US Department of Commerce (USDOC) announced that it has signed

agreements to suspend the antidumping duty (AD) and countervailing duty (CVD) investigations on imports of sugar from Mexico.

USDOC had announced, on October 27, 2014, preliminary ADs ranging from 39.54 percent to 47.26 percent on imports of sugar from Mexico, in addition to the preliminary CVDs ranging from 2.99 percent to 17.01 percent, which were determined on August 26, 2014.

Sugar producers based in the US had requested the duties, arguing that "unfair" subsidies on offer in Mexico have allowed Mexican producers to flood the US market with cheap exports. The US sugar industry claims that it has lost USD1bn worth of business as a result.

According to a previous statement from USDOC's International Trade Administration, the signed agreements create mechanisms to ensure that unfairly traded imports of Mexican sugar do not cause injury to US sugar producers.

The CVD agreement contains provisions to ensure there is not an oversupply of Mexican sugar in the US market, which could cause price declines that threaten the US industry and farmers. Specifically, USDOC will calculate an export limit for Mexico set at 100 percent of US needs after accounting for US production and imports from tariff rate quota countries.

The agreement, signed by both governments, will also prevent imports from being concentrated during certain times of the year, and the Government of Mexico has agreed to establish an export licensing mechanism.

On the other hand, the AD agreement establishes reference prices, or minimum prices, to guard against undercutting or suppression of US prices. The signatories of the AD agreement are USDOC and the main Mexican sugar producers and exporters.

In addition, USDOC emphasized that the agreements do not change the US Department of Agriculture's sugar program, or US obligations under the World Trade Organization regarding sugar quotas.

UNITED KINGDOM - CANADA

Into Force

The protocol amending the DTA between the United Kingdom and Canada entered into force on December 18, 2014.

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

THE AMERICAS

19TH TAXATION OF CORPORATE REORGANIZATION

Federated Press

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

Key Speakers: Mark Brender (Hoskin & Harcourt LLP), Firoz Ahmed (Hoskin & Harcourt LLP), Eric C Xiao (Ernst & Young LLP), Mitchell J Sherman (Goodmans LLP), among numerous others

1/20/2015 - 1/22/2015

http://www.federatedpress.com/pdf/TCR1501-E.pdf

4TH ANNUAL INSTITUTE ON TAX, ESTATE PLANNING AND THE ECONOMY

STEP

Venue: Newport Beach Marriott Hotel & Spa, 900 Newport Center Drive, Newport Beach, California, 92660, USA

Chair: Mark Silberfarb (Chapter Chair, STEP OC)

1/22/2015 - 1/24/2015

http://www.step.org/sites/default/files/STEP%20OC%20Conference%20Brochure%202015%20SCREEN%2026%20August%202014.pdf

16TH TAX PLANNING FOR THE WEALTHY FAMILY

Federated Press

Venue: Calgary Marriott Hotel, 110 9th Avenue, SE, Calgary, AB, T2G 5A6, Canada

Key Speakers: James Meadow (MNP LLP), Melanie McDonald (Borden Ladner Gervais LLP), Doris C.E. Bonora (Dentons Canada LLP), David N. Beavis (Counsel Financial), Michael J. Beninger (Bennett Jones LLP), among numerous others

1/27/2015 - 1/28/2015

http://www.federatedpress.com/pdf/TPWF1501-E.pdf

INTERNATIONAL TAX ISSUES 2015

Practicing Law Institute

Venue: PLI New York Center, 1177 Avenue of the Americas, New York, New York 10036, USA

Chair: Michael A. DiFronzo (PwC)

2/11/2015 - 2/11/2015

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2015/_/N-4kZ1z12a24?ID=223914

INTERNATIONAL ESTATE & TAX PLANNING 2015

Practicing Law Institute

Venue: PLI New York Center, 1177 Avenue of the Americas, New York 10036, USA

Chairs: Dean C. Berry (Cadwalader, Wickersham & Taft LLP), Robert L. Dumont (Deloitte Tax LLP)

2/13/2015 - 2/13/2015

http://www.pli.edu/Content/Seminar/International_Estate_Tax_Planning_2015/_/N-4kZ1z1297k?fromsearch=false& ID;=222616

AMERICAS TRANSFER PRICING SUMMIT 2015

TP Minds

Venue: Biltmore Hotel, Miami, Florida, 1200 Anastasia Ave Coral Gables, FL 33134, USA

Key Speakers: Samuel Maruca (IRS), Michael Lennard (United Nations), Mayra Lucas (OECD), David Ernick (PwC), Sergio Luis Pérez (SAT Mexico), among numerous others

2/19/2015 - 2/20/2015

http://www.iiribcfinance.com/event/Americas-Transfer-Pricing-Conference

ADVANCED INTERNATIONAL TAX PLANNING

Bloomberg BNA

Venue: Treasure Island Hotel, 3300 S. Las Vegas Blvd, Las Vegas, NV, 89109, USA

Chair: TBC

2/23/2015 - 2/24/2015

http://www.bna.com/advanced_lasvegas.aspx

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://www.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/inter_SF2015/

INTERNATIONAL TAX ISSUES 2015 - CHICAGO

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)

9/9/2015 - 9/9/2015

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

ASIA PACIFIC

THE 3RD OFFSHORE INVESTMENT CONFERENCE SINGAPORE 2015

Offshore Investment

Venue: Raffles, 1 Beach Rd, 189673, Singapore

Chair: Nicholas Jacob (Wragge Lawrence Graham & Co)

1/21/2015 - 1/22/2015

http://www.offshoreinvestment.com/media/uploads/The%203rd%20OI%20Conference%20Singapore%202015%20pgs%207-10%20(2).pdf

2015 FINANCIAL SERVICES TAXATION CONFERENCE

The Tax Institute

Venue: Surfers Paradise Marriott Resort & Spa, 158 Ferny Avenue, Surfers Paradise QLD 4217, Australia

Key Speakers: Rob Colquhoun, ATI (Australian Financial Markets Association), Dr Stephen Kirchner (Australian Financial Markets Association), Rob McLeod (EY), Greg Fitzgerald (Macquarie Group), Robert Gallo (PwC), Warren Dunn (EY), Patrick Grob, CTA (Suncorp), among numerous others

2/18/2015 - 2/20/2015

http://eportal.taxinstitute.com.au/StaticContent/Download/1150202M1WD.pdf

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

CENTRAL AND EASTERN EUROPE

CIS WEALTH MOSCOW 2015

CIS Wealth

Venue: Renaissance Moscow, Monarch Centre Hotel, 31A bld.1 Leningradsky prospect Moscow 125284, Russia

Key speakers: TBC

2/16/2015 - 2/17/2015

http://cis-wealth.com/files/1411641516.pdf

WESTERN EUROPE

EMPLOYMENT TAX PLANNING CONFERENCE

IIR & IBC Finance Events

Venue: etc. Venues, The Hatton, 51-53 Hatton Garden, London, EC1N 8HN, UK

Key Speakers: Patrick Way QC (Field Court Tax Chambers), Teresa Payne (BDO), Nick Wallis (Smith & Williamson), Rosemary Martin (Deloitte), Jenny Wheater (Duane Morris), among numerous others

1/20/2015 - 1/20/2015

http://www.iiribcfinance.com/event/Employment-Tax-Planning-Conference/dates-venue

PRIVATE CLIENT PROPERTY TAXATION 2014

IBC

Venue: Radisson Blu Portman Hotel London, 22 Portman Square, London W1H 7BG, UK

Key Speakers: Robert Smeath (Clarke Wilmott LLP), Michael Thomas (Gray's Inn Tax Chambers), Emma Chamberlain (Pump Court Tax Chambers), Marilyn McKeever (Berwin Leighton Paisner LLP), among numerous others.

1/22/2015 - 1/22/2015

http://www.iiribcfinance.com/event/private-client-property-taxation-conference

EMPLOYMENT TAX PLANNING CONFERENCE 2015

IIR & IBC Financial Events

Venue: etc. Venues, The Hatton, 51-53 Hatton Garden, London, EC1N 8HN, UK

Key Speakers: Patrick Way QC (Field Court Tax Chambers), Teresa Payne (BDO), Nick Wallis (Smith & Williamson), Rosemary Martin (Deloitte), Jenny Wheater (Duane Morris), among numerous others.

1/28/2015 - 1/28/2015

http://www.iiribcfinance.com/event/Employment-Tax-Planning-Conference

4TH IBA/CIOT CONFERENCE: CURRENT INTERNATIONAL TAX ISSUES IN CROSS-BORDER CORPORATE FINANCE AND CAPITAL MARKETS

International Bar Association

Venue: Holborn Bars, 138-142 Holborn, London, EC1N 2NQ, UK

Chair: Jack Bernstein (Aird & Berlis)

2/9/2015 - 2/10/2015

http://www.int-bar.org/conferences/conf618/binary/London%20Tax%20Issues%202015%20programme.pdf

20TH INTERNATIONAL WEALTH TRANSFER PRACTICE LAW CONFERENCE

International Bar Association

Venue: Claridges Hotel, 49 Brook St, London, W1K 4HR, UK

Chairs: Leigh-Alexandra Basha (Holland & Knight), Gerd Kostrzewa (Heuking Kühn Lüer

Wojtek), Christopher Potter (Sete), Rashad Wareh (Kozusko Harris Duncan)

3/2/2015 - 3/3/2015

http://www.int-bar.org/conferences/conf603/binary/London%20IWTP%202015%20programme.pdf

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

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

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%202015%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

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

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

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

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

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

INTERNATIONAL TAXATION OF BANKS AND FINANCIAL INSTITUTIONS

IBFD

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

Key Speakers: TBC

9/16/2015 - 9/18/2015

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

WESTERN EUROPE

Italy

The European Court of Justice (ECJ) was asked for a preliminary ruling concerning an Italian company that failed to follow domestic value-added tax (VAT) invoicing requirements for intra-community acquisitions from two other companies, which were established in France and the Netherlands.

The tax authority imposed a VAT assessment and a penalty on the company for failing to register the VAT invoices concerned – being a monthly requirement under Italian law.

On appeal, the District Tax Court dismissed the assessment, but the Regional Tax Court ruled in favor of the authority, stating that "the failure to register was a breach which was not formal but substantive in nature and that it constituted an infringement such as to warrant a notice of reassessment and/or recovery." The company further appealed to the Court of Cassation, arguing that its failure to register the VAT invoices was not a substantive breach and argued that the tax authority had erred in assessing the company's VAT liability. The ECJ was approached for an interpretation of provisions regarding a company's right to deduct VAT in circumstances where that company had failed to register VAT invoices following intra-Community acquisitions.

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

The ECJ said, according to case law, that the right to deduct VAT "is an integral part of the VAT scheme and in principle may not be limited." It said the reverse charge mechanism applies because the transactions were between two member states and the recipient should therefore be entitled to deduct the input tax it incurs for receiving the supply.

The ECJ further stated that EU law allows member states to create requirements for the application of the right to deduct VAT, but they must be not go beyond what is necessary to ensure that the reverse charge procedure has been correctly applied. In addition, it said member states may impose obligations together with the obligations under EU

law for the sake of collecting taxes and preventing fraud, as long as they do not interfere with the principle of neutrality.

Drawing on previous rulings, the ECJ said, with regards the reverse charge procedure, that fulfillment of the substantive requirements may be enough to allow the right to deduct VAT, even if the more formal requirements were not satisfied by the company. A tax authority which identified evidence that the company complied with the substantive requirements cannot therefore prevent the company from applying the right "for practical purposes."

The ECJ concluded that the company in the present case fulfilled all the necessary substantive requirements and should be eligible for an input tax credit on VAT incurred under a reverse charge on goods acquired for use in making taxable supplies. The ECJ concluded that EU law precludes a tax authority from denying the company the right to deduct VAT if that company has fulfilled the most necessary requirements, despite its failure to register its VAT invoices.

The judgment was delivered on December 11, 2014.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=160567&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7842

European Court of Justice: *Idexx Laboratories Italia Srl v. Italy (C-590/13)*

Spain

The European Court of Justice (ECJ) was asked for a preliminary ruling concerning Spain's national law stating that a Spanish tax representative is required when pension funds and insurance services based in other EU member states provide services (for example occupational pension schemes) in Spain. The European Commission was of the opinion that the law was incompatible with European legal provisions with regard to freedom to provide services, and brought an action against Spain when it failed to implement measures to change the law; Spain then approached the ECJ for a ruling.

The Commission argued that requiring a tax representative only in the case suppliers of pension funds and insurance based in other member states was an infringement of the freedom to provide services available under EU law, because it imposed an additional burden on such companies providing services in Spain and therefore discouraged them from doing so. Spain admitted that the law was affecting the freedom to provide services of non-resident companies, but argued that the measure was "justified by the need for effective fiscal supervision and the prevention of tax evasion."

Spain believed that appointing a tax representative in the case of non-resident suppliers reduced the possibility of tax evasion occurring since the representative could be more easily contacted by the Spanish tax authority in case they required more information. In addition, the requirement under Spanish law for the representative to withhold tax

on non-resident pension fund and insurance services meant that foreign companies could fulfill the same obligation under EU law to withhold tax as resident companies.

France argued (in support of Spain) that the tax representative law was "justified by the need to ensure the effective collection of tax, which the Court has recognized as an overriding reason in the public interest." A representative meant that the receivers of the services did not have to withhold tax themselves, which would have made foreign companies less attractive since business with resident companies did not carry the same burden, France claimed. The Commission rejected the arguments of both Spain and France on the basis that appointing a tax representative was not necessary to ensure the efficient collection of tax from the provision of non-resident services.

The ECJ pointed out that EU law prevents the application of any national law that makes foreign provision of services more difficult than the domestic provision of services, or impedes "the activities of a provider of services established in another Member State where he lawfully provides similar services."

Spain argued that the ECJ had stated in the past that the prevention of tax evasion was a legitimate reason for restricting the freedom to provide services according to past cases. The ECJ agreed for the most part that a tax representative was an appropriate measure to ensure effective tax collection; however, exchange of information between tax authorities of different member states for the sake of accurately collecting income tax is permitted under EU law, and although Spain attempted to argue that a tax representative was necessary because the relevant EU legal provisions were ineffective, it failed due to a lack of supporting evidence.

The fact that the tax representative was intended to withhold tax on behalf of the foreign service providers, which the ECJ had held to also be a legitimate reason, was not deemed relevant because the main issue according to the Commission was the obligation to appoint a tax representative rather than the tax withholding method itself.

The ECJ ruled that Spain had failed to adhere to EU law by enacting legislation which restricted foreign companies' freedom to provide services in Spain by requiring them to appoint a tax representative.

The judgment was delivered on December 11, 2014.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=160569&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=121573

European Court of Justice: *Commission v. Spain (C-678/11)*

Dateline January 1, 2015

Last year belonged to the OECD, surely? From before the Lough Erne G8 leaders summit and until and after the Cairns G-20 Finance Ministers show, the airwaves and the blogosphere have been dominated by the OECD, the G8, the G20 and their BEPS agenda. At first the international business community was respectful, if cautious, agreeing that something needed to be done. A majority of senior commentators were in favor of the initiative, although worried that the time-scales were very challenging, and pleading that damage should not be done to the intricate apparatus of international business taxation as reflected in tax treaties. A year later, this guarded optimism has turned to outright alarm that Pandora's box has been opened, and that only harm can come of the BEPS initiative; a senior business leader reports that a mere 23 percent of 2,500 businesses think that there can now be a good outcome.

In one of our news analyses this week, we point out that the reasons for the failure of so many of the EU's brilliant ideas is that they are hatched away from reality and brought to their poisonous fruition in a hot-house atmosphere by people who have no direct connection with business, or even in many cases with politics. Well, if that is the case with the Brussels bureaucracy, it is true in spades of the OECD, the G8 and the G20. These organizations have no substance: they have no citizens, no polling booths, no shops, navies, coal mines (my dear, imagine the dirt!) or cemeteries. They have wine cellars, it is true, very nice ones by all accounts, and they have secretariats, by all means, stuffed with interns, professors on sabbaticals, and career diplomats on secondment. Flunkeys they have in abundance, of course, and they have giant budgets willingly provided by their component nations, whose leaders have given up the effort to work out what to do for themselves.

How has it happened that we have put ourselves in the hands of these self-important, destructive cuckoos? There is no one answer to that question, although I am going to attempt some partial answers, while on the way to a discussion of how it might still be possible to draw back from the ultimate fiscal and economic disaster which is about to overwhelm large parts of the developed world.

We have to begin with the dawn of the age of the intern, roughly thirty years ago, with the politicization of legislators and the final divorce of government from economic sanity. Ronald Reagan and Margaret Thatcher were the last two Western leaders who had any real grasp over the actual running of a country. The interns "disease," as we may call it, was already biting hard, but it took until roughly 2000 before governments around the world had fallen mostly into the hands of a political class of "operators" who when they came into power naturally reached out to the "think-tanks" and the "multilaterals" such as the OECD for their policies, having none of their own. It is unfortunate, but may have been inevitable, that the period of

"government by proxy" that ensued was one which saw a largely left-wing set of leaders in power, while at the same time the level of "bread and circuses" (let's call them entitlements) grew beyond the capacity of governments to finance them. The result, whatever mechanism was involved, was the emergence of a new fiscal revenue-raising paradigm that threw all restraint out of the window, and has now become the norm for all parties in all countries. Don't forget that the interns now spend all of their time with each other and none with you and me. When was then last time that you heard anyone praise individual wealth? Or entrepreneurial achievement? (Except on The Apprentice, of course, where the business world is treated as just another aspect of the shadow-play that dominates our economic lives).

Well, that has been quite a diversion through territory you may not have been expecting, but it brings us back to *terra firma*. The first thing to do is to get rid of all the shadow people and their organizations. Send them back to the universities and institutions they came from, where they can continue to win imaginary prizes for scratching each others' backs. As for our elected leaders, the second thing is that we need to tell them to stop spending money, and in particular to stop getting into debt. If we don't do those two things, then within two to three years the fairies will have succeeded in destroying the laboriously constructed international business house which sits today protectively over the heads of cross-border traders big and small, and it will be open season for every government inside and outside the OECD to take what it fancies under any old pretext, and fight it out in court with any taxpayer who is rich enough to stand up for themselves. If you doubt me, then just look at the behavior of the British Government over the last two weeks, which has cast off the last fig-leaf of legal propriety and is allowing and perhaps even encouraging HMRC to introduce a series of ever more Draconian anti-business laws. By now, it probably calculates, might is right, and it will get first mover advantage, while other countries, which are in an even worse fiscal state than the UK, will have to play catch-up and won't dare to be as grasping as Perfidious Albion. We can expect to see Italy and France, both of which are going to be in desperate need of assistance from the unmentionables, persist with the statist game whatever the color of their Governments. Russia now finds itself in the same camp, unexpectedly enough, although it has had a bad year in terms of international trade rules. So, execrations for all four of them. Australia, which is by now a sort of pallid resource reflection of China, hardly has a short-term future at all. Most of South and Central America has been practicing being anti-internationalist for so long now that it should be becoming almost second-nature for them. India has lately shown the world just what it thinks of international law; so no surprises in that direction.

There is one remaining question that niggles me. If everyone is accounted for, then who is left to pull the trigger? Ah, Uncle Sam. But if the Hill takes as little notice of the OECD as China does (it's based in Paris, remember), then not much is going to

happen. Few people would by now remember that the OECD got its start as a kind of classy, unbiased Governmental Research Office, and the odd thing is that it turned into an anti-business organization, captured, like all the budding leaders, by the Great Heresy, when you might have expected the opposite. Why then is it that international business has failed to form its own voice in the last 30 years? That's inexplicable. OK, there are all those Pink Wombat Associations, Rotarians, fraternities with Greek names and such-like, but they don't amount to a hill of beans. Not even jelly-beans.

The Jester