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a closer look

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

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a closer look

Global Tax Weekly – A Closer Look

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The New Double Taxation Agreement Between Cyprus And Georgia

by Philippos Aristotelous,
Andreas Neocleous & Co. LLC

On May 13, 2015, Cyprus and Georgia signed a new double taxation agreement (DTA). Unlike many former members of the USSR, Georgia did not adopt the 1982 Cyprus–USSR DTA when it became independent, and the new agreement is the first between the two countries. It will come into force once it has been ratified in accordance with both countries' domestic legal procedures.

The new agreement closely follows the 2010 OECD Model Convention, with only minor modifications, and the Protocol to the agreement clarifies the information exchange provisions. Details of the DTA and Protocol are now available, and they are analyzed in the following paragraphs.

Taxes Covered

The agreement covers all taxes on income and capital levied by either state or by any of its subdivisions or local authorities, including taxes on capital appreciation and on gains from the alienation of movable or immovable property. The specific taxes to which it applies are, in the case of Georgia, income tax, profit tax, and property tax; and, in the case of Cyprus, income tax, corporate income tax, Special Contribution for Defence (commonly referred to as SDC tax), capital gains tax, and immovable property tax.

The agreement will also apply to any identical or substantially similar taxes that are imposed in future in addition to, or in place of, existing taxes.

Residence

Article 4 of the DTA reproduces the provisions of the 2010 OECD Model regarding residence verbatim.

Permanent Establishment

Article 5 of the DTA, which deals with permanent establishment, also reproduces the provisions of the OECD Model almost verbatim, with the same definition of a permanent establishment and the same list of ancillary activities that *prima facie* do not give rise to a permanent establishment as appears in the OECD Model, including storage and display of goods, maintenance of stocks for processing by a third party, a purchasing or information-gathering facility, or a facility for preparatory or auxiliary purposes.

As in the OECD Model, a place of management, a branch, an office, a factory, a workshop or a mine, an oil or gas well, a quarry or any other place of extraction, exploration or exploitation of natural resources will give rise to a permanent establishment. A building site, a construction, assembly or installation project or a supervisory or consultancy activity connected with it will be deemed to be a permanent establishment if it lasts for more than nine months (rather than the 12 months required in the OECD Model).

As in the OECD Model, the DTA provides that an independent broker or agent that represents the enterprise in the ordinary course of their business will not be caught by this provision. However, paragraph 5 of Article 5 introduces a reservation. In the event that a person other than an agent of an independent status is acting on behalf of an enterprise in a contracting state and has, and habitually exercises, an authority to conclude contracts in the name of the enterprise, the enterprise concerned will be deemed to have a permanent establishment in that state in respect of any activities which that person undertakes for the enterprise, unless the activities concerned are limited to those that do not give rise to a permanent establishment, listed in the preceding paragraph of the article. This means that particular caution needs to be exercised regarding the issuing of general powers of attorney, so as not to risk inadvertently creating a permanent establishment, with potential adverse consequences.

Offshore Activities

Many of the DTAs that Cyprus has concluded since gas reserves were discovered in its exclusive economic zone in 2008 have included an article dealing with offshore hydrocarbon exploration and exploitation activities. The Cyprus–Georgia agreement does not include any specific provision regarding offshore hydrocarbon exploration and exploitation activities, but instead relies on the provision that an oil or gas well, a quarry or any other place of extraction, exploration or exploitation of natural resources gives rise to a permanent establishment.

Income From Immovable Property

As in the OECD Model, income from immovable property may be taxed in the territory of the state where the property is situated.

Business Profits

The profits of an enterprise are taxable only by the contracting state in whose territory it is resident unless it carries on business in the territory of the other state through a permanent establishment there, in which case the profit attributable to the permanent establishment may be taxed by the contracting state in whose territory it is located.

The agreement follows the OECD Model as regards the apportionment of profits to permanent establishments.

International Shipping And Transport

Profits of an enterprise from the operation of ships or aircraft in international traffic (including income from containers, trailers and related equipment, and profits from participation in a pool, a joint business or an international operating agency) are taxable only by the contracting state in whose territory the enterprise is resident.

Associated Enterprises

The provisions for adjusting profits of associated enterprises operating other than on an arm's length basis reproduce the corresponding article of the OECD Model verbatim.

Dividends

Dividends paid by a resident of one contracting state to a resident of the other contracting state are taxable only by the second contracting state, with the usual reservation regarding dividends arising from a permanent establishment in the first contracting state. There is no stipulation regarding beneficial ownership.

Interest

Interest arising in one contracting state and paid to a resident of the other is taxable only in the contracting state in which the recipient is resident, subject to the usual reservations regarding interest arising from a permanent establishment in the first contracting state, and any excess above the amount that would be payable on an arm's length basis.

Royalties

Royalties arising in one contracting state and paid to a resident of the other are taxable only by the contracting state in whose territory the recipient is resident, provided that the recipient is the beneficial owner.

Capital Gains

Gains derived by a resident of one contracting state from the alienation of immovable property situated in the territory of the other, or from the disposal of immovable or movable property associated with a permanent establishment situated in the other, may be taxed by the contracting state in whose territory the immovable property or the permanent establishment is situated.

Gains derived from the disposal of all other property are taxable only by the contracting state of residence of the disponor.

Elimination Of Double Taxation

Elimination of double taxation is achieved by the credit method. In relation to income or capital that is exempt pursuant to other provisions of the agreement, the contracting state in which the recipient is resident may take into account the exempt income or capital when calculating the tax liability of the recipient (exemption with progression).

Non-Discrimination And Mutual Agreement Procedure

The DTA reproduces the corresponding provisions of the OECD Model, except that it does not include any arbitration procedure to settle issues that cannot otherwise be resolved.

Exchange Of Information

The exchange of information article reproduces Article 26 of the OECD Model Convention verbatim.

However, the Protocol to the DTA provides robust safeguards against abuse of the information exchange provisions by requiring the contracting state that requests information to fulfill specified procedures to demonstrate the foreseeable relevance of the information to the request. No request is to be submitted unless the party making the request has reciprocal procedures and means of obtaining similar information, and every request must be accompanied by the following details in writing:

- The identity of the person under examination or investigation;
- The period covered by the request;
- The nature of the information sought and the form in which the requesting state wishes to receive it;
- The tax purpose for which the information is sought;
- The reasons for believing that the information requested is foreseeably relevant to the tax administration and enforcement of the state requesting it, with respect to the named person;
- Grounds for believing that the information requested is held or is in the possession or control of or obtainable by a person within the jurisdiction of the recipient of the request;
- To the extent known, the name and address of any person believed to be in possession of or able to obtain the requested information;
- A statement that the request is in conformity with the law and administrative practices of the state requesting it, that if the requested information was within its jurisdiction the requesting state would be able to obtain the information under its laws or in the normal course of administrative practice and that the request is in conformity with the DTA;
- A statement that the contracting state requesting the information has pursued all reasonable means available in its own territory to obtain the information.

In effect, this means that the authorities requesting the information must already have a *prima facie* case even before they request the information, and must make a reasoned request for disclosure.

These provisions are in line with the robust safeguards against abuse of exchange of information provisions contained in Cyprus's Assessment and Collection of Taxes Law. Requests for exchange of information are dealt with by a specialist unit and informal exchange of information between tax officers bypassing the competent authority is prohibited. A request must be much more than a brief email containing the name and identifying information of the individual concerned.

Rather, a detailed case must be made, with the criteria set out in a formal, reasoned document. In effect, this means that the authorities requesting the information must already have a strong case even before they request the information. As a final safeguard, the written consent of the Attorney General must be obtained before any information is released to an overseas tax authority.

Assistance In The Collection Of Taxes

The DTA does not include any provisions regarding assistance in the collection of taxes.

Entry Into Force And Termination

The agreement will enter into force when the two governments inform one another that the requisite constitutional procedures have been completed. Its provisions will have effect in the territory of both contracting parties from the beginning of the following year.

Termination of the agreement will require written notice by either state given at least six months before the end of any calendar year, whereupon the agreement will cease to have effect from the beginning of the following year. Notice may only be given after the agreement has been in force for five years.

Conclusion

Georgia is turning towards the west in economics and trade and the DTA will be a valuable addition to Cyprus's extensive treaty network. It is hoped that the remaining steps required to bring the new agreement into effect can be achieved quickly.

Principles In The Computation Of Profit: Unanswered Questions?

by Joseph Frankovic, Toronto

This article was first published in 'Tax Topics', Number 2261, July 9, 2015

Determination Of Profit

Section 9 of Canada's *Income Tax Act* (the "Act") provides that a taxpayer's income from a property or business for a year is the profit from that property or business for the year. The term "profit" is not defined in the Act. As a result, it has been left to the courts to determine the meaning of profit, including the principles to be used in computing that profit. For some time, the general consensus was that profit could be determined initially by reference to financial accounting principles, but that the computation was subject to legal principles (as enunciated by the courts) and the provisions of the Act. However, a minority of court cases held that the accounting profit calculation was subject to only the provisions of the Act. Under this latter interpretation, it seemed that certain financial accounting principles were elevated to general legal principles, at least in terms of the profit calculation.

Ultimately, the profit issue made its way up to the Supreme Court of Canada. In a trio of decisions dealing with the income tax treatment of tenant inducement payments (*Canderel*, *Toronto College Park*, and *Ikea*[1]), the Supreme Court set out the principles to be used in determining profit, including the role of financial accounting principles in that determination. Many readers will be familiar with the six guiding principles set out by the Supreme Court:

(1) The determination of profit is a question of law;

(2) The profit of a business for a taxation year is to be determined by setting against the revenues from the business for that year the expenses incurred in earning said income;

(3) In seeking to ascertain profit, the goal is to obtain an accurate picture of the taxpayer's profit for the given year;

(4) In ascertaining profit, the taxpayer is free to adopt any method which is not inconsistent with:
- (a) The provisions of the *Income Tax Act*;
- (b) Established case law principles or rules of law; and
- (c) Well-accepted business principles.

(5) Well-accepted business principles, which include but are not limited to the formal codification found in GAAP, are not rules of law but

interpretive aids. To the extent that they may influence the calculation of income, they will do so only on a case-by-case basis, depending on the facts of the taxpayer's financial situation;

(6) On reassessment, once the taxpayer has shown that he has provided an accurate picture of income for the year which is consistent with the Act, the case law and well-accepted business principles, the onus shifts to the Minister to show either that the figure provided does *not* represent an accurate picture, or that another method of computation would provide a *more* accurate picture.

The six guidelines apply for the purposes of computing profit under the general provisions of section 9. They do not appear to apply to more specific income computation provisions under the Act, even in those cases where the provisions do not necessarily provide an accurate picture of income. And, of course, specific statutory provisions will often be inconsistent with financial accounting principles and other well-accepted business principles.

Furthermore, the Supreme Court guidelines apply only once a source of business or property income is determined. They have no application in determining whether such a source exists, or whether, for example, an amount is business income, a capital gain, or a tax-free windfall.

So What's The Problem?

The fourth and sixth guidelines indicate that the calculation of profit must be consistent with well-accepted business principles, which include financial accounting principles. (Profit must also be consistent with legal principles and the provisions of the Act.) However, the fifth guideline states that well-accepted business principles may influence the calculation only on a case-by-case basis, depending on the facts of the taxpayer's situation. The fifth guideline thus implies that well-accepted business principles will not always be followed in the profit computation. This notion was confirmed in earlier statements by the Supreme Court in *Canderel* at page 6106:

> "However, well-accepted business principles are not rules of law and thus a given principle may not be applicable to every case … while financial accounting may, as a matter of fact, constitute an accurate determinant of profit for some purposes, its application to the legal question of profit is inherently limited."

In the majority of situations, profit for income tax purposes will be consistent with a well-accepted business principle or financial accounting principle. But in those cases where well-accepted business principles are not followed, can it be said that the computation of profit is consistent with those principles? Assuming the answer is no, there is an inherent conflict in the Supreme Court guidelines.

In one case, the Federal Court of Appeal maneuvered its way around the apparent conflict. In the *Urbandale Realty* case,[2] the taxpayer was a land developer. A regional development charge ("RDC") was imposed by a municipality on certain land purchased by the taxpayer. The RDC helped fund various municipal services related to general urban expansion in the region. The main issue in the case was whether the RDC was deductible in full as a current expense in the year in which it was incurred, or whether it was required to be added to the cost of the land. According to the accounting evidence given by experts for both sides, once the land was being developed, the RDC should have been added to the cost of the land for accounting purposes. However, notwithstanding the accounting treatment, the majority of the Federal Court of Appeal held that the RDC was fully deductible in the year in which it was incurred because it provided an accurate picture of the taxpayer's profit for the year (in line with the Supreme Court's third guideline for computing profit).

Justice Strayer, speaking for the majority of the Court, held that the relevant questions in the case could be resolved "by reference to the first three principles enunciated by the Supreme Court in *Canderel*. This case does not, in my view, raise any question requiring that resort be had to the other three *Canderel* principles" (paragraph 26). Since the Federal Court of Appeal did not consider the "other three" Supreme Court guidelines to be relevant to the case at hand, it apparently felt no need to discuss the inconsistency between its finding on profit and well-accepted business principles.

Another unresolved issue, perhaps more significant, relates to the accurate picture of income concept. In its guidelines, the Supreme Court makes it clear that the profit of a taxpayer must reflect an accurate picture of income. But what is meant by "income" for these purposes? The Court did not elaborate. Clearly, for reasons already discussed, it cannot mean accounting income. Does it mean income as described by the courts, or, put another way, income as determined under legal principles? This proposition seems unlikely because it would lead to redundancy or at least some circularity (if profit is calculated using, and consistent with, case law and legal principles, it will presumably reflect an accurate picture of income under the same principles). But perhaps the Supreme Court was referring to income in a more general sense. For example, in previous decisions, the Supreme Court has described income in somewhat ethereal terms:

> "The task of determining the meaning of income for income tax purposes has been left to the courts … Income is to be understood in its plain ordinary sense and given its natural meaning …"[3]

and similarly,

> "… there is no extensive description of income … The word must receive its ordinary meaning bearing in mind the distinction between capital and income and the ordinary concepts and usages of mankind."[4]

Unfortunately, these descriptions of income are not particularly helpful. There does not appear to be one universally accepted notion of income in a plain, ordinary sense or under ordinary concepts and usages of mankind. It would be difficult if not impossible to show that a particular method of computing profit was consistent with this broad notion of income.

In my view, the most plausible way to determine if the computation of profit of a taxpayer for a taxation year reflects an accurate picture of income is to determine the extent to which that profit reflects the increase or decrease in wealth of the taxpayer in the year. That is not to say that a taxpayer's profit will always coincide with those changes in wealth, since profit is based on legal principles such as the realization principle and not all changes in wealth are realized. However, it is uncontroversial that our income tax system is based on the general proposition that, assuming there is a source, an increase in wealth relating to that source should be included in income while a decrease in wealth should serve to reduce income. This view of the accurate picture concept appears to be supported by the Supreme Court findings in the *Toronto College Park* and *Ikea* cases, although, as noted, the Court did not actually elaborate on the accurate income concept.

In *Toronto College Park*, the Court found that all of the benefits relating to a tenant inducement payment made by the taxpayer were realized in the year of expenditure and not in subsequent years (expressed another way, the utility or value of the payment was fully exhausted in the year of expenditure). As a result, the deduction of the payment in the year of expenditure reflected an accurate picture of the taxpayer's income position relative to the amortization of the payment over time. In the *Ikea* case, which dealt with the receipt of a tenant inducement payment by the taxpayer, the Court held that the taxpayer's right to the amount became absolute in the year of receipt. Accordingly, the Court felt it would be inappropriate to amortize the payment and include it in income over time because "it would constitute a serious distortion of Ikea's taxation picture to ignore the fact that this entire amount was freely available to it as of the 1986 taxation year [the year of receipt]" (page 6100). The Court held that the payment was fully included in the taxpayer's income in the year of receipt.

Endnotes

1 *Canderel Limited v. The Queen*, 98 DTC 6100 (SCC); *Toronto College Park Limited v. The Queen*, 98 DTC 6088 (SCC); and *Ikea Limited v. The Queen*, 98 DTC 6092 (SCC).

2 *Urbandale Realty Corporation Limited v. The Queen*, 2000 DTC 6118 (FCA).

3 *Wood v. MNR*, 69 DTC 5073 (SCC).

4 *Curran v. MNR*, 59 DTC 1247 (SCC).

Topical News Briefing: Talking Up Australia's GST

by the Global Tax Weekly Editorial Team

The agreement by Australia's federal and state governments to broaden the goods and services tax (GST) to cover all overseas online transactions under AUD1,000 (USD728.50), as reported in this week's issue of *Global Tax Weekly*, could be the first of many changes to GST in Australia.

In June 2015, the Government released a draft discussion paper on the future of the country's federal tax system, which included options for GST reform. This was primarily concerned with how GST revenues are allocated to state and territorial governments, and could result in changes to Australia's complex horizontal fiscal equalization (HFE) regime, under which all GST revenue (less the cost of administration) is passed to the states and territories.

However, the focus of the debate seems to have narrowed to GST rates. New South Wales Premier Mike Baird helped launch this national discussion by calling for an increased GST rate to fund health care reform. He said that any reform package must "importantly look after those families who need support."

The idea of raising the rate of GST to pay for better public services seems to be one that is gathering momentum. Increasing the rate by 5 percent to 15 percent and broadening the GST base could produce as much as AUD265bn (USD193bn) in additional revenue, according to a study by Chartered Accountants Australia and New Zealand. These revenues could be used to lower personal income taxes and to abolish inefficient state taxes, CA ANZ said.

According to a survey commission by the Property Council of Australia, most Australians have already accepted that GST will be increased, with 72 percent of respondents saying that a higher GST rate is "inevitable" over the next ten years. About half of survey participants were prepared to live with a higher GST if other taxes were eliminated, notably stamp duty.

On the other hand, business groups, including the Australian Chamber of Commerce and Industry (ACCI), have urged the federal and state governments not to get too excited about the idea of a sales tax increase. The ACCI said that while it makes sense for the GST to do more of the "heavy lifting" in revenue terms, any additional revenue from a sales tax hike should be used to abolish other taxes and not result in a net tax increase. "Australia needs tax reform, not tax increases," argued Kate Carnell, CEO of the ACCI.

Prime Minister Tony Abbott welcomed the fact that Baird has put the GST debate "on the table." He also noted that sales tax was already one of Australia's more "efficient" taxes and so any changes should be designed to increase the system's efficiency. However, given that Australia's GST is relatively low by international standards, and the fact that there is some support for increasing the tax, perhaps its just a question of when, rather than if, the rate rise will happen.

UK Budget July 2015 – Non-Doms In The Spotlight

by Sophie Dworetzsky and Christopher Groves, Withers

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1. Introduction

The July Budget 2015 was one of the most eagerly anticipated UK Budgets in recent years. It was the first Budget to be delivered by a Conservative government since 1996 and there was much speculation in the media concerning the steps the Chancellor would introduce now that he is no longer subject to the constraints of coalition government.

Following an increase in political and media attention concerning the taxation of non-UK domiciliaries in the run up to the General Election in 2015, it was expected that the Chancellor would introduce reforms to the tax regime applicable to non-UK domiciliaries ("non-doms"), which he has done. It is likely that the changes announced will be welcomed by the public at large. However, they will also mean that long-term residents of the UK who currently elect to be taxed on the remittance basis will be forced to give serious consideration to their tax position and a number may choose to leave the UK altogether.

However, the reforms are not limited to the non-dom tax regime, and the Chancellor outlined significant changes to other areas of UK tax law. Below we have summarized the changes that we think will be of particular interest.

2. Changes To The Rules Concerning Non-UK Domiciliaries

For many, the most significant changes announced in the July Budget 2015 concern the taxation of non-doms. Two potentially very significant changes have been announced to the rules currently in place, together with a more minor change concerning the election for the remittance basis to apply:

(a) Extended Deemed Domicile Rules And Restriction Of The Remittance Basis

From April 6, 2017, individuals will become "deemed domiciled" in the UK for all tax purposes once they have been UK resident for more than 15 out of the past 20 tax years. This means that once an individual has been resident for this period, he will be unable to claim the remittance basis and will be chargeable to UK income and capital gains tax ("CGT") on his worldwide income and capital gains.

In addition to affecting the income tax and CGT position of individuals, the change will also mean that an individual who has been resident in the UK for 15 out of 20 years will be within the UK inheritance tax net and subject to UK inheritance tax at 40 percent on his worldwide assets up to two years earlier than was the case under the old rules (which stipulate that an individual becomes deemed domiciled for inheritance tax purposes when he has been UK resident in 17 out of the past 20 tax years). In addition, the new rules will mean that once a non-dom who has become deemed domiciled under the 15-year rule leaves the UK, he will not lose his UK deemed domicile until he has spent more than five complete tax years outside the UK. There will therefore be a longer "inheritance tax tail" for those non-doms who leave the UK than is currently the case.

One piece of good news is that it will still be possible for non-doms to create "excluded property trusts" for as long as they are not deemed domiciled in the UK (although subject to the restriction described in (b) below). This means that it will still be possible for non-doms to shelter their assets (with the exception of UK residential property – see point 3 below) from UK inheritance tax in the event that they subsequently become deemed domiciled. Furthermore, it appears that settlors of such trusts will not be taxable on income and gains that are retained in the trust, even after they become deemed domiciled. Offshore trusts will therefore still offer very attractive tax deferral possibilities for individuals with a non-UK domicile of origin.

(b) Restrictions On Individuals With A UK "Domicile Of Origin"

The government has also announced restrictions on tax planning that can be undertaken by individuals who were UK domiciled at birth. Under the current rules, it is technically possible for an individual with a UK domicile of origin to leave the UK and to acquire a domicile of choice in another jurisdiction. Such an individual could return to the UK at a later date and elect to be taxed on the remittance basis as long as he could demonstrate that he had not lost his domicile of choice outside the UK.

In addition, a trust set up by such an individual while that individual was non-UK domiciled (and not deemed domiciled in the UK for inheritance tax purposes) would be an excluded property trust for UK inheritance tax purposes and would therefore remain outside the scope of UK inheritance tax even if the individual subsequently lost his domicile of choice.

Under the new rules, such an individual will not be able to benefit from the excluded property status of any trust set up by him whilst non-UK resident and non-UK domiciled if he returns to the UK and becomes UK resident. In addition, he will not be able to claim the remittance basis in relation to the trust assets or other assets held outside the trust but kept offshore.

On departure from the UK, domicile status will be lost again in the tax year after departure, as long as the individual has not been in the UK for more than 15 years and has not acquired an actual UK domicile.

(c) Claim Period For The Remittance Basis To Apply

In the March 2014 Budget it was announced that the Government would consult on whether to change the rules regarding the ability to claim the remittance basis on an annual basis (it was suggested that an individual would have to elect to be taxed on the remittance basis for a period of three years). The Government has now announced that it does not intend to implement these changes. Elections for the remittance basis to apply will therefore continue to be made on an annual basis.

3. Inheritance Tax On UK Properties

(a) Current Position

Under current rules, individuals who are not domiciled or "deemed domiciled" in the UK (regardless of where they are resident) are only subject to inheritance tax ("IHT") on assets situated in the UK. Because IHT is only charged on directly held UK assets, it is relatively easy for a non-dom to avoid IHT by "enveloping" such assets, *i.e.*, owning them through a non-UK company or other non-transparent entity (either directly or *via* an "excluded property trust").

In recent years the UK Government has made various attempts to discourage non-doms from enveloping UK residential real estate, including the introduction of the ATED (annual tax on enveloped dwellings) and the increased rates of SDLT (stamp duty land tax) for residential properties held through non-UK entities. However, some non-dom owners of high-value properties have taken the view that these disadvantages do not outweigh the benefit of protection from an IHT charge of 40 percent on their death.

(b) Proposed New Rules

With effect from April 6, 2017, the current IHT rules are to be amended so that individuals or trusts owning UK residential property through a non-UK "envelope" will be subject to IHT on the value of the property, in the same way as UK domiciled individuals. The charge will be based on the existing ATED rules, but will be wider in scope as it will also apply in relation to properties which are rented out and the various ATED reliefs will not apply. Also, the IHT charge will apply regardless of the value of the property (assuming that it exceeds the normal IHT nil rate band).

IHT will be imposed on the value of UK residential property owned by the offshore holding company on the occasion of any chargeable event. This would include:

(i) The death of the individual (wherever resident) who owns the company shares;
(ii) A gift of the company shares into trust;
(iii) The ten-year anniversary of the creation of the trust;
(iv) Distribution of the company shares out of trust;

(v) The death of the donor within seven years of having given the offshore company away to an individual; or

(vi) The death of the donor/settlor where he benefits from the gifted UK property or shares within seven years prior to his death (*i.e.*, the IHT "reservation of benefit" rules will be extended to apply to the shares of the offshore holding company in the same way as the rules currently apply to UK domiciliaries and directly held UK property of non-doms).

In some cases the position may be more complicated, *e.g.*, because the offshore company has other assets as well as the UK residential property, the offshore company is held through a group, or the non-dom/trust does not wholly own the company. The intention is that only the UK residential property will be caught by the new IHT charge and the Government proposes to consult on the details of the proposals to ensure that this is achieved.

It is intended that the same IHT reliefs and charges will apply as if the UK property was held directly by the owner of the company. The spouse exemption will therefore be available on the non-dom's death in the normal way if he/she owned the company shares directly – but in most cases it will not apply if the property is held through a trust.

There will be targeted anti-avoidance legislation, and attempts to avoid the new charge may also be within the proposed extension of the DOTAS (disclosure of tax avoidance schemes) regulations in relation to IHT.

The Government apparently does not intend to change the IHT treatment of other UK or non-UK assets held by non-doms or excluded property trusts.

(c) Impact Of New Rules?

It is anticipated that the new IHT charge may prompt at least some non-doms and trusts to "de-envelope" UK properties. The Government is aware that in some cases (*e.g.*, if the property is mortgaged or has increased in value since 2013) there may be significant costs associated in doing this and has announced that it will consult on this aspect, and any other concerns stakeholders may have, before the new rules are implemented. A consultation document is due to be published towards the end of this summer.

In the meantime, it remains to be seen what the overall impact of the changes will be in economic terms. Although they may well increase the IHT take, the yield from the ATED (which is more reliable given that an IHT charge will not always materialize, *e.g.*, if the non-dom sells the UK property before his death) is likely to reduce, and the new charge may also affect the attractiveness of the UK property market for non-doms.

4. Taxation Of UK Dividends

The tax treatment of UK dividends is currently more complicated than it needs to be, mainly because of the dividend tax credit system (which reduces the amount of tax payable on dividends, but is disproportionately complex). The Government is proposing to simplify the system from April 2016, by abolishing the dividend tax credit and replacing it with a new "dividend tax allowance" of GBP5,000 and increased tax rates on dividend income. The new tax rates will be 7.5 percent for basic rate taxpayers, 32.5 percent for higher rate taxpayers, and 38.1 percent for additional rate taxpayers.

According to the Government, this change will result in a tax cut or no change for investors with modest income from shares, but taxpayers who receive significant dividend income (*e.g.*, if they have very large shareholdings or receive significant dividends through a closed company) will pay more. The Government also anticipates that the changes will reduce the incentive to incorporate and remunerate through dividends rather than through wages, and that this will reduce the cost to the Exchequer of future "tax motivated incorporation."

5. Enhanced Compliance And Increased Criminal Investigations

Also included in the Budget are measures designed to discourage tax evasion and tax avoidance and to increase compliance.

(a) Tax Evasion

The Government has stated that it will increase funding to HM Revenue & Customs ("HMRC") by over GBP60m by 2020/21 to allow HMRC to step up criminal investigations into serious and complex tax crime carried out by wealthy individuals and corporations. HMRC's powers to acquire data from online intermediaries and electronic payment providers will also be increased to catch those operating in the "hidden economy."

(b) Tax Avoidance

The Government will introduce legislation to clamp down on serial tax avoiders who persistently enter into tax avoidance schemes which are defeated. The measures will include a special reporting requirement and a surcharge on those whose latest tax return is inaccurate as a result of a defeated avoidance scheme.

In addition, the Government will seek to strengthen the "General Anti-Abuse Rule," which seeks to prevent the creation of schemes which are artificial and designed solely in order to reduce tax. It will also consult on introducing a penalty for those who fall foul of the GAAR.

(c) Compliance

The Government will also invest additional funds to tackle non-compliance by small and mid-sized businesses, public bodies, and affluent individuals.

6. Common Reporting Standard ("CRS")

Legislation will be introduced to require financial intermediaries (including tax advisers) to notify their customers about the CRS. The notification will also have to include information concerning the penalties for tax evasion and the opportunities available to individuals to regularize their tax affairs.

This is a welcome announcement since individuals may be unaware of the far-reaching implications of the CRS, which comes into force in some jurisdictions (including the UK) in 2016 and will result in the automatic exchange of information between jurisdictions where assets are located and where the beneficial owner of those assets is resident.

It is similarly important for advisers to make clients aware of the various disclosure facilities that are still available and which offer individuals favorable terms under which to regularize undeclared tax liabilities. These facilities, the most favorable of which is the Liechtenstein Disclosure Facility, will only remain open for new registrations until December 31, 2015. However, the Government has also announced that it will introduce an additional time-limited disclosure facility in 2016 to allow non-compliant taxpayers to correct their tax affairs before HMRC starts to receive data under the CRS in 2017. This facility will be on tougher terms than the facilities currently available, and we recommend that taxpayers who are aware that they have outstanding tax liabilities take steps to regularize their affairs using one of the schemes currently available rather than waiting until 2016.

7. Other Points To Note

(a) Capital Gains Tax And Hedge Funds

With effect from July 8, 2015, the rules on the taxation of "carried interest" will be amended with a view to stopping investment fund managers from using tax loopholes to avoid paying the correct amount of CGT on the carried interest. Individuals will normally be charged to CGT on the full amounts they receive in respect of the carried interest, regardless of the items notionally applied to satisfy the carried interest at the level of the partnership or other entity in the fund structure. Only limited deductions will be permitted, in particular for any actual consideration given by the individual for the carried interest. This measure will apply to all carried interest arising on or after July 8, 2015, regardless of when the arrangements were entered into.

The Government has also issued a consultation on the circumstances in which investment managers' performance-related returns are to benefit from CGT treatment (rather than being treated as income).

(b) Banking Tax

From January 1, 2016, a new tax on banking sector profit set at a permanent rate of 8 percent will be introduced. There will also be a phased reduction of the bank levy rate from 0.21 percent to 0.10 percent by January 1, 2021. In addition, the scope of the bank levy will be changed so that from January 1, 2021, UK headquartered banks are charged on their UK balance sheet liabilities.

(c) Pension Tax

From April 2016, the Government will reduce the amount of money individuals with an annual income of more than GBP150,000 (including their own and their employer's pension contributions) can pay into a pension scheme free of tax. The reduction will take the form of a taper to the annual allowance. For every GBP2 of income over GBP150,000, the limit on the amount of tax relieved pension saving will be reduced by GBP1 down to a minimum of GBP10,000 (the limit is currently GBP40,000).

FATCA – One Year On, And As Challenging As Ever

by Stuart Gray, Senior Editor, Global Tax Weekly

Just over one year has passed since the US Foreign Account Tax Compliance Act (FATCA) became effective. This article summarizes the main provisions of the legislation, and looks at FATCA's wider consequences on financial institutions, tax authorities, and affected taxpayers.

Introduction

Signed by President Barack Obama in March 2010 as a revenue provision to the Hiring Incentives to Restore Employment Act,[1] FATCA is designed to tackle the non-disclosure by US citizens of taxable income and assets held in foreign accounts. The law is intended to ensure that the US obtains information on accounts held abroad at foreign financial institutions (FFIs) by US persons. Failure by an FFI to disclose information on their US clients, including account ownership, balances, and amounts moving in and out of the accounts, will result in a requirement on US financial institutions to withhold 30 percent tax on US-sourced payments to FFIs.

Intergovernmental Agreements

To address situations where foreign law would prevent an FFI from complying with the terms of an FFI agreement, the US Treasury Department has developed three model intergovernmental agreements (IGAs).

The Model 1 IGA requires FFIs in the foreign jurisdiction to report tax information about US account holders directly to the government, which will in turn relay that information to the IRS.

The Model 1A IGA is essentially the same, except that the IRS will reciprocate with similar information about account holders from the signatory country with the partner government.

The Model 2 IGA requires FFIs to report specified information about their US accounts directly to the IRS, to the extent that the account holder consents or such reporting is otherwise legally permitted, and such direct reporting is supplemented by information exchange between governments with respect to non-consenting accounts. FFIs also report to the IRS aggregate information with respect to holders of pre-existing accounts who do not consent to have their account information reported, on the basis of which the IRS may make a "group request" to the partner jurisdiction for more specific information.

As of July 15, 2015, 61 jurisdictions had signed Model 1 IGAs with the US Treasury; seven jurisdictions had signed Model 2 IGAs; 30 jurisdictions had reached agreements in substance with the US concerning Model 1 IGAs; and six countries had reached agreements in substance on Model 2 IGAs.

Filing Requirements And Thresholds

US citizens, US individual residents, and some non-resident individuals who own certain foreign financial accounts or other offshore assets must report those assets on new Form 8938 Statement of Specified Foreign Financial Assets, which must be attached to the annual US income tax return. Individuals who do not have to file an income tax return for the tax year do not need to file Form 8938.

For individuals who are resident in the US, if the total value of the specified foreign assets is at or below USD50,000 at the end of the tax year, there is no reporting requirement for the year, unless the total value was more than USD75,000 at any time during the tax year.

Higher asset thresholds apply to US taxpayers who file a joint tax return or who reside abroad. Married taxpayers filing a joint income tax return and living in the US must report if the total value of their specified foreign financial assets is more than USD100,000 on the last day of the tax year or more than USD150,000 at any time during the tax year. Married taxpayers filing separate income tax returns and living in the US must each report if the total value of their specified foreign financial assets is more than USD50,000 on the last day of the tax year or more than USD75,000 at any time during the tax year.

US taxpayers living abroad must file Form 8938 if they file a return other than a joint return and the total value of specified foreign assets in the foreign account is more than USD200,000 on the last day of the tax year or more than USD300,000 at any time during the year. Non-resident taxpayers filing a joint return and with specified foreign assets of more than USD400,000 on the last day of the tax year or more than USD600,000 at any time during the year must also file Form 8938.

The following types of foreign assets must be reported on Form 8938:

- Financial (deposit and custodial) accounts held at foreign financial institutions
- Foreign stock or securities not held in a financial account
- Foreign partnership interests
- Foreign mutual funds
- Foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trusts
- Foreign-issued life insurance or annuity contracts with a cash-value
- Foreign hedge funds and foreign private equity funds.

In addition to accounts held at foreign branches of US financial institutions and US branches of foreign institutions, the following assets are not reportable under FATCA:

- Domestic mutual funds investing in foreign stocks and securities
- Indirect interests in foreign financial assets through an entity
- Foreign real estate held directly
- Foreign real estate held through a foreign entity (although the foreign entity itself is a specified foreign financial asset and its maximum value includes the value of the real estate)
- Foreign currency held directly
- Precious metals held directly
- Personal property held directly, such as art, antiques, jewelry, cars and other collectibles
- Social security-type program benefits provided by a foreign government.

FATCA Timeline

Final regulations for the implementation of FATCA were issued by the US Treasury and IRS in January 2013. From August 2013, FFIs have been permitted to use an online portal for FATCA registration. The final text of the agreement to be entered into by FFIs and guidance for participating FFIs was released in December 2013. FFIs must have fulfilled their due diligence and withholding requirements to comply with FATCA by July 1, 2014, ready for the first reports to have reached the IRS by March 31, 2015, regarding accounts maintained during 2014.

However, as expected with such an extensive, extra-territorial piece of tax legislation, the preparations for FATCA didn't go off without a hitch. The compliance deadline for FFIs was delayed by six months, from January 1 to July 1, 2014, as a result of a notice issued by the IRS in July 2013. At the time, the Treasury had signed just nine IGAs, and clearly a lot more than that were needed to make FATCA enforceable.

In Notice 2014-33,[2] published in Internal Revenue Bulletin 2014-21 on May 19, 2014, it announced that calendar years 2014 and 2015 would be regarded as an enforcement and administration "transitional period" with respect to the implementation and enforcement of FATCA. FATCA is still considered effective from July 1, 2014 under the Notice, but, with regard to its reporting, due diligence and withholding provisions, and so as to "facilitate an orderly transition," the IRS will refrain from rigorously enforcing many of its requirements during the transitional period, as long as FFIs are making a "good-faith" effort to achieve compliance. An entity that has not made such efforts to comply with the new requirements will not be given any relief from IRS enforcement during the transitional period.

Cost-Benefit Analysis

To mark the entry into force of FATCA in 2014, Treasury Deputy Assistant Secretary for International Tax Affairs Robert B. Stack said its introduction represented "a major milestone in the Administration's effort to crack down on tax evasion and reduce the tax gap."

"FATCA has gained broad support among international partners, including many of the world's largest financial centers, and is poised for a strong start," he declared. "Over the past several years, FATCA has become the global standard in combating international tax evasion and promoting transparency. With FATCA agreements treated as in effect with nearly 100 jurisdictions and more than 80,000 financial institutions already registered to comply with the IRS, the international support for FATCA is without question."

What the US Treasury has neglected to publicize – as have the dozens of other governments which have supported FATCA – is the cost of its implementation to those 80,000 financial institutions, as well as scores of national tax authorities. Indeed, in December 2013, the IRS's Information Reporting Program Advisory Committee (IRPAC) urged the IRS to delay the implementation date for the legislation by six months, to January 1, 2015, to help withholding agents and their customers adjust to the new requirements.[3]

IRPAC confirmed that withholding agents had already devoted substantial resources to the design of systems based on the draft final regulations and the associated draft forms, but that "substantial work remains to be done." Furthermore, IRPAC pointed out that FFIs with branches and subsidiaries located in multiple countries would have to implement varying IGA requirements in the many jurisdictions expected to enter into IGAs. "Thus, financial institutions are faced with the prospect of programming systems to comply with the FATCA regulations and then reprogramming systems and revising procedures for individual countries when an IGA becomes effective," its report noted.

There are no precise figures available to gauge its costs, but a ballpark figure of USD7bn–USD8bn per year is generally accepted as the total amount spent by FFIs so far on information collection and reporting systems to enable compliance with FATCA.

The total cost to revenue authorities is also uncertain. However, we do know that the FATCA legislation approved the appointment of an additional 800 IRS staff at an annual cost of somewhere between USD40m and USD160m. The Treasury Inspector General for Tax Administration has also said that the FATCA XML data portal cost USD16.6m to set up.

This is all for a projected revenue gain for the US Government of USD8.7bn over 11 years, or USD790m per year. This is FATCA's most obvious flaw, but certainly not its only one, according to critics of the legislation.

FATCA Challenged At Home And Abroad

Many countries have flocked to sign FATCA IGAs despite the legislation's extra-territorial reach, no doubt tempted by the reciprocity clause in the Model 1A IGA. FATCA also provided the template for a global automatic tax information exchange mechanism. Notably, the incoming Common Reporting Standard, which will facilitate the global exchange of financial account information on an automatic basis, is partly based on the US law. However, while FATCA seems to have been accepted by foreign governments as the first step towards global automatic information exchange, the legislation is by no means loved at home.

In the US Congress, Senator Rand Paul (R – Kentucky), a Republican presidential candidate for the 2016 election, has probably been the most active critic of FATCA. In a letter to fellow senators in 2012, Paul warned that FATCA will "undermine Americans' constitutional privacy protections and add burdensome regulations with a negative economic impact on the United States." In the previous congressional session, Paul introduced a bill to repeal the anti-privacy elements of FATCA, and has more recently filed a lawsuit challenging several of its provisions.

The case, filed in US District Court for the Southern District of Ohio (No. 15-250)[4] on July 14, 2015, seeks a preliminary injunction to stop the enforcement of both the IGAs negotiated by the US Treasury Department and the IRS with other foreign jurisdictions to enforce FATCA, and the account reporting requirements of FATCA. The lawsuit also seeks an injunction against the enforcement of the Report of Foreign Bank and Financial Accounts (FBAR), which must be filed with the Financial Crimes Enforcement Network (FinCEN) by American taxpayers who have one or more bank or financial accounts located outside the US, or signature authority over such accounts, whose aggregate value exceeds USD10,000 at any time. Republican Overseas Action (ROA) and a group of individuals are also named as plaintiffs on the filing.

In the introduction to the case, it is stated that the FATCA and FBAR "laws and agreements impose unique and discriminatory burdens on US citizens living and working abroad," and that "the challenged provisions are unconstitutional and the defendants [the US Treasury, IRS and FinCEN] should be enjoined from enforcing them."

The case calls IGAs unconstitutional, as they have not been submitted to the US Senate for its advice, consent or approval, thereby violating the rights of Paul (and of all other Senators). On the other hand, if they are meant to be considered as only executive agreements concluded by the US Administration, it is pointed out that the President "lacks any independent authority over such matters."

In addition, the IGAs "nullify the right of individuals to refuse to waive foreign privacy laws that would otherwise prohibit their banks from disclosing their account information to the IRS. This second ground thus provides another independent reason that the IGAs are unconstitutional."

The information reporting provisions imposed on FFIs by FATCA also "permit the federal government to conduct wide-ranging, indiscriminate searches of the private financial records of American citizens without providing any opportunity for judicial oversight. Such unbridled discretion to pry into the private financial information of American citizens violates the Fourth Amendment."

Furthermore, it is noted that the reporting requirements "require US citizens living abroad to report more detailed information about their local bank accounts than US citizens living in the United States."

Finally, it claimed that the 30 percent "tax" imposed by FATCA on payments to FFIs when they "choose not to help the IRS pry into the bank accounts of their US customers … is not a tax at all but rather a penalty designed to accomplish indirectly through financial coercion what the US government cannot mandate directly through regulation."

In a press release issued by ROA, lead lawyer for the lawsuit, James Bopp commented that the lawsuit "will not only enable ROA to defend all [8.7m] overseas Americans' and [12.5m] stateside 'Green Card' holders' right to privacy and other constitutional protections, but also provide them immediate injunctive relief by crippling the Treasury's ability to enforce IGAs."

While most governments have accommodated the US Treasury in its mission to implement FATCA internationally, some individuals affected by the legislation aren't submitting to its requirements quietly. FATCA has caused quite a stir in Canada in particular, which is perhaps unsurprising given the flow of people crossing the border to take up employment or residence, or both.

In August 2014, two American-Canadian dual citizens living north of the border filed a lawsuit in the Federal Court of Canada challenging the constitutionality of the country's involvement with FATCA.[5] The lawsuit argues that FATCA violates provisions of the Canadian Charter of Rights and Freedoms, which guarantees life, liberty, and security of person; security against unreasonable search and seizure; and equal protection of law without discrimination. The complaint also suggests that FATCA goes against the principle "that Canada will not forfeit its sovereignty to a foreign state."

The pair have not lived in the US since early childhood, and they never obtained US passports or developed meaningful ties with the US. One of them asked why she is being treated as a potential US tax evader merely because of her place of birth. This lawsuit is accompanied by a separate submission to the United Nations, by concerned citizens worldwide, that the USA's "place of birth taxation," for which FATCA is an enforcement tool, violates fundamental human rights.

The US District Court for the Southern District of Ohio filing also notes the additional reporting requirements heaped on US citizens living abroad – and it is certainly the case that the introduction of FATCA is having negative consequences for US expats in terms of access to even basic financial services.

Recent reports would appear to confirm that many FFIs want nothing to do with FATCA and are therefore "locking out" US customers by closing existing accounts and refusing to open new ones. This is as much to do with FFIs fearing the legal and reputational consequences of inadvertently failing to meet the FATCA rules as it is with the reporting requirements themselves. For example, a recent survey of expats conducted by Democrats Abroad,[6] the overseas arm of the Democratic Party, suggests that one-in-six respondents have had their bank accounts closed.

This situation has led to repeated calls from groups representing the interests of Americans overseas that a "same country exception" should be introduced. This regulatory change would exclude from FATCA reporting a taxpayer's financial accounts in a foreign home state where they are a "*bona fide*" resident.

This is a proposal supported by US National Taxpayer Advocate Nina Olson, who observed in a recent report that such a change "would mitigate concerns about the collateral consequences of FATCA" and "allow the IRS to focus enforcement efforts on identifying and addressing willful attempts at tax evasion."[7]

Conclusion

Given the scale and the extra-territoriality of FATCA, its implementation, despite delays, is a remarkable achievement on the part of the US Treasury and the IRS. But there are a number of issues with the legislation. The enforcement "transition period" indicates that the IRS and financial institutions are struggling to cope with the sheer amount of data involved in FATCA, while its unfavorable costs-to-revenue ratio has led to accusations that the law is a sledgehammer being used to crack a nut.

And just how legal is FATCA? The Treasury, of course, argues that it has implemented FATCA in accordance with the Constitution, but, with Congress seemingly by-passed in key areas, there certainly seems to be a case for examining in court the way the law was implemented. Then there is the question of privacy – and to some influential critics of the legislation, FATCA is not so much a tax enforcement law but a mass financial surveillance tool. This is an issue that has particular resonance in the Republican Party, so it would be interesting to see how a Republican President would deal with FATCA.

It is difficult to assess how effective a piece of legislation FATCA is until it has been in operation for a period of time. However, given that the world is moving rapidly towards automatic exchange of information on the FATCA model, this law, as unpopular as it is in some quarters, is here to stay for the foreseeable future.

Endnotes

1 http://www.gpo.gov/fdsys/pkg/PLAW-111publ147/pdf/PLAW-111publ147.pdf

2 http://www.irs.gov/pub/irs-drop/n-14-33.pdf

3 http://www.irs.gov/pub/irs-utl/2013%20IRPAC%20IRW.pdf

4 http://isaacbrocksociety.ca/wp-content/uploads/2015/07/D.2-1-PI-Memo.pdf

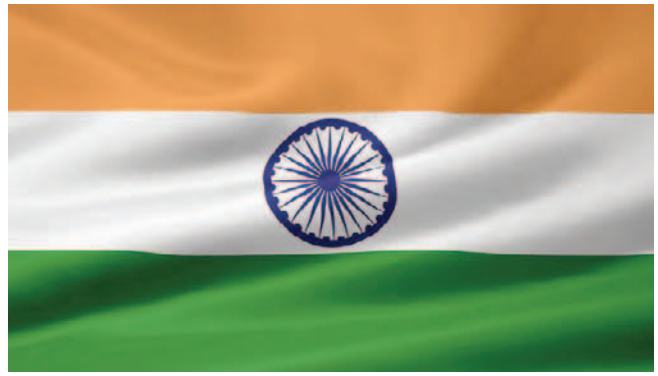
5 http://isaacbrocksociety.ca/wp-content/uploads/2014/06/ADCSClaimFilingPressReleaseAugust112014.pdf

6 https://www.democratsabroad.org/sites/default/files/Executive%20Summary%20-%20Democrats%20Abroad%202014%20FATCA%20Research%20Report_1.pdf

7 http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2016-JRC/Area_of_Focus_4_Implementation_of_FATCA.pdf

Sony Ericsson Mobile Communications India Pvt. Ltd v. CIT (2015 - Delhi High Court)

by Aditi Gupta, S.C. Vasudeva & Co.
independent member of Morison International



Introduction

This article summarizes a recent ruling of the Hon'ble Delhi High Court in the case of various companies on the issue of a transfer pricing adjustment for excessive advertising, marketing and promotional (AMP) expenses incurred by the assessees.

The Hon'ble Delhi High Court, while deciding this case, has addressed the controversies surrounding the transfer pricing adjustments for AMP expenses, arising out of the ruling of the Special Bench of the Income tax Appellate Tribunal, Delhi in the case of *LG Electronics India Pvt. Ltd v. ACIT* (2013) 152 TTJ 273.

Background And Brief Facts Of The Case

- The assessees were several Indian subsidiaries of multinational enterprises including subsidiaries of Sony, Reebok, Canon, *etc.*;
- During the relevant period they were engaged in import, distribution and marketing of branded products manufactured by their foreign associated enterprises (AEs);
- The functions performed by the assessees were to promote and develop the market for selling and distributing the branded products in India, and to support and cooperate in execution of global marketing plans and strategies;
- The intangible rights in the brand name were owned and controlled by the foreign AEs;
- The assessees used the transactional net margin method/resale price method (TNMM/RPM) as the most appropriate method to justify the arm's length price in respect of their international transaction of import of finished goods;
- The Transfer Pricing Officer (TPO) accepted the methods so applied by the assessees; however, he alleged that by incurring excess AMP, the assessee was engaged in brand-building development or enhancing marketing tangibles, although no corresponding reimbursement of expenses from AEs was made;
- The TPO used the bright line test – *i.e.*, the arithmetic mean of the AMP – sales ratio of comparable companies – to determine the excess AMP. Thereafter, a transfer pricing adjustment to the extent of the excess so ascertained was made, along with a mark-up of 15 percent;

- The Dispute Resolution Panel upheld the TPO's approach, but reduced the mark-up from 15 percent to 12 percent;
- The assessee was not successful at the Income-tax Appellate Tribunal and therefore the matter traveled to the High Court.

Issues Before The Hon'ble Delhi High Court

- Whether AMP expenses can be treated and characterized as a separate international transaction under section 92B of the Income-tax Act (the Act)?
- Whether transfer pricing adjustments can be made in respect of AMP expenses, and if so, under what circumstances?
- Whether the Tribunal was right in directing that selling expenses – such as trade discount, rebates and commission – cannot be included in the AMP expenses?

In order to appreciate the decision of the Court, it is imperative to go through the findings of the Special Bench in the case of LG Electronics.

Special Bench Ruling In The Case Of LG Electronics

The Special Bench in the case of LG Electronics, by largely holding in favor of the Revenue, had held the following:

- Incurring of higher AMP expenses than the comparable companies would be classified as a separate international transaction of provisions of brand-building/brand-promotion services supplied by the Indian Assessee to its foreign AE;
- The amount of excess AMP expenses were computed having regard to the bright line test. Anything in excess of the bright line was designated "non-routine expenses," which should have been recovered from the foreign AE by applying an appropriate mark-up;
- The Special Bench summarized a set of 14 principles for undertaking benchmarking; expenses such as discount, sale commissions, *etc.* should not be considered as a part of the value/cost of the international transaction.

Decision Of The Hon'ble Delhi High Court

AMP Expense Is An International Transaction

The Court held that incurrence of AMP expense by the assessee in relation to marketing intangibles owned by the foreign AE is an international transaction under Section 92B of the Act. Differentiating the provisions of Chapter X (*i.e.*, transfer pricing provisions) of the Act from Section 37(1) of the Act, the Court observed that the Revenue is not questioning the reasonableness of the AMP expenses incurred by the assessee towards third parties in India. The issue was adequacy of compensation received by the assessee towards marketing and distribution functions.

Aggregation Of Transactions And Application Of TNMM

The Court observed that the expressions "class of transaction" and "functions performed by the parties" under Section 92C(1) of the Act imply that the word "transaction" includes a bundle or group of connected transactions. The Court also observed that

AMP is an expense related to distribution and under a bundled approach, it would be illogical to treat the same as a separate international transaction. Clubbing of closely linked transactions, including continuous transactions, may be permissible under the Act and the assessee can aggregate the controlled transactions if the transactions meet the specific parameter. While giving such ruling, the Court also held that one of the primary rules of statutory construction is that singular includes plural and *vice versa*, and that there cannot be any contrary presumption.

It was further held that if the TPO accepts the method applied by the assessee for computing the ALP in respect of its international transaction, then AMP expenses must not be treated as a separate international transaction. This is because AMP expense is a cost that is factored into the net profit of the interlinked transaction. Thus, when the comparables pass the functional analysis test and the profit margin matches with the comparables, the conclusion is reached that the transfer price is the arm's length price of the international transaction and that the AMP expense is already factored into the analysis.

However, in the case of manufacturing, distribution and marketing activities, where the transactions cannot be benchmarked together, the appropriate approach would be to benchmark manufacturing and distribution/marketing separately.

Aggregation Of Transactions And Provisions Of Set-off

In LG's case, the assessee was of the view that the additional profits earned due to excessive AMP, as segregated by the Revenue, had not been segregated. The Revenue, however, contended that such a set-off is prohibited under Section 92(3) of the Act.

The assessee's stand was rejected; however, the Court held that the concept of set-off or adjustments is well recognized and accepted internationally. Section 92(3) of the Act does not *per se* prohibit set-off.

Subsection (3) of Section 92 does not incorporate a bar or prohibit set-off or adjustments. The effect of the subsection is that the profit or loss declared (*i.e.,* computed by the assessee on the basis of entries in the books of account) shall not be enhanced or reduced because of transfer pricing adjustments under subsection (2) or (2A) to Section 92. The concept of set-off or adjustments was/is widely recognized internationally, including by the tax experts/commentators. Had the legislative intention behind subsection (3) to Section 92 been to deny set-off, it would have been worded to make this absolutely clear. **Legislative intent to the contrary should not be assumed.**

AMP Expenses Vis-à-Vis Brand And Brand Building

The Court, on the issue of whether AMP expenses lead to brand creation, held that it would be erroneous to consider brand commensurate with AMP expenses. The Court observed that there could be situations where a brand name is developed without incurring huge advertisement expenses, and there could also be situations where brand value is not created even after incurring huge AMP expenses. Brand reflects the reputation of the brand owner; it is earned over a period of time, on the basis of the nature and quality of goods and services and various other factors. Thus, it would be inappropriate to state that AMP expenses are a major contributing factor to brand building, or that the only reason for incurring AMP expenses is to build the brand.

Bright Line Test Lacks Acceptability

The Court did not accept the universal bright line test of computing excess AMP expenses by bifurcating the AMP expenses between routine and non-routine expenses, the latter being attributed towards brand building. Assessees do not undertake advertisement to increase the value of brand, but with the intention of increasing sales, and thus profits. The Court observed that applying the bright line test, on the basis of 14 parameters prescribed in the LG Electronics Special Bench Ruling (para. 17.4 of the Special Bench order) would be adding text to the statute and the rules, and by doing so introducing a new concept that has not been recognized and accepted in any of the international commentaries or as per the general principles of international taxation accepted and applied universally. There is nothing in the Act or the rules to hold that it is obligatory for AMP expenses to be subjected to the bright line test or for the non-routine AMP expenses as a separate transaction to be computed in the manner as stipulated.

The Court concurred with the view adopted under the UN Model. As per para. 10.4.8.15 of the said model, determination of arm's length price in cases of marketing intangibles would involve functional assets analysis of the profile of the Indian entity and the parent company. The question, therefore, of when a subsidiary entity engaged in distribution and marketing incurs AMP expenses, can only be answered by ascertaining whether the subsidiary AE entity has been adequately and properly compensated for undertaking the said expenditure. Such compensation could be in the form of low purchase price or reduced royalty, or even by payment of direct compensation/reimbursement to the assessee.

Economic Ownership Versus Legal Ownership

The assessee had argued that they were economic owners of the brand in India. The Special Bench in the LG case, however, rejected this argument and held that the Income-tax Act only recognized legal ownership and that economic ownership exists only in a commercial sense.

The Court, however, recognized that economic ownership of a brand is an intangible asset and that this is an internationally accepted factor in determining transfer prices. The Court also stated that economic ownership will only arise in case of long-term contracts and where there is no stipulation of denying economic ownership. It further observed that valuation of economic ownership of a brand could be required when the Indian assessee is deprived of, or transfers its economic ownership in, the brand – *i.e.*, upon termination of the distribution/marketing agreement or when economic ownership gets transferred to a third party.

Direct Marketing Expenses

The Revenue authorities had added direct marketing and selling expenses – including discounts, incentives, sales commission, *etc.* – to the AMP expenses. The Special Bench in the LG case had held that such expenses should be excluded from the AMP expenditure by stating that these do not create any marketing intangible. The Hon'ble Court upheld the decision of the Special Bench and held that marketing or selling expenses like trade discounts, volume discounts, *etc.* offered to sub-distributors or retailers are not in the nature and character of brand promotion. The expenses being in the nature of selling expenses have an immediate connect with price/consideration payable for the goods sold. They are not incurred for publicity or advertisement.

Conclusion

The Delhi High Court has substantially overruled the Special Bench Ruling in the case of LG Electronics. This judgment broadly rejects application of the bright line test by holding that it has no statutory mandate. It permits clubbing of closely linked transactions and benchmarking of a bundle of transactions applying entity-wide TNMM. Importantly, the Court has upheld the argument that economic ownership of a brand is an intangible asset, just like legal ownership.

This ruling is welcome, as it lays down some very significant (albeit broad) principles of law to be applied to the facts of each case. The decision is likely to have a far-reaching impact for Indian distributors and MNEs. Going forward, taxpayers should ensure that appropriate functional and economic analysis is captured in the transfer pricing documentation itself.

Topical News Briefing: Too Many Cooks

by the Global Tax Weekly Editorial Team

The US tax reform debate is usually characterized as a battle between Democrats and Republicans over whether a new US tax code should raise revenue for deficit reduction, or should be revenue-neutral and growth orientated. However, as the news stories included in this week's issue of *Global Tax Weekly* show, there are other forces at work that could have a major bearing on the future shape of the code.

With presidential and congressional elections on the horizon, there is a tendency for politicians to turn their attention away from long-term goals to short-term measures that might appeal to voters. This conflicts with one of the desired outcomes of tax reform: simplification of the tax code.

In such times, congressmen and presidential candidates often resort to the tried and trusted tax credit to provide targeted tax relief to certain taxpayers. Proposals announced recently by Democratic presidential hopeful Hillary Clinton are a good illustration of this. While the former Secretary of State has spoken of her desire to simplify the tax obligations of small businesses, she has also proposed targeted tax measures designed to encourage companies and individuals to invest with a view to the long term. However, given that the US tax code is littered with complex tax credits, which the Internal Revenue Service is finding harder to administer and enforce, such measures are hardly likely to assist the cause of tax simplification.

Congressional action on tax is also being driven by short-term needs. There are 50 or so temporary tax breaks that expired at the end of 2014, but with no agreement on how to deal with these tax extenders in the context of tax reform, Congress is forced to enact temporary fixes lasting one or two years, which makes tax planning fraught with uncertainty for many taxpayers. There seems no end in sight to this annual or bi-annual ritual until Congress and the Administration can come to terms on a more stable tax code and government financing mechanism.

There are also different views on whether comprehensive tax reform is achievable, or should be tackled in manageable chunks. With senior Republicans having acknowledged that comprehensive tax reform is now impossible before 2016, some members of Congress see corporate-only tax reform as achievable before the election. However, President Obama's tendency to wave the stick of tax penalties at US multinationals contrasts sharply with Republican preference to offer the carrot of lower taxes, suggesting that the US will be stuck with its dysfunctional corporate tax code for a while yet.

And what about the millions of small businesses governed by the individual tax code? Corporate-only tax reform proposals often ignore these pass-through businesses. But Senator David Vitter (R – Louisiana) argues that small firms should not have to wait for Congress to conclude its endless deliberations on tax reform, and he is proposing to simplify tax obligations for small firms only. His proposals seem like sensible measures designed to reduce the resources spent by small businesses on complying with the tax code. However, some will argue that they should be included in a more comprehensive bill to avoid more fragmentation of the code.

There are also outside forces influencing discussions on US tax reform, namely under the banner of the OECD's BEPS project. This was highlighted by the discussions on international taxation undertaken by a delegation from the EU and representatives of Congress and the US Government, which almost felt like a gentle reminder by the EU of America's responsibilities in the area of base erosion and profit shifting.

However, even if President Obama were to support the OECD's BEPS proposals wholesale, the chances of him being able to force the required changes to US tax legislation through Congress in an election year are next to zero. Indeed, many senior Republicans have spoken in hostile tones against the BEPS project, which they see as an effort by foreign powers to force increases in US taxes.

In terms of the future of taxation in the US, therefore, the 2016 presidential election is shaping up to be a crucial one.

Uncle Sam Enlists Another Collections Agent

by Mike DeBlis, Esq., DeBlis Law

India and Pakistan could be described as the geopolitical Odd Couple, with a few important differences. First and foremost, Felix and Oscar are fictional. Any conflict between the two is resolved with an exchange of funny one-liners and forgotten by the time the end credits roll. Secondly, despite the show's title, they do have some things in common. They're both middle-aged guys, both divorced, both New Yorkers, and both reasonably successful professionals.

Other than their status as former British colonial subjects, India and Pakistan have little in common. More importantly, there has been significant conflict between the two and, unlike The Odd Couple, there's no laugh track to smooth things over. Although the region has been quiet recently, the two have fought five wars since independence in 1947. Even more ominously, as of 1998, both have nuclear weapons.

Despite the warning signs, the United States chose to buddy up with India in pursuit of the elusive dollar. Although the FATCA agreement signed between the two[1] does not entitle New Delhi to a finder's fee, it does have some concrete benefits for this developing nation. In addition, it signals that the United States is moving closer to India at a time when America's relations with Pakistan are still a bit chilly.

FATCA 101

For those who are just tuning in, or who have blocked the relevant memories from their minds, here's a quick primer on the Foreign Account Tax Compliance Act. During debate in the Senate, Michigan Democrat Carl Levin claimed that "thousands of US tax dodgers conceal billions of dollars"[2] in assets within secrecy-shrouded foreign banks," but didn't really cite a source for that figure.

FATCA plugs that leak, regardless of how big it actually is. In most cases, foreign banks must turn over information about their US account-holders. Furthermore, these individuals and businesses must file Form 8938, and there are stiff penalties for noncompliance. Finally, and here's the big one, accounts with "FATCA indicia" are subject to a 30 percent withholding, whether or not taxes are due. Ouch.

What Happened

India's signature brings the total to over 110 nations that have binding intergovernmental agreements with the US Internal Revenue Service. US Ambassador Richard Verma focused on the information-exchange element, which "is [a] top priority for governments." Speaking privately with the media after the announcement, Revenue Secretary Shaktikanta Das used even stronger language, adding that New Delhi would "fight the menace of evasion and bring transparency in the matters of payment of taxes which are legitimately due to the government."

The agreement will take effect on September 30.

Who Gets What

There are very few, if any, reliable estimates about how much American money is lurking untaxed in India, and therein lies the problem. In a country with 1.25 billion souls, it's very easy to hide.

In addition to a healthy dose of international goodwill, India gets to strike a blow against so-called "black money"[3] that, according to many observers, hinders economic development. Since the United States also agreed to share information about Indian assets in America, taxpaying Indians will be less able to stuff money into US banks.

Why It's Important

The US Government claims that, at its core, FATCA is not really about heavy-handed tactics to collect delinquent tax dollars. Instead, the government wants to promote the free exchange of financial information across international borders.

It's very clear that the shadows are starting to fade, and if you have foreign assets, it's best to get ahead of the curve and address any problems before they become unmanageable.

Endnotes

1 http://www.forbes.com/sites/robertwood/2015/07/13/india-signs-pact-to-give-irs-account-data-could-end-blackwhite-money-too/

2 http://www.gpo.gov/fdsys/pkg/CREC-2010-03-17/pdf/CREC-2010-03-17-pt1-PgS1633-8.pdf#page=4

3 http://articles.economictimes.indiatimes.com/2015-07-10/news/64282983_1_tax-evasion-fatca-revenue-secretary-shaktikanta-das

Australian Leaders Agree Need For GST Reform

Australia's federal and state leaders have agreed to broaden the goods and services tax (GST) to cover all overseas online transactions under AUD1,000 (USD728.50).

In a communiqué issued following the recent Council of Australian Governments (COAG) leaders' retreat, the participants confirmed: "All leaders agreed to keep Commonwealth and state tax changes on the table including the GST and the Medicare levy. As a first step, there was agreement in principle by leaders to broaden the GST to cover overseas online transactions under AUD1,000. This matter will be referred to the upcoming meeting of Treasurers to progress in detail."

The agreement came after New South Wales Premier Mike Baird called for an increased GST rate to fund health care reform. He said last week that any reform package must "importantly look after those families who need support, families under AUD100,000 not being any worse off."

At a post-COAG press conference, Baird said: "We have to have this debate on the GST because the requirement for services, that everyone relies on in terms of health care on a daily basis, [is] so critical. We need to be able to provide it not only today but in 15 years' time, and the gap at the moment is unfunded, so we have to look at all options including revenue."

Federal Prime Minister Tony Abbott said he was "so pleased when Mike Baird put the GST on the table the other day, and other colleagues on both sides of the fence didn't immediately rule it out." He pointed out that GST "is one of the relatively more efficient taxes and as far as I'm concerned, any change in this area has got to be about improving the efficiency of our system, because if the system is more efficient, it will work better, we'll have more economic growth, and we'll have more money to invest in the services that we want."

Abbott did however stress that the leaders "were at the beginning of a process." He pointed out that "if we're talking about big reshapings of our federation, nothing's going to happen tomorrow or next month," but did confirm that politicians will aim to publish a green paper on federation reform within the next month.

The federal 2015 Budget included proposals to ensure digital goods and services receive equal GST treatment regardless of whether they are provided by Australia-based or overseas entities.

Kate Carnell AO, CEO of the Australian Chamber of Commerce and Industry, commented: "Ensuring overseas online transactions are treated the same as domestic sales makes a lot of sense because it will mean retailers are operating on a more level playing field. We know many local retailers are doing it tough in the face of online overseas rivals and this change will remove an unfair advantage."

"Given consumers are increasingly shopping online this change will also help to protect the GST revenue base. We look forward to the upcoming meeting of Treasurers enacting this reform. We hope the agreement among leaders on this issue can lead to agreement on more fundamental matters of tax reform."

Japan Needs Bolder Fiscal Reforms, Says IMF

The International Monetary Fund (IMF) has called on Japan to take more ambitious measures to put debt on a downward trajectory.

The IMF said the recent decline in the fiscal deficit – achieved through containment of spending and higher consumption tax revenue – will temporarily stabilize the ratio of debt to gross domestic product (GDP) at about 250 percent – the world's highest – before this debt begins to grow again under current policies.

The IMF has therefore said that Japan needs to do more to begin to reduce its gargantuan debt. It said Japan needs to substantially change its tax and spending policies to enable it to achieve a fiscal adjustment worth 4.5 percent of GDP, namely by increasing the consumption tax rate beyond 10 percent.

Japan plans to raise the consumption tax rate from 8 percent to 10 percent from April 2017, after previously deferring a hike that was to take place from October 1, 2015. The IMF has underscored that Japan should retain a single rate structure and increase the rate gradually in an attempt to keep consumer consumption broadly unchanged.

India's GST Reform Takes Step Forward

In a significant development on July 22, an Indian parliamentary committee approved the majority of the provisions of the constitutional amendment bill that will allow the proposed goods and services tax (GST) to be introduced in 2016.

However, as opposition parties hold out for a better revenue compensation package for state governments, pushing the bill through Parliament is going to be far from straightforward for the ruling BJP Party.

The proposed GST will represent one of the largest shake-ups of the Indian tax system for decades. By replacing a plethora of indirect taxes charged at state and federal level, the GST is designed to make India's consumption tax system far more efficient, boosting interstate trade and economic growth.

Proponents of the GST say that the tax will remove obstacles to the free movement of goods and services in the country. As things stand, an interstate transaction is subject to both central sales tax and value-added tax (VAT), while a transaction that takes place in a single state is subject only to VAT. The introduction of GST will also significantly simplify the tax regime, enable exporters to recover input tax, and remove distortions caused by cascading taxes.

This reform has been problematic from the start however, with state governments fearing they will lose out in revenue terms and jealously guarding their tax jurisdiction.

After more than a decade of drawn-out negotiations, the lower house of Parliament on May 6, 2015, passed the Constitutional Amendment Bill to enable states to levy the GST on services, which was seen as a major step towards the adoption of GST in India. But many issues remain to be resolved, including agreeing a revenue-neutral rate (currently proposed to be as high as 27 percent), rates for different goods and services, place of supply rules, and, crucially, a compensation package for the states.

The endorsement by the Rajya Sabha (upper house) select committee on GST of almost all of the 21 clauses in the constitution amendment bill on July 22 represents a significant step forward for the GST reform. However, the panel proposed that the central Government fully compensate the states for revenues lost as a result of the reform for a period of five years, whereas the Government has proposed that states should be given 100 percent compensation only for three years, and 50 percent for the following two years.

Encouragingly for the Government, Bhupendra Yadav, head of the select committee, told reporters in Parliament that committee members foresee the legislation's adoption by the Lok Sabha, describing it as "the right Bill." However, the Government still faces an uphill battle to introduce GST on time in April 2016. Not only do the outstanding issues need to be ironed out, but the ruling BJP Party lacks a majority in the Rajya Sabha, where the bill will need the approval of at least two thirds of the members before it can be signed into law by the President. Ironically, it is the opposition Congress Party, which originally drew up the GST legislation, that is standing in the way.

Finance Minister Arun Jaitley has made the introduction of the GST his top priority, and the Government has worked hard to push the reform as far as it has in Parliament. The final hurdle may yet be the highest, and there are certainly no guarantees that India will have its GST by April next year.

Algeria Adopts Additional Finance Act 2015

Algeria's Government has adopted the Additional Finance Act (LFC) 2015, which contains several tax reform measures aimed at encouraging enterprise, and domestic manufacturing in particular.

The original Finance Act 2015 set corporate income tax at 23 percent. The LFC increases the headline rate to 26 percent for most areas of activity, but reduces the rate for manufacturing to 19 percent. For tourism and BTPH construction activities (building, civil works and hydraulic), the rate remains at 23 percent. The tax on professional activities (TAP), currently levied at 2 percent of turnover, is reduced to 1 percent for manufacturing and 1.5 percent for construction.

Measures aimed at boosting investment include an exemption from VAT for loans to buy real estate, and a reduction in the notarial fees paid for business registrations and certain other legal processes.

President Abdelaziz Bouteflika also emphasized the need to improve compliance and tackle evasion.

Austria To Introduce Second Reduced VAT Rate

Austria is to introduce a new, higher reduced rate of value-added tax (VAT).

A 13 percent rate will apply, in place of the existing 10 percent rate, on supplies of animal feed; works of art that are more than 100 years old; and domestic air travel. For two years from the beginning of 2016, Austria will also levy the 13 percent rate on accommodation services and admissions to cultural events and swimming pools, with transitional provisions applying to pre-existing bookings until the end of August.

The changes are included in Article 4 of the 2015/16 Tax Reform Act, available in German only.

US Senate Bill To Ease Small Business Tax Compliance

The Chairman of the Senate Small Business and Entrepreneurship Committee, David Vitter, has introduced a tax reform bill that would relieve tax compliance burdens for US small businesses.

Vitter's legislation would provide relief from tax code provisions frequently cited as overly restrictive or onerous for small businesses, including by increasing the threshold for cash accounting and eliminating burdensome record-keeping requirements for business computers and other communications equipment.

The Small Business Tax Compliance Relief Act of 2015 would also require the Internal Revenue Service (IRS) to convene small business panels to offer guidance on rules and regulations that impact small businesses, and give small businesses a greater legal platform to protest IRS penalties when they have acted in "good faith."

During his opening statement to a Committee hearing on July 22, Vitter said that "the administrative burden of tax compliance is now a greater strain on small businesses than their actual tax liability. … According to the National Federation of Independent Businesses, small businesses annually spend 1.7bn hours on tax compliance and approximately USD15bn on compliance costs."

"Nearly 40 percent of small businesses spend 80 hours or more a year on tax compliance, and a quarter of all small businesses spend more than 120 hours. That doesn't even take into account state and local income, sales, and property taxes they must file."

He added that the cost of compliance to small businesses is 70 percent higher than for bigger firms, and "roughly a third of all small businesses spend more than USD10,000 just on federal tax administration and half spend more than USD5,000."

"Small businesses shouldn't have to wait for wholesale tax reform to have these compliance related issues resolved; Congress can, and should, address them right now," he said.

Jeffrey Porter, testifying on behalf of the American Institute of Certified Public Accountants, supported Vitter's Bill, stating that it should "contribute to a more equitable and fair set of rules. We also believe that proposals similar to the penalty waivers in cases of good faith promote certainty and transparency in the tax law. Such improvements should reduce small businesses' compliance costs and encourage voluntary compliance through a simplification of the rules."

EU Visits Washington To Talk BEPS

A delegation of members from the EU's Economic and Monetary Affairs (ECON) Committee visited

Washington DC on July 20, 2015, to exchange views with senior US representatives on developments in the area of international tax.

The delegation, led by Roberto Gualtieri, Chairman of the ECON Committee, met members of Congress and representatives of the US Treasury, the International Monetary Fund, the US Federal Reserve, the Commodity Futures Trading Commission, and the Securities and Exchange Commission.

Discussion centered on the US response to the OECD's ongoing work on base erosion and profit shifting (BEPS), particularly on Action 13, on the implementation of country-by-country reporting standards.

They also discussed systemic risk regulation, regulation of shadow banking, regulating commodities derivatives, derivatives and securities regulation, and executive pay regulation (bonuses) in the US.

The meeting took place amid concerns in the US about the adverse impact of the BEPS project on US tax revenues and jobs.

Last week, in a speech given on the Senate floor, US Finance Committee Chairman Orrin Hatch (R – Utah) called upon Congress to weigh up the costs and benefits of adopting BEPS proposals. Hatch said: "Before any additional steps are taken and before we can even consider moving on any of the BEPS action items, we need more information. I urge Treasury to work more closely with Congress on this and to not tie our hands as we move toward tax reform by consenting to bad outcomes. I urge them to consider the interests of US taxpayers and to not make any commitments that would impose unnecessary burdens on American companies and put them at a competitive disadvantage."

A recent paper from the Progressive Policy Institute concluded that "unless Congress acts quickly to reform the ossified US tax system, the BEPS project has the potential to turn into a massive job and revenue grab by Europe, and a massive loss of jobs and revenues by the US."

Tax Extenders Pass US Senate Finance Committee Markup

On July 21, the US Senate Finance Committee voted by 23 to 3 to advance a bipartisan bill that would renew for two years the package of "tax extenders" that expired at the end of 2014.

The 50-plus expired tax provisions for individuals and businesses have previously been rolled forward annually, but their extension by Congress has been found to be possible only very late in the year. This has caused problems both to taxpayers relying on the credits and deductions, and also to the Internal Revenue Service when organizing tax filing seasons.

After the vote, Senate Finance Committee Chairman Orrin Hatch (R – Utah) and Ranking Member Ron Wyden (D – Oregon) stated that the Committee has "succeeded in passing a number of widely-supported tax provisions that will provide some certainty in the tax code for the next two years. We look forward to continuing to work together in a bipartisan fashion to enact tax extenders legislation."

The American Institute of Certified Public Accountants welcomed the vote, pointing out that it had "pressed Congress for years to provide taxpayers with certainty about the extenders, on which Congress too often doesn't act until the end of the year. A successful conclusion to this year's earlier start would help millions of Americans plan for and more accurately calculate their 2015 tax bill."

The provisions, which would be extended to the end of 2016, include, for individuals, mortgage tax relief, the deduction for state and local sales taxes, education tax deductions, and tax-free distributions from individual retirement accounts for charitable purposes.

For businesses, the package of measures includes increased expensing under Section 179 (which allows small businesses to immediately deduct the cost of investments in property and qualifying equipment); the 50 percent bonus depreciation; the credit for research and development expenses; and tax breaks promoting renewable energy, such as the production tax credits.

The next step would be consideration of their renewal by the Senate as a whole, which has not yet been scheduled.

FATCA Change Urged For US Expats

National Taxpayer Advocate Nina Olson has urged the US Treasury Department to amend the Foreign Account Tax Compliance Act (FATCA) regulations to adopt a "same country exception."

This regulatory change would exclude from FATCA reporting a taxpayer's financial accounts in a foreign home state where they are "*bona fide*" resident. Only accounts in a country other than one's country of residence should be subject to information reporting, she has recommended.

FATCA, which was enacted by the US Congress in 2010 and took effect on July 1, 2014, is intended to ensure that the Internal Revenue Service (IRS) obtains information on financial accounts held at foreign financial institutions (FFIs) by US persons. Failure by an FFI to disclose information on its US clients would result in a requirement to withhold 30 percent tax on payments to it of US-sourced income.

Olson noted that representatives of organizations representing the American expat community have pointed out that accounts opened by US citizens resident in a foreign country should not be considered as "offshore" accounts designed for tax evasion, as those citizens have a legitimate need for local banking services in their country of residence.

She said that a same country exception "would mitigate concerns about the collateral consequences of FATCA, reduce reporting burdens faced by FFIs, and allow the IRS to focus enforcement efforts on identifying and addressing willful attempts at tax evasion through foreign accounts."

Olson noted that, to date, the IRS has not been willing to pursue this recommendation.

Clinton Proposes Complex US CGT Hike

Democratic Party presidential candidate Hillary Clinton has provided details of the changes she would propose to capital gains tax (CGT) in the US, if she were to be elected next year.

As part of a policy of reforming the US tax code to encourage investment for the long term instead of the short term, she would increase CGT rates on investments held for less than five years for those on the highest income tax bracket (single individuals with taxable income of more than USD413,200, and married couples filing joint returns with taxable income above USD484,850).

For those taxpayers, CGT rates on investments held for one year would remain unchanged at 39.6 percent (before consideration of the 3.8 percent net investment income tax imposed under the Affordable Care Act). However, instead of the current immediate fall to the standard 20 percent rate that is imposed on all other taxpayers, under Clinton's plan they would be subject to the top 39.6 percent for all investments sold within two years.

In fact, taxpayers on the highest income tax bracket would see their CGT rate then fall only gradually to 36 percent for investments disposed of between the end of the second year and the end of the third year; 32 percent between the third and fourth year; 28 percent between the fourth and fifth year; 24 percent between the fifth and sixth year; and reaching 20 percent only for investments held for six years or longer.

Believing that the definition of short term at one year is "woefully inadequate," and inhibits the development of long-term investments, Clinton has suggested that the delayed fall in CGT rates would help corporates who want to plan their businesses over a longer period.

However, her opponents argue that any increase to CGT rates would reduce potential economic growth by curtailing overall investment, while her sliding CGT scale would add further complexity to the US tax code.

"Hillary Clinton is old enough to remember the capital gains tax reductions of 1978, 1981, 1997 and 2003 that spurred investment in new firms, created jobs and increased tax revenues," said Grover Norquist, President of Americans for Tax Reform (ATR). "Sadly, Hillary is not wise enough to have learned the simple lesson from those decades: reducing the capital gains tax is part of any pro-growth agenda."

ATR added that her reforms would "only serve to distort capital markets as investors will buy and sell not based on rational market signals, but on exogenous, arbitrary tax holding period considerations."

International Agreement On Tax Breaks For IT Products

On July 24, 2015, 54 World Trade Organization (WTO) members agreed to expand the Information Technology Agreement (ITA) to eliminate trade taxes on 200 more IT products.

The ITA, established in 1996, eliminated tariffs on a number of technology products, such as semiconductors, computers, and telecommunications equipment. However, the agreement's coverage has never been updated, even though there have been significant technological advances since 1996, and many IT goods are therefore now not included in the deal.

Among the products covered in the expanded agreement are new-generation semi-conductors; GPS navigation systems; medical products, including magnetic resonance imaging machines; machine tools for manufacturing printed circuits; telecommunications satellites; and touch screens.

"Today's agreement is a landmark," said WTO Director-General Roberto Azevêdo. "Annual trade in these 201 products is valued at over USD1.3 trillion per year, and accounts for approximately 7 percent of total global trade today. This is larger than global trade in automotive products – or trade in textiles, clothing, iron and steel combined."

"This is the first major tariff-cutting deal at the WTO in 18 years," the Director-General said. "Coming so soon on the heels of the historic Bali Package which members agreed in 2013, it shows that the multilateral trading system can deliver. The WTO has now negotiated two deals in the space of two years which deliver real, economically significant results. I hope that this success will inspire members in other areas of our negotiations."

Ministers from the participating members will now work to conclude their implementation plans in time for the WTO's 10th Ministerial Conference, which will be held in Nairobi this December. By the end of October 2015, each of the participating members will submit to the other participants a draft schedule to spell out how the terms of the agreement will be implemented.

Azevêdo pointed out that all 161 WTO members will benefit from this WTO agreement, as they will all enjoy duty-free market access in the markets of those members who are eliminating tariffs on these products. The terms of the agreement were formally circulated to the full membership at a meeting of the WTO General Council on July 28.

Under the terms of the agreement, most tariffs will be eliminated on these products within three years, with reductions beginning in 2016.

Stockpile Of Trade-Restrictive Measures Rising, Says WTO

The increasing number of trade-restrictive measures, including new tariff barriers to trade, remains a cause for concern, says a new report from the World Trade Organization (WTO).

The report found that 104 new trade-restrictive measures (excluding trade remedy measures) were put in place in the reporting period October 16, 2014, to May 15, 2015 – an average of around 15 new measures per month.

Of the 2,416 measures recorded since October 2008, less than 25 percent have been removed, leaving the stock of restrictive measures still in place at 1,828. This represents an increase of 12 percent compared with the last report.

The number of initiations of anti-dumping investigations totaled 122 in the period between October 2014 and April 2015. By comparison, 130 investigations were launched between October 2013 and April 2014.

During the latest review period, India was responsible for the most anti-dumping investigations (28), followed by Turkey (16), and the US (14).

On the positive side, an increasing number of trade-liberalizing measures, such as tariff-cutting measures, were adopted by WTO members during the period under review, the WTO said. WTO members implemented 114 new trade-liberalizing measures, an average of more than 16 measures per month.

China Starts New Steel Anti-Dumping Investigation

Beginning another trade dispute in the sector, China's Ministry of Commerce (MOFCOM) has announced the instigation of an anti-dumping (AD) investigation into grain-oriented flat-rolled electrical steel (GOES) imported from Japan, South Korea, and the EU.

A short statement from MOFCOM on July 23 said that, following complaints by Chinese producers, it will investigate whether GOES imports from those countries have damaged the local industry and, if so, the extent of that damage and appropriate AD duties.

In May this year, the EU put its own provisional AD duties on Chinese, Japanese, South Korean, US and Russian imports of GOES, which is used in large electrical transformers, reactors, and motors.

A MOFCOM investigation normally takes around one year. Meanwhile, a final decision in the EU investigation into GOES imports is expected in November this year.

Last year, the US imposed AD duties on imports of non-oriented electrical steel from China, Germany, Japan, South Korea, Sweden, and Taiwan, together with countervailing anti-subsidy duties on imports from only China and Taiwan.

Spain Urged To Raise Energy Taxes

The International Energy Agency (IEA) said in a new report that Spain needs to reform energy taxation and introduce revenue-neutral fiscal incentives to encourage greenhouse gas (GHG) reductions and energy efficiency improvements.

The report, *Energy Policies of IEA Countries: Spain – 2015 Review*, stressed that although Spain's GHG emissions from energy use have been declining, they need to be reduced further. Current policies and measures are not enough to meet the target of reducing GHG emissions by 10 percent from 2005 to 2020 in the non-emissions trading scheme sector, it said.

Raising tax rates in a revenue-neutral way can encourage more efficient oil use, thus delivering environmental and energy security benefits, the report said. In particular, it said there is scope to raise fuel tax rates, which are relatively low by international comparison.

Australian Report Confirms Post-Carbon Tax Savings

Australian households are saving an average of AUD550 (USD403) a year following the repeal of the carbon tax, the Australian Competition and Consumer Commission (ACCC) has confirmed.

The ACCC has now concluded its formal carbon tax repeal monitoring role and presented its final report to Small Business Minister Bruce Billson. ACCC Chairman Rod Sims said: "As a result of its monitoring activities, the ACCC is satisfied that all electricity and natural gas suppliers, and bulk synthetic greenhouse gas (SGG) importers have passed through to customers all cost savings attributable to the carbon tax repeal."

The ACCC said that, taking into account all the available information, it believes the Treasury's estimate of an average yearly household cost saving of AUD550 is reasonable.

It has calculated direct cost savings, ranging from AUD153 to AUD269, that have been passed through to customers by electricity and natural gas retailers. Depending on the SGG type, average SGG prices at the bulk import level have fallen from between AUD38/kg and AUD109/kg during the carbon tax period, to between AUD8/kg and AUD34/kg. At a wholesale level, average prices have decreased from between AUD47/kg and AUD182/kg to between AUD14/kg and AUD33/kg.

The ACCC has also seen cost savings across sectors including landfill, council rates and charges, food manufacturing, water charges, aviation fuel, and liquid petroleum gas. The ACCC expects that these cost savings will flow down the supply chain throughout the economy over time and be passed through to consumers as part of the normal market process.

Billson said: "This finding is what the Government expected and [is] part of our strategy to help build a stronger economy and bring down the cost of living for Australian families and businesses. It confirms that a tax on carbon is harmful for businesses and households."

France Plans Hikes To Carbon Tax

France's National Assembly has adopted a new energy bill which includes tax increases in the coming years.

The bill provides for increases in the *contribution climat énergie* (CCE). The tax is currently levied at EUR14.50 (USD16) per tonne of CO2 produced. This will be increased to EUR22 per tonne in 2016. Further significant increases will be imposed in subsequent years, with the aim of a hike to EUR56 per tonne in 2020 and EUR100 in 2030.

Opponents of the bill have stressed that it will raise prices for consumers.

Liechtenstein Disclosure Facility To Close In December

The UK and Liechtenstein have published a Joint Declaration that provides for the early closure of the Liechtenstein Disclosure Facility (LDF).

The UK's March 2015 Budget brought forward the final date for registration to participate in the LDF from April 2016 to December 31, 2015. The Joint Declaration, signed this month, makes the necessary amendments to the bilateral Memorandum of Understanding (MoU) on cooperation in tax matters. After that date, Liechtenstein financial institutions will continue to follow the review and termination of service procedures set out in the MoU until December 31, 2017. The requirement to issue a Confirmation of Relevance (COR) will expire on September 30, 2017. The final audit of the COR procedure will take place between January 1 and December 31, 2017.

The UK and Liechtenstein have agreed that no request shall be made under their Tax Information Exchange Agreement during the period after an individual applies to register to participate in the LDF and before they have been notified by HMRC that either their application has been refused, their disclosure has been accepted, or the terms of the LDF no longer apply to them.

Since 2009, more than 6,400 people and companies have registered to participate in the LDF. More than 5,900 disclosures have been received and the LDF has raised more than GBP1.15bn from settled cases and payments on account.

Tessa Lorimer, special counsel at law firm Withers, commented: "The UK is closing the LDF as access to coercive new criminal powers will shortly supersede the need for it. Although a new disclosure facility will be introduced in 2016, I am certain that its conditions will be much stricter than the LDF's and would urge anyone with undisclosed offshore assets to make use of the LDF before it closes. Allowing time to go through the disclosure process means that people should register as soon as possible."

"As HMRC's information gathering powers continue to increase – with the introduction of Common Reporting Standards on the horizon – taxpayers must be aware that they will not be able to hide undisclosed assets."

Vietnam Seeks Sharp Tax Revenue Increase

The Government of Vietnam is planning to collect 15 percent more in tax in 2016 than it collects this year as it seeks to increase tax revenue as a share of the economy.

According to a report posted on the website of Vietnam's General Department of Taxation, which cites information reported by *Saigon Times Online*, the Government is targeting a tax-to-gross domestic product (GDP) ratio of 18 to 19 percent next year. The Heritage Foundation's 2015 Index of Economic Freedom suggests that the tax-to-GDP ratio in Vietnam is currently about 14 percent.

The Government appears to be more or less on track to reach its 2015 revenue target, having collected 49 percent of the VND638 trillion (USD28.8bn) it plans to collect this year in the first six months.

To help reach these ambitious targets, the revenue authority has recently ratcheted up its compliance activities, in particular by targeting corporate taxpayers whose tax payments are more than 121 days overdue. Around 600 companies that owe the Government tax have been "named and shamed" by having their details published on the revenue authority's website.

Taiwan's Tax Agency Targeting High-Value Transactions

Taiwan's National Taxation Bureau (NTB) has announced that, with effect from June 1, 2015, it will make additional checks to ensure the levying of business tax on certain high-value goods and services.

Business entities that manufacture, import and sell the following goods and services in Taiwan will be liable to checks:

- Furniture, turtle shells, hawksbill sea turtles, coral, ivory, and fur products that have a selling price or taxable value of not less than TWD500,000 (USD15,900), but excluding those that are not made from protected species under the Wildlife Conservation Act;
- Passenger cars (that have nine seats or less, including the driver's seat), airplanes, helicopters, and ultra-light aircraft that have a selling price or taxable value of not less than TWD3m;
- Yachts with a full length of not less than 30.48 meters; and
- Club membership rights worth not less than TWD500,000.

The NTB further confirmed that taxpayers may be exempted from any or all tax penalties, and from any criminal liability, if they voluntarily file a supplementary tax declaration to the tax authority and make supplementary payments covering the tax they have failed to declare, as long as that declaration is made before a case for non-payment of taxes has been brought against them.

The NTB added that any taxpayers found to have violated the tax code will have to pay overdue tax and will be fined in accordance with the Specifically Selected Goods and Services Tax Act.

HMRC Consults On Stronger Anti-Avoidance Sanctions

HM Revenue & Customs (HMRC) has published details of proposals to strengthen sanctions against serial promoters and users of tax avoidance schemes, and introduce specific penalties where the General Anti-Abuse Rule (GAAR) applies.

The plans are set out in a new HMRC consultation, which explains how each of the measures would work. The consultation will run until October 14. It builds on the responses received during a previous consultation, held prior to March's Budget. At the Budget, Chancellor George Osborne confirmed the Government's intention to introduce a surcharge and special reporting requirements for serial avoiders and a tax-geared penalty for cases where the GAAR applies.

The Government proposes that the first defeat of a tax avoidance scheme would trigger a "warning period," during which the taxpayers involved would be issued with a warning notice and advised of certain additional consequences of entering into further schemes within a set period. Affected taxpayers would then have to certify annually whether they had entered into any avoidance scheme.

Taxpayers entering into further avoidance schemes during the warning period would be required to provide additional information and the reasons why they considered the schemes to work. If any of the schemes concerned were defeated, a new warning period would commence. The Government proposes to name as "serial avoiders" those who enter into three or more schemes during their warning period.

In addition, the consultation seeks views on two possible approaches to the implementation of a surcharge for serial avoiders. The first is the introduction of a simple low level of charge, similar to current late-payment penalties. The second option is a higher surcharge rate similar to that applied with Follower Notices, with the possibility for reductions in the rate to reflect cooperation or disclosure by the taxpayer. The Government proposes that under either model, a serial avoider who during a warning period continues to use avoidance schemes that are defeated should face increasing rates of surcharge.

The consultation also sets out plans for the introduction of a GAAR penalty that would apply when a taxpayer submits a return, claim, or other document that includes a tax advantage arising from abusive tax arrangements coming within the scope of the GAAR. The penalty would only be chargeable after the scrutiny of the GAAR Advisory Panel, at the point at which HMRC has successfully counteracted the abusive tax arrangements concerned. Taxpayers would be able to correct their tax position up until the point of referral to the GAAR Advisory Panel.

BARBADOS - KOREA, SOUTH

Negotiations

During a recent meeting by the Korean Ambassador-Designate to Barbados, Doo-Young Lee, the Barbadian authorities expressed an interest in launching DTA negotiations with South Korea.

CZECH REPUBLIC - ANDORRA

Negotiations

The Czech Government has visited Andorra to express interest in signing a DTA, the Andorran Government disclosed on July 3.

FRANCE - VARIOUS

Forwarded

France's National Assembly on July 1, 2015, approved two bills (No. 2924 and No. 2925) endorsing the DTAs signed with Luxembourg and Switzerland.

HONG KONG - SOUTH AFRICA

Ratified

According to a July 21 update from the South African Revenue Service, Hong Kong has newly ratified the DTA signed with South Africa.

ITALY - HONG KONG

Ratified

Italy has ratified the DTA signed with Hong Kong, publishing Law No. 96 in its Official Gazette on July 7, 2015. The law became effective on July 8, 2015.

JAPAN - GERMANY

Negotiations

Japan's Ministry of Finance on July 16, 2015, announced that it has agreed a DTA in principle with Germany.

JERSEY - KOREA, SOUTH

Signature

Jersey and South Korea signed a TIEA on July 21, 2015.

KENYA - NETHERLANDS

Signature

Kenya and the Netherlands signed a DTA on July 22, 2015.

KYRGYZSTAN - SAUDI ARABIA

Ratified

Kyrgyzstan has ratified the DTA signed with Saudi Arabia, the President's website said on July 22, 2015.

LUXEMBOURG - BRUNEI

Signature

Luxembourg and Brunei signed a DTA on July 14, 2015.

NETHERLANDS - GERMANY

Signature

The Netherlands and Germany on July 14, 2015 signed a TIEA covering tax rulings and advance pricing agreements.

NEW ZEALAND - SAMOA

Signature

New Zealand signed a DTA with Samoa on July 8, 2015.

OMAN - SWITZERLAND

Ratified

Oman has ratified the DTA signed with Switzerland, it was announced on July 14, 2015.

POLAND - ETHIOPIA

Signature

Poland and Ethiopia signed a DTA on July 13, 2015.

SWITZERLAND - LIECHTENSTEIN

Signature

Switzerland and Liechtenstein signed a DTA and an accompanying Protocol on July 10, 2015.

UKRAINE - IRELAND

Forwarded

Ukraine's Parliament on July 15, 2015 approved a law to ratify the DTA signed with Ireland.

UNITED ARAB EMIRATES - URUGUAY

Ratified

According to preliminary media reports, the United Arab Emirates has ratified the DTA signed with Uruguay.

UNITED KINGDOM - VARIOUS

Legislation

The UK has recently released draft legislation to ratify DTAs signed with Algeria, Brazil, Bulgaria, Croatia, Senegal, and Sweden.

UNITED STATES - VIETNAM

Signature

The United States and Vietnam signed a DTA on July 7, 2015.

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

THE AMERICAS

GLOBAL TAX TRANSPARENCY FOR LATIN AMERICA & THE CARIBBEAN 2015

Hanson Wade

Venue: Conrad Miami, 1395 Brickell Avenue, Miami, Florida, 33131, USA

Key speakers: Alfredo Revilak (Servicio de Administración Tributaria), Neil M. Smith (Ministry of Finance Government of the Virgin Islands), Álvaro Iván Revelo Méndez (Secretaría Distrital de Hacienda), Nadja Ruiz (Servicio de Administración Tributaria), Miguel Zamora (Noguera, Larraín & Dulanto), among numerous others

8/4/2015 - 8/5/2015

http://globaltaxtransparency.com/

INTERNATIONAL TAX ISSUES 2015 - CHICAGO, IL

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

ADVANCED INTERNATIONAL TAX PLANNING - CHICAGO

Bloomberg BNA

Venue: Baker & McKenzie, 300 E Randolph Street, Chicago, IL 60601, USA

Key Speakers: TBC

9/28/2015 - 9/29/2015

http://www.bna.com/advanced_chicago/

BASICS OF INTERNATIONAL TAXATION 2015 – SAN FRANCISCO, CA

PLI

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

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), John L. Harrington (Dentons US LLP)

9/28/2015 - 9/29/2015

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2015/_/N-4kZ1z129zs?ID=223955

INTRODUCTION TO US INTERNATIONAL TAX – LAS VEGAS, NV

Bloomberg BNA

Venue: Trump International Hotel, 2000 Fashion Show Drive, Las Vegas, NV 89109, USA

Chairs: Bart Bassett (Morgan Lewis LLP), Doug Stransky (Sullivan & Worcester LLP)

9/28/2015 - 9/29/2015

http://www.bna.com/uploadedFiles/BNA_V2/Professional_Education/Tax/Live_Conferences/IntroIntermediateJuneAugSept2015.pdf

12TH TAXATION OF FINANCIAL PRODUCTS AND DERIVATIVES

Federated Press

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

Chairs: Ryan L. Morris (WeirFoulds LLP), David P. Stevens (Gowling Lafleur Henderson LLP)

9/28/2015 - 9/29/2015

http://www.federatedpress.com/12th-Taxation-of-Financial-Products-and-Derivatives.html

INTERMEDIATE US INTERNATIONAL TAX UPDATE – LAS VEGAS, NV

Bloomberg BNA

Venue: Trump International Hotel, 2000 Fashion Show Drive, Las Vegas, NV 89109, USA

Chairs: Bart Bassett (Morgan Lewis LLP), Doug Stransky (Sullivan & Worcester LLP)

9/30/2015 - 10/2/2015

http://www.bna.com/uploadedFiles/BNA_V2/Professional_Education/Tax/Live_Conferences/IntroIntermediateJuneAugSept2015.pdf

INTERNATIONAL TAX CONFERENCE

BNA

Venue: Park Hyatt Toronto Yorkville, 4 Avenue Rd, Toronto, Ontario M5R 2E8, Canada

Key speakers: TBC

10/14/2015 - 10/14/2015

http://www.bna.com/agenda-m17179927392/

GLOBAL TRANSFER PRICING CONFERENCE

BNA

Venue: Park Hyatt Toronto Yorkville, 4 Avenue Rd, Toronto, Ontario M5R 2E8, Canada

Key speakers: TBC

10/15/2015 - 10/16/2015

http://www.bna.com/agenda-m17179927386/

CAPTIVE INSURANCE TAX SUMMIT – WASHINGTON, DC

BNA

Venue: McDermott Will & Emery, 500 North Capital Street, NW, Washington, DC 20001, USA

Key Speaker: TBC

10/26/2015 - 10/27/2015

http://www.bna.com/captive_dc2015/

INTERMEDIATE US INTERNATIONAL TAX UPDATE – CHICAGO, IL

BNA

Venue: Baker & McKenzie LLP, 300 East Randolph Drive, 50th Floor, Chicago, IL 60601, USA

Key Speaker: TBC

10/28/2015 - 10/30/2015

http://www.bna.com/inter_chicago2015/

PRINCIPLES OF INTERNATIONAL TAXATION

Bloomberg BNA

Venue: Bloomberg LP, 731 Lexington Avenue, New York, NY 10022, USA

Key Speakers: TBC

11/16/2015 - 11/18/2015

http://www.bna.com/principlesintltax_NYC/

INTERNATIONAL TAX PLANNING

IBFD

Venue: Av. das Nacoes Unidas, 12901, Sao Paulo, SP 04578-000, Brazil

Key Speakers: Shee Boon Law (IBFD), Boyke Baldewsing (IBFD)

11/25/2015 - 11/27/2015

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

INTRODUCTION TO US INTERNATIONAL TAX – ARLINGTON, VA

Bloomberg BNA

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

Chairs: TBC

11/30/2015 - 12/1/2015

http://www.bna.com/intro_va/

THE NEW ERA OF TAXATION

International Bar Association

Venue: TBC, Mexico City, Mexico

Key speakers: TBC

12/3/2015 - 12/4/2015

http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bf91caa6-9df6-454b-a682-8b57c7bf9209

ASIA PACIFIC

4TH INTERNATIONAL TAX CONFERENCE

IBFD

Venue: JW Marriott, No. 83 Jian Guo Road, China Central Place, Chaoyang District, Beijing, China

Key speakers: TBC

9/10/2015 - 9/11/2015

http://www.ibfd.org/IBFD-Tax-Portal/Events/4th-International-Tax-Conference#tab_program

INTERNATIONAL TAX AT CROSSROADS – PLOTTING THE FUTURE

Taxsutra

Venue: The Oberoi hotel at Gurgaon, No. 443, Phase 5, Beside Trident Hotel, Udyog Vihar, Gurgaon, Haryana 122016, India

Key Speakers: Justice Mohit Shah, Harish Salve, Philip Baker, Akhilesh Ranjan, Grace Perez-Navarro, Marlies de Ruiter, among numerous others.

10/16/2015 - 10/17/2015

http://www.ibfd.org/sites/ibfd.org/files/content/img/event/Taxsutra_Conclave_brochure.pdf

JUBILEE CONFERENCE

Foundation for International Taxation

Venue: ITC Maratha Hotel, Sahar Tower, Andheri East, Mumbai, Maharashtra 400099, India

Chairs: Sohrab Dastur, Girish Vanvari (KPMG), Dinesh Kanabar (Dhruv Advisors), Nishith Desai (Nishith Desai Associates), Vipul Jhaveri (Deloitte), Kiran Umrootkar (Jacobs Engg.), V. Lakshmikumaran (Lakshmikumaran & Sridharan), Mukesh Butani (BMR Legal), Pranav Sayta (E & Y), Rohan Shah (ELP), Ajay Vohra (Vaish Associates), Gautam Mehra (PwC), Richard Vann (Challis Professor)

12/3/2015 - 12/5/2015

http://www.fitindia.org/downloads/FIT_flier.pdf

INTERNATIONAL TAX SUMMER SCHOOL 2015

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

THE 25TH OXFORD OFFSHORE SYMPOSIUM 2015

Offshore Investment

Venue: Jesus College, Turl Street, Oxford OX1 3DW, UK

Chairs: Nigel Goodeve-Docker (Down End Office), Peter O'Dwyer (Hainault Capital), Richard Cassell (Withers LLP), Nick Jacob (Wragge Lawrence Graham & Co), Andrew De La Rosa (ICT Chambers)

9/6/2015 - 9/12/2015

http://www.offshoreinvestment.com/pages/index.asp?title=Programme_Ox_2015&catID=12148

DUETS ON INTERNATIONAL TAXATION: GLOBAL TAX TREATY ANALYSIS

IBFD

Venue: IBFD Head Office Auditorium, Rietlandpark 301,1019 DW Amsterdam, The Netherlands

Key Speakers: Richard Vann, Pasquale Pistone, Marjaana Helminen, Peter Harris, Adolfo Martin Jimenez, Scott Wilkie

9/7/2015 - 9/7/2015

http://www.ibfd.org/IBFD-Tax-Portal/Events/Duets-International-Taxation-Global-Tax-Treaty-Analysis-1#tab_program

DUETS ON INTERNATIONAL TAXATION: SUBSTANCE AND FORM IN CIVIL AND COMMON LAW JURISDICTIONS

IBFD

Venue: IBFD Head Office, Auditorium, Rietlandpark 301, 1019 DW Amsterdam, The Netherlands

Key Speakers: TBC

9/8/2015 - 9/8/2015

http://www.ibfd.org/IBFD-Tax-Portal/Events/Duets-International-Taxation-Substance-and-form-civil-and-common-law

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - BRISTOL

CCH

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

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

9/9/2015 - 9/10/2015

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

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - MILTON KEYNES

CCH

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

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

9/15/2015 - 9/16/2015

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

INTERNATIONAL TAXATION OF BANKS AND FINANCIAL INSTITUTIONS

IBFD

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

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

9/16/2015 - 9/18/2015

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

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - MANCHESTER

CCH

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

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

9/22/2015 - 9/23/2015

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

CO-ORDINATED EUROPEAN PLANNING & TAXATION

IIR & IBC

Venue: TBC, London

Key speakers: Filippo Noseda (Withers), Timothy Lyons QC (39 Essex Street), Beatrice Puoti (Burges Salmon), Jonathan Burt (Harcus Sinclair), Line-Alexa Glotin (UGGC Avocats), among numerous others

9/23/2015 - 9/24/2015

http://www.iiribcfinance.com/event/Co-ordinated-European-Planning-and-Taxation

TAXATION OF COLLECTIVE INVESTMENT SCHEMES CONFERENCE

IIR & IBC

Venue: TBC, London

Key speakers: Malcolm Richardson (M&G), John Harpur (Aberdeen Asset Management), James Willson (KPMG), Lorraine White (Bank of New York Mellon), Tim Lewis (Travers Smith), Ali Kazimi (Mazars), among numerous others

9/30/2015 - 9/30/2015

http://www.iiribcfinance.com/event/Taxation-of-Collective-Investment-Schemes

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE - OXFORD

CCH

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

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

10/6/2015 - 10/7/2015

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

INTERNATIONAL TAX PLANNING ASSOCIATION MONTE-CARLO MEETING

ITPA

Venue: Hôtel Hermitage Monte-Carlo, Square Beaumarchais, 98000 Monaco

Chair: Milton Grundy

10/11/2015 - 10/13/2015

https://www.itpa.org/?page_id=9909

10TH INTERNATIONAL CORPORATE TRANSFER PRICING CONFERENCE

IQPC

Venue: Hilton Hotel, Georg-Glock-Straße 20, Duesseldorf, 40474, Germany

Key Speakers: Johannes Schimmer (Adidas AG), Sandip Garg (Government of India), Ami Goldenstein (Takeda Pharmaceutical Int'l), Jadwiga Latawiec (Carlsberg Polska Sp. z o.o.), among numerous others.

10/19/2015 - 10/20/2015

http://www.global-transferpricing.com/

INTERNATIONAL TAX STRUCTURING FOR MULTINATIONAL ENTERPRISES

IBFD

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

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

10/21/2015 - 10/23/2015

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

EU FINANCIAL ACCOUNTING IN INTERNATIONAL COOPERATION AND DEVELOPMENT PROJECTS

European Academy

Venue: Arcotel John F, Wederscher Markt 11, 10117, Berlin, Germany

Key Speakers: TBC

11/26/2015 - 11/27/2015

http://www.euroacad.eu/events/event/eu-financial-accounting-in-international-cooperation-and-development-projects.html

THE AMERICAS

United States

The United States Supreme Court has upheld a key part of President Barack Obama's health care law, allowing premium tax credits granted through both state and federal health insurance exchanges.

Under the Affordable Care Act (ACA), premium tax credits were introduced to defray the cost of purchasing health insurance and, in May 2012, the Internal Revenue Service (IRS) issued a final rule (IRS Rule) for their implementation.

The ACA requires the creation of an Exchange in each state – basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each state the opportunity to establish its own Exchange, but provides that the federal Government will establish "such Exchange" if the State does not.

In related language, the ACA provides that tax credits "shall be allowed" for any "applicable taxpayer," but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State," under US Code Title 42 – Public Health Service Act – subsection 18031. An IRS regulation in 2012 interpreted that language as making tax credits available on "an Exchange … regardless of whether the Exchange is established and operated by a state … or by [the US Department of Health and Human Services – *i.e.*, a Federal Exchange]."

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

The case was brought by four individuals living in Virginia, which has a Federal Exchange. They did not wish to purchase health insurance. They argued that Virginia's Exchange does not qualify as "an exchange established by the State" under the aforementioned provision, making them ineligible for tax credits. That would have made the cost of buying insurance more than 8 percent of their income, thereby exempting them from the requirement under the ACA to maintain health insurance coverage or make a payment to the IRS.

The individuals challenged the IRS Rule in the Federal District Court. The District Court dismissed the suit, holding that the ACA unambiguously made tax credits available to individuals enrolled through a Federal Exchange. The Court of Appeals for the Fourth Circuit affirmed this. The Fourth Circuit viewed the ACA as ambiguous, and deferred to the IRS's interpretation under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.* (467 US 837).

The Supreme Court noted that the tax credits are one of the ACA's key reforms and highlighted that whether they are available on Federal Exchanges is a question of deep "economic and political significance." Therefore, had Congress wished to assign that question to an agency, it surely would have done so expressly, the Supreme Court observed, adding that it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

The Supreme Court therefore noted that the case concerned determining the correct reading of Section 36B of the ACA. It said that, in arriving at its decision, it first considered whether the statutory language was plain. It noted that, if so, the Court must enforce it according to its terms. However, where wording is ambigious, the Court must determine the meaning by the context. When deciding whether the language is plain, the Court must read the words "in their context and with a view to their place in the overall statutory scheme," it said, noting the ruling in *FDA v. Brown & Williamson Tobacco Corp* (529 US 120, 133).

The Court ruled that, when read in context, the phrase "an Exchange established by the State" is ambiguous. "The phrase may be limited in its reach to State Exchanges. But it could also refer to all Exchanges – both State and Federal – for purposes of the tax credits. If a state chooses not to follow the directive in Section 18031 to establish an Exchange, the Act tells the Secretary of Health and Human Services to establish 'such Exchange.' And by using the words 'such Exchange,' the Act indicates that State and Federal Exchanges should be the same," the Court said.

It concluded: "State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges; one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens. The other type of Exchange would not."

This judgment was released on June 25, 2015.

http://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf

US Supreme Court: *King v. Burwell (No. 14-114)*

WESTERN EUROPE

European Union (EU)

Advocate General Juliane Kokott of the European Court of Justice (ECJ) has said that bitcoin should be exempt from VAT, in relation to the ongoing case of *Swedish Tax Agency v. David Hedqvist* (Case C-264/14).

She recommended to the ECJ that, although virtual currencies are not legal tender, the purchase of goods and services for a consideration of bitcoin should be recognized as a means of payment that should benefit from the same exemption as for purchases made with legal tender as stated under Article 135, paragraph 1(e) of the VAT Directive:

> "Member states shall exempt the following transactions: … (e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver, or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest."

However, she acknowledged that the wording of Article 135, paragraph 1(e) does not provide a clear answer to the question, and member states' interpretation of this provision in their respective domestic laws varies.

The Advocate General filed her opinion on July 16, 2015.

This opinion is not yet available in English.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=165919&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=358404

European Court of Justice AG: *Swedish Tax Agency v. David Hedqvist (Case C-264/14)*

United Kingdom

The UK Supreme Court has ruled in favor of an appellant concerning his right to double taxation relief on income remitted to the UK from the US.

The appellant's eligibility for double tax relief depended on the interpretation of Article 23(2)(a) of the UK–US Double Taxation Convention 1975 and its successor, Article 24(4)(a) of the UK–US Double Taxation Convention 2001. The relevant question under both provisions was whether the UK tax is "computed by reference to the same profits or income by reference to which the United States tax is computed."

The relevant period was the seven UK tax years running from April 6, 1997, to April 5, 2004, during which the appellant was a member of a Delaware limited liability company (the LLC), classified as a partnership for US tax purposes. As such, the appellant was liable to US federal and state taxes on his share of the profits.

The appellant remitted the balance to the UK and was liable to UK income tax on the amounts remitted, as "income arising from possessions outside the UK." The UK tax authority, HM Revenue & Customs (HMRC – the respondent), decided that he was not entitled to any double taxation relief, on the basis that the income that had been taxed in the US was not the appellant's income but that of the LLC.

On the appellant's appeal, the First-tier Tribunal (FTT) found that the combined effect of the Delaware LLC Act (the LLC Act) and the LLC agreement made between the members was that profits of the LLC belong to the members as they arise. It concluded that the appellant was taxed on the same income in both countries, so he was entitled to double taxation relief.

The Upper Tribunal allowed HMRC's appeal. Later, the Court of Appeal dismissed the appellant's appeal, but the Supreme Court unanimously allowed the appellant's appeal.

The FTT had decided that the profits belonged to the members, referring to a personal right rather than a proprietary right. This was consistent with the appellant's expert evidence and with the comparison that the FTT made between the LLC and a Scottish partnership. However, the Upper Tribunal disagreed. The Supreme Court noted that in coming to its decision, the FTT had based its judgment on expert evidence as to the combined effect under Delaware law of the LLC Act and the LLC agreement.

The Court of Appeal focused on whether the appellant had a proprietary right to the profits of the LLC as they arose, rather than addressing whether the income taxed in one country is the same as the income taxed in another. The Court of Appeal also accepted HMRC's submission that the FTT's finding that the profits belonged to the members as they arose was a holding on UK domestic tax law, with which the Upper Tribunal was entitled to interfere. However, questions about whether the members had a right to the profits and, if so, the nature of that right were questions of non-tax law, governed by Delaware law. The FTT's conclusion on them was a finding of fact, the Supreme Court stated, adding that the Court of Appeal had been diverted by its consideration of the case of *Memec plc v. Commissioners of Inland Revenue* [1998] STC 754, which was concerned with Article 23(2)(b) of the 1975 Convention, not Article 23(2)(a). Eventually, the Supreme Court agreed with the ruling of the FTT.

The Supreme Court said that, if the words used in Article 23(2)(a) are given their ordinary meaning, it is necessary to identify the profits or income by reference to which the taxpayer's UK tax liability is computed, being primarily a question of UK tax law. Next, one must identify the profits or income from sources within the US on which US tax was payable under the laws of the US and in accordance with the Convention – primarily a question of US tax law. Then it is necessary to compare the profits or income in each case, and decide whether they are the same.

The Supreme Court concluded that the FTT was right in finding that the appellant was entitled to the share of the profits allocated to him, rather than receiving a transfer of profits previously vested (in some sense) in the LLC. The Court said it follows that his "income arising" in the US was his share of the profits. The Supreme Court found that the appellant's liability to UK tax was computed by reference to the same income as was taxed in the US. Accordingly, the Supreme Court ruled that the appellant should qualify for double taxation relief under Article 23(2)(a).

This judgment was released on July 1, 2015.

https://www.supremecourt.uk/cases/docs/uksc-2013-0068-press-summary.pdf

UK Supreme Court: *Anson v. HM Revenue and Customs [2015] UKSC 44*

United Kingdom

The UK's Supreme Court has rejected an appeal brought by the Rank Group against HM Revenue & Customs' decision to levy value-added tax (VAT) from takings from certain slot machines.

The key issue was whether the takings in question were exempt from VAT because of technology which separated the Random Number Generator (RNG), which is the system for producing numbers for the machine's software to determine the outcome of a bet, from the machines themselves.

The appeal related to "multi-terminal" systems, whereby the RNG might be housed in a separate box or hung on the wall, but would be connected by a wire to the playing terminals. Up to six playing terminals might be served by a single remote RNG. Each terminal was designed to be used with the RNG obtained from the manufacturer of the terminal; the terminals and RNGs were sold together; and each RNG was "manufacturer-specific." Although they were linked to a single RNG, each terminal could be operated independently, offering the same or different games.

The key issue was whether the takings resulted from the provision of a "gaming machine," as defined. The disputed element of the definition of "gaming machine" was whether "the element of chance in the game is provided *by means of the machine*" (emphasis added). If this was not satisfied, then the takings from the disputed machines were exempt from VAT.

It is commonly accepted that a slot machine is a "gaming machine" for VAT purposes when the element of chance is provided by a component that forms part of the body of the machine on which the game is played. Rank had argued because these two elements were separate, that supply should be exempt.

The VAT and Duties tribunal concluded, in favor of Rank, that the disputed machines were not "gaming machines" because the RNG was not part of any terminal, and the element of chance was not provided by the machine containing the slot. The High Court agreed. However, the Court of Appeal overturned this decision; it considered that each terminal and the single RNG could together constitute a machine. Rank appealed to the Supreme Court, which dismissed the appeal.

The Supreme Court stated that the question was how the element of chance is provided "in the game." It observed that the definition implies an active function in the game as it is played, rather than the mere passive transfer of information to the player. There had been no good policy reason given for distinguishing between on the one hand, embedded software or a single-terminal RNG, and on the other, a multi-terminal RNG.

The Court found as follows:

> "The overall purpose is the creation of a game of chance for the player, in which purpose both the terminal and the RNG play, and are designed to play, essential and connected functions … The terminal is useless for playing the game without the RNG. Where the RNG is linked to a single terminal, the tribunal saw nothing wrong in principle in viewing them as together being a single machine for playing the game. Similarly, where the RNG serves several terminals, it is appropriate to treat the combined apparatus as a 'machine'."

This judgment was released on July 8, 2015.

https://www.supremecourt.uk/cases/docs/uksc-2013-0257-press-summary.pdf

UK Supreme Court: *HMRC v. The Rank Group Plc ([2015] UKSC 48)*

United Kingdom

The UK's Upper Tribunal has ruled in favor of the appellant in a case that discussed the tests to be applied to determine whether the "no-supply" VAT concession for transfers of a going concern (TOGCs) should apply with respect to the transfer of an entity to a member of a VAT group following the European Court of Justice's (ECJ's) ruling in *Skandia* (Case C-7/13).

The case concerned an appeal brought by Intelligent Managed Services Limited (IMSL) against the decision of the First-tier Tribunal (FTT). The FTT had dismissed its appeal against the decision of HM Revenue & Customs (HMRC) that the transfer of its banking support services business, consisting of business assets and staff, to Virgin Money Management Services Limited (VMMSL), a member of the Virgin Money Group (VMG), was not a "transfer of a going concern." HMRC decided that the transfer gave rise to supplies of goods and services that were subject to VAT.

Under EU law, Article 19 of the EU VAT Directive provides that in the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or parts thereof, member states may consider that no supply of goods has taken place, and that the person to whom the goods are transferred is to be treated as the successor to the transferee.

Member states may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortions of competition. They may also adopt any measures needed to prevent tax evasion or avoidance through the use of that Article. The UK has legislated for this rule through Article 5 of the Value Added Tax (Special Provisions) Order 1995.

It was accepted before the Upper Tribunal, having regard in particular to the ECJ's judgment in *Skandia*, which was issued after the FTT had released its decision in this case, that for VAT purposes the acquirer of IMSL's business was the single taxable person, namely the VMG VAT group, and not VMMSL itself. The relevant tests had to instead be applied in relation to what the group as a whole had done, and not any individual group member.

The Upper Tribunal observed: "The Skandia case demonstrates the extent of the single taxable person fiction in a group context. There the question was whether a supply of services from a US company to a branch of the same company in Sweden, which was a member of a Swedish VAT group, was a taxable transaction. The Court held that it was, essentially because the effect of the grouping provisions was that the supply was to a separate single taxable person, namely the group of which the branch was a member, and not to the branch itself."

"In this appeal, therefore, the issues have narrowed down. It is accepted that, if VMMSL were a standalone company, all the conditions for the sale of the business by IMSL being a TOGC, including that VMMSL was carrying on the same kind of business as IMSL, would be satisfied. The only question is whether, when the transaction is regarded as a sale by IMSL to the single taxable person, the VMG VAT group, that group fails to satisfy the same kind of business test. That was not a question addressed by the FTT in its decision." The Upper Tribunal therefore set aside the FTT's ruling.

The Upper Tribunal noted that the requirement that the transferee carry on the same kind of business as that of the transferor is an express requirement of Article 5 of the SPO (UK law), but not of Article 19 of the Principal VAT Directive (EU law). It considered the case of *Zita Modes* (Case C-497/01), which looked at the precursor to Article 19 of the EU VAT Directive (Article 5(8) of the Sixth VAT Directive).

After discussing the tests used in that case, the Upper Tribunal found that the transfer was for the group to continue to supply such services, rather than to liquidate the assets of the business transferred. The Tribunal concluded that "leaving aside the effect of the VAT group rules, it is accepted that VMMSL is, as a matter of fact (and ignoring any deeming provisions of Section 43 VATA), carrying on the same business as that formerly carried on by IMSL."

The Upper Tribunal determined that VMMSL is accepted as "having had the requisite intention to carry on that business, and not to liquidate the activity or do anything else that could lead to the conclusion that this was no more than a transfer of assets [rather than a transfer of a going concern]."

The Upper Tribunal concluded: "For the reasons we have given, we allow this appeal and set aside the decision of the FTT. We decide that the transfer by IMSL of the assets of its business to VMMSL satisfied the conditions of Article 5(1) of the SPO, and that those supplies are accordingly to be treated as neither a supply of goods nor a supply of services."

This judgment was released on July 7, 2015.

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Intelligent-Managed-Services-v-HMRC.pdf

UK Upper Tribunal: *Intelligent Managed Services v. HMRC*

Dateline July 30, 2015

Something of a tax reform theme emerges from the news this week. And unlike in some countries (I'm talking about you in particular, USA), some governments and legislatures are actually putting words into action for a change.

Let's start in India, where the Government is inching ever closer to its goal of introducing the highly anticipated goods and services tax (GST) in April 2016. It's not often you hear that a tax is expected to actually improve the functioning of a country's economy and lead to higher levels of commerce and growth, but this will probably be the case in India, where presently several inefficient indirect state taxes exist, some of which cascade as goods are traded across state borders, discouraging intra-Indian trade.

The GST promises to sweep these taxes away and replace them with a cleaner system, which will be levied concurrently at central (federal) and state levels akin to Canada's Harmonized Sales Tax. Except that getting the states to agree on it has been a far from harmonious process, with many states expecting to collect less in tax as a result of GST.

The BJP Party, which has won back the confidence of domestic and foreign investors alike, has made GST one if its top priorities, and has managed to push the legislation further along the legislative road in the space of a year than the previous lot did in ten. Encouragingly, the upper house of parliament's GST panel largely endorsed the proposed change to the Constitution that will be needed before GST in its proposed form can be introduced. However, it did recommend that the central Government provide a more extensive revenue compensation package to the states than it has been prepared to give, which has been one of the major stumbling blocks all along.

There are signals coming from the Government that it is prepared to relent on this point. But some crucial details still need to be finalized, and the indications are that opposition parties will block the bill quite easily in the upper house, where a two-thirds majority is needed to change the constitution, if their demands aren't met. Yet again, it could be a case of so near, but yet so far, for tax reform in India.

Reforming a country's tax code can often be an agonizing process. Often, it starts with the formation of a panel of experts or parliamentarians, charged with studying various options for reform. Then, the panel will publish a report detailing where the tax system is failing, and proposing ways in which it can be fixed. The report will then be submitted to parliament or the government, upon which the finance minister will laud the great work and dedication of the panel and its chairman. Within a week of this, it'll probably be forgotten about. Or, if a tax reform bill is eventually drawn up, it will be so divisive as to be virtually impossible to approve, with the result that it gets batted back and forth between lower and upper chambers, finance committees, and constitutional courts. Some members of the legislature with a particular interest in tax reform will try to keep the issue in the government's consciousness, and the government will be reminded on a regular basis by the IMF, the OECD *et al.* not to forget about that tax reform bill it promised. But rarely does a country manage to make a clean sweep of its tax code.

So, it was refreshing to read that Turkey is on the brink of making fairly seismic changes to its tax legislation, a process that so far has taken a relatively brisk two years. The draft tax code will merge the two separate laws for the taxation of corporate and individual income, and by all accounts will strip away many overlapping and confusing provisions, reducing the number of articles by 200 to about 320. Of course, one of the main aims is to bring more people into the tax net and widen the tax base – *i.e.*, it will raise revenue – but it is also said that the changes will make Turkey a considerably easier place to do business, so it merits an encomium.

It remains to be seen whether the conclusions of South Africa's Davis Tax Reform Committee, led by Judge Dennis Davis, will be acted upon by the Government or quietly shelved. I suspect this process will lead to some changes, but mainly to wring more revenue out of the tax system; the Government has admitted that the budget deficit is growing, but it intends to increase public spending.

Last week, the Davis Committee released two options papers on the subject of value-added tax reform. One of the terms of reference of the committee is to consider ways in which the South African VAT system can be made more efficient. Or, in other words, how the Government can raise more tax from the system for less effort. However, inconveniently for the Government, South Africa's VAT regime is already one of the most efficient in world, according to the conclusions of an IMF report, which was actually commissioned by the Government to support the work of the Davis Committee.

Therefore, the IMF said, there is limited scope for improvements to VAT in South Africa. It's quite a delicious irony really. The IMF is routinely heard to tell countries to widen their tax bases, and the Government was probably hoping for the same response to justify some stealthy revenue-raising measures of its own. If that was the plan, it's certainly backfired. But the Government will probably make the changes it wants to make anyway, IMF or no IMF.

The UK Government might also be careful what it wishes for as it presses the Office of Tax Simplification back into action to study merging the income tax and National Insurance systems. National Insurance contributions (NICs) were first introduced just prior to World War I to help working people insure against periods of unemployment and illness. They were expanded immediately after World War II to help pay for the new National Health Service.

However, revenues from NICs have long ceased to be ring-fenced and, in reality, the National Insurance system is just another item of general taxation.

Merging National Insurance into income tax would achieve huge administrative savings for both governments and employers, and the proposal is strongly supported by business, which sees NICs as a large tax on employment. Yet, the Government is on dangerous territory here. For starters, merging NICs into income tax would make personal taxation much more transparent, showing people just how much tax they are really paying on their salaries: if employer NICs, charged at 12 percent on wages, were combined with income tax, the basic rate of income tax would rise from 20 percent to 32 percent. And unless significant changes were made to the rate structure, there would be some bizarre results.

The Adam Smith Institute calculates that effectively there would be ten tax bands if the two systems were merged under their current parameters, with those earning over GBP100,000 paying from 42 percent to 62 percent. There are also other issues. Pensioners don't pay NICs, so they would have to be put on a separate regime with lower rates. There is also the employer National Insurance contribution of 13.8 percent to consider, and it is unclear how this would be absorbed into the new system. Moreover, merging the two regimes, which have entirely separate IT systems, could be highly disruptive, expensive, and time consuming from an administrative point of view, which is one of the reasons why the Government didn't pursue this reform in the last parliament. George Osborne has at times been a bold finance minister. This move, if he goes ahead with it, could be the bravest of the lot.

The Jester