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a closer look

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

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

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

Combining expert industry thought leadership and the unrivalled worldwide multi-lingual research capabilities of leading law and tax publisher Wolters Kluwer, CCH publishes Global Tax Weekly — A Closer Look (GTW) as an indispensable up-to-the minute guide to today's shifting tax landscape for all tax practitioners and international finance executives.

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A Role For Small Jurisdictions In The World Economy

by Andrew P. Morriss, Dean & Anthony G. Buzbee Dean's Endowed Chair, Texas A&M School of Law

As I write this, I am sitting in St. Helier, Jersey, Channel Islands. Down the street, the clock above a jewelry store revolves a turntable with scenes of the three pillars of the Jersey economy on it each hour: agriculture, tourism, and finance. Despite the excellent Jersey cream (and ice cream) from the famous cows and the sweet strawberries on sale at the Victorian market, and the crowds of tourists who wander down King Street in search of clothing, watches, and jewelry, it is finance that is the heart of the Jersey economy. And it is finance that makes Jersey important to the rest of the world.

A Quick History

Jersey (and its close neighbor, Guernsey) have long histories, with elements of tax arbitrage from as far back as the Napoleonic wars. Retired English officers settled there, where the weather was milder, the duty on key parts of a retired soldier's diet, tea and rum, lower, and, on a clear day, they could gaze across the water at France to make sure France remained quiet. Those lower duties came from the Channel Islands' constitutional status as what we now call Crown Dependencies.

As the last remaining bits of the English monarchs' Norman domains, the islands are constitutionally distinct from England, Scotland, Wales, and Northern Ireland. That distinction allowed them to develop their own legal systems. Jersey's is the result of the island's drawing on a diverse array of sources. As Stéphanie C. Nicolle's, QC, excellent *The Origin and Development of Jersey Law* (Jersey & Guernsey Law Review 2009) notes in the introduction, the result is "what at first encounter appears to be an inexplicable mixture of native and foreign law, where authorities are selected or rejected in a way which the beginner may find very difficult to follow." [1]

From the end of the Napoleonic Wars until after World War II, Jersey played a supporting role in tax and estate planning primarily for British taxpayers but also for the occasional French taxpayer. World War II interrupted Jersey's economic development, as the Channel Islands were occupied by German troops, bringing considerable hardship to the residents, who were not liberated until May 9, 1945, long after the June 6, 1944 D-Day landings in Normandy.

As tax planning in those days often meant moving one's person as well as one's money, the scope remained relatively limited. As Henry Myhill's 1964 *Introducing the Channel Islands* noted, "For income does not necessarily cease to suffer UK tax simply because its recipient has left Britain." One's money needed to leave too, and, although Myhill cautioned that it was "untrue to say, as so many frustrated immigrants do say, that 'There is nothing in the Channel Islands to put your money into'," he did warn that "it remains true that the ideal Channel Island investments, property, local investment trusts, European unit trusts, Canadian banks, and so on, are the type of securities to stick in the old tin box and forget about – they do not appeal to the 'in-and-out' speculator, whose numbers have risen so greatly in modern Britain. The Channel Island investor can sleep at nights, certainly; but sleeping a' nights is just what the average UK investor has forgotten how to do."

The 1961 decision by the island's legislature, the States of Jersey, to remove the 1771 usury limit of 5 percent, opened up the opportunity to develop investment products with a broader appeal. This led to an influx of investment from investors throughout the rapidly decolonizing British Empire, seeking a secure jurisdiction through which to bank without incurring UK tax liabilities that would follow from moving assets to London. The UK's 1979 end to exchange controls which also ended them in the Channel Islands further opened the world market to Jersey's financial industry. The financial industry thus developed into a robust sector of the economy, with a broad array of financial professionals (banks, accounting firms, law firms, and other service providers).

As a result, Jersey developed into a business center that had 187 regulated trust and company service providers holding 855 trust company business licenses, 1,320 regulated investment funds with GBP225.7bn (USD3.07bn) net asset value under management, companies listed on global exchanges with a combined market capitalization of GBP145bn, and the largest number of FTSE 100 companies registered outside the UK.[2] A 2013 study for Jersey Finance (the industry's trade association) by Capital Economics found that Jersey was the conduit for 1 in 20 pounds invested by foreigners in the UK, and helped produce GBP2.3bn in UK tax revenue and support 180,000 British jobs.[3] This same report found the most the UK could lose in tax revenue through legal

Jersey-based avoidance measures was GBP480m and another GBP150m of illegal avoidance, leaving the British Treasury considerably better off from Jersey's role in the international economy.

What Role?

There is considerable debate over the role of small jurisdictions like Jersey in the world economy. Tax campaigners like the Tax Justice Network and Oxfam (which, oddly enough, runs a charity shop in St. Helier – suggesting the group has no problem accepting donations from the financial industry professionals who it spends the money it raises attacking) decry these jurisdictions' participation in what they are convinced is a world-wide effort to evade and avoid taxes. In their view, every penny denied a government might have bought schools or health care for children or some similar public good. They see no reason to allow these jurisdictions to participate in the global economy – except, perhaps, as objects of charity when their economies collapse due to punitive measures like blacklists.

Is there a positive role for jurisdictions like Jersey? There are three big reasons why it is important for places like Jersey to have a role in the world economy. First, the rule of law is a scarce commodity in the world. Economic activities require business organization and contract laws on which participants can rely. Even more importantly, those laws must be embedded in a legal system that provides participants with confidence that future disputes will be resolved in accord with well-thought-out and known-in-advance legal principles by competent judges.

Second, robust and agile regulatory regimes that address real problems but do not throw sand in the gears of international commerce are needed to both provide investor confidence and protect the public against fraud and other problems.

Third, competition spurs improvements across the world of business. Just as competition keeps businesses on their toes, so too it can improve governments. Bigger, slower moving jurisdictions need the competitive pressure of smaller, agile ones to keep them from stagnating. Let's look at each of these.

Rule Of Law Services

A case can be made that Jersey ought to adopt the slogan "Providing the World the Rule of Law since 1204." [4] Here's how that works. Imagine we have a group of investors from Germany, Britain, and Slovenia, who wish to establish a business in Angola. Not unreasonably, they are concerned that the Angolan legal system would not be an effective means of settling any future

disputes they might have over the governance of the business, as Angola ranked 163rd out of 168 in Transparency International's 2015 Corruptions Perception Index. The British and Slovenian investors might feel disadvantaged by use of German law, the Germans by the use of British or Slovenian law, and so on. A neutral jurisdiction is thus needed.

The jurisdiction needs to be one that fits well into world capital markets and thus make investors feel secure. It needs to offer business laws that are recognized in London, New York, Hong Kong, and other major markets, allowing investors the ability to sell their investments to others without requiring expensive analyses of the legal regime.

It needs to be able to be compliant with European Union regulations. And it needs to have access to sophisticated judges and lawyers in the event that there is a dispute among the investors over the governance of their business. This is precisely the niche that a jurisdiction like Jersey can fill. Jersey's bar is filled with sophisticated business lawyers, and its courts regularly address governance problems and are staffed by highly qualified judges. Appeals are heard by the Appeals Court (staffed by a number of QCs) and, by special leave, to the Judicial Committee of the Privy Council.

Value-Adding Regulatory Regimes

Critics of small jurisdictions often claim they are engaged in a "race to the bottom" on regulation. By offering businesses chances to escape regulatory efforts, the critics argue, these jurisdictions allow bad behavior that would be prevented if only the big jurisdictions could have their way and enforce "fair" rules across the globe. This is a false picture of how the world actually works.

First, in general, investors don't like loose regulation. Why? Because investors are turning their money over to the people running businesses to do things with. In an unregulated environment, some of those business people are likely to scamper off with the investors' money. The more likely you think someone is to run off with your money, the higher the return you will demand before entrusting your hard-earned cash to them. If a business can reassure an investor that the investor's money is not going to be stolen, the business can find investors willing to invest without paying a premium return. Legitimate businesses therefore seek regulatory regimes that add value by providing reassurance to investors.

One concern investors have today is that they will end up in business with bad people (sponsors of terrorism, fraudsters, *etc.*). No legitimate investor (like a pension fund) wants that. Nor do they want to be an investor in a business from a jurisdiction where there are other businesses that are

run by such people. At the same time, investors value their privacy (both for business reasons and personal reasons) and don't want their personal affairs spread across the internet.

Across the world, jurisdictions are struggling to address these competing needs. Jersey is a good example of a successful balancing of the need for regulators to know who the beneficial owners of businesses are and protecting the privacy of investors. Griffith University professor Jason Sharman, one of the world's leading experts on money laundering and corruption, recently looked at Jersey's beneficial ownership regulations in light of the evidence on what works and what doesn't.

He concluded that Jersey's beneficial ownership regulations outperformed the UK and the US regimes. Jersey's success is the result of three conditions that make up the "Jersey model" for beneficial ownership regimes: (1) active verification of identities at the time of registration, including use of due diligence software on the names of the beneficial owners; (2) close coordination with licensed corporate service providers to ensure information is kept up to date; and (3) approval of company registrations only when trained staff are confident that they have identified the beneficial owner.[5]

After noting that "by far the biggest problem [with beneficial ownership registration] is the United States," Sharman concluded that "it is peculiar that IFCs [international financial centers] are subject to much more international pressure and negative publicity, even though their performance is much better. This disparity seems to be an indicator of the degree to which the policy debate over beneficial ownership is dominated by politics and public relations concerns, rather than a genuine desire to fix the problem of untraceable shell companies." This is just one example of how jurisdictions can add value through proper regulatory structures.

Regulatory Competition

Jersey also adds value on the international stage. It is part of the debate because the Jersey Financial Services Commission belongs to the international regulatory bodies including the International Organization of Securities Commissions (IOSCO), the Group of International Finance Centre Supervisors (GIFCS), the International Association of Insurance Supervisors (IAIS), the Group of International Insurance Centre Supervisors (GIICS), and the International Federation of Audit Regulators (IFIAR), and participates in organizations like the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Basel Committee on Banking Supervision, and the Financial Action Task Force (FATF).[6] Adding voices of experienced regulators to these debates is important.

Even more importantly, Jersey's efforts put pressure on larger, less nimble jurisdictions to improve their regulatory regimes. For example, having a competing jurisdiction a short plane ride away from London available helps keep the UK regulatory authorities focused on maintaining their regulatory regime.

Jersey's Role

As a result of William the Conqueror's victory in 1066, Jersey's destiny was joined to Britain's. As a result of Philip II's victory in 1204, it was separated from Normandy and France. The result was a constitutional status that has allowed Jersey's just-under 47 square miles and just-over 100,000 population to have an outsized impact on the world financial system. By "exporting the rule of law," contributing solutions to important problems, and putting competitive pressure on larger jurisdictions, Jersey is helping expand the world economy. That's a reason to raise a locally-brewed Liberation Ale in a toast to the jurisdiction.

Endnotes

1 Stéphanie C. Nicolle, QC, *The Origin and Development of Jersey Law* (Jersey & Guernsey Law Review, Ltd. 2009).

2 Statistics drawn from the Jersey Financial Services Commission Annual Report 2015.

3 *Jersey's Value to Britain* (2013).

4 France conquered the Duchy of Normandy, of which Jersey and the other Channel Islands had been a part, in 1204, and the islands then became self-governing.

5 Jason Sharman, *Solving the Beneficial Ownership Conundrum: Central Registries and Licenced Intermediaries* (Jersey Finance 2016).

6 Jersey participates in the latter two through its GIFCS membership.

The Multilateral Convention – The Springboard To Global Automatic EoI

by Stuart Gray, Senior Editor, Global Tax Weekly

In an era when international tax enforcement programs have assumed increasingly pithy titles (think FATCA for example), the Multilateral Convention on Mutual Administrative Assistance in Tax Matters[1] is certainly something of a mouthful! However, this legal instrument, as obscure as it sounds, is assuming greater importance as automatic exchange of information (EoI) gradually spreads its way around the world. In this article, we attempt to understand why.

Introduction

The news that representatives from Burkina Faso, Malaysia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Samoa were in Paris recently to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters has, unsurprisingly, hardly rocked the world of international taxation.

Nonetheless the event marked a significant milestone on the road towards international cooperation in tax enforcement, for it brought the number of jurisdictions that have signed the pact to over 100. As Grace Perez-Navarro, Deputy-Director of the OECD Centre for Tax Policy and Administration, observed: "With over 100 countries and jurisdictions now participating in this multilateral tax information sharing agreement, national efforts to combat international tax evasion and avoidance have been substantially strengthened." [2]

Background

Few people unacquainted with the complex world of international taxation are likely to have heard of the Multilateral Convention, let alone claim knowledge of what it does. But this fairly innocuous-sounding instrument is the bedrock upon which new global EoI requirements sit, and

so it is likely to touch many people's lives, albeit indirectly. Indeed, according to the OECD, the Convention is the most comprehensive multilateral instrument available for all forms of administrative assistance between governments in the area of tax.

Originally developed jointly by the OECD and the Council of Europe and opened for signature by their member states on January 25, 1988, the Convention was for two decades only open to members of the OECD and the EU. But in 2009, as the G20 nations renewed their offensive against tax avoidance in the wake of the financial crisis, it was made available for all countries to sign. "Given its multilateral nature, the Convention is a unique instrument to counteract international tax avoidance and evasion," OECD Secretary General Angel Gurría commented in April 2010, after the Council of Europe and the OECD agreed to update the treaty.[3]

Amendments to the Convention which opened it up to all countries duly took effect on June 1, 2011. This update incorporated internationally agreed standards for the exchange of information in tax matters.

Administrative Assistance Provisions

The Convention is framed so as to provide for all possible forms of administrative cooperation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion.

In short, the Convention binds signatory countries to providing administrative assistance to each other in tax matters, including:

- The exchange of information;
- Simultaneous tax examinations and participation in tax examinations abroad;
- Assistance in recovery, including measures of conservancy; and
- Service of documents.

Such assistance may be given by a judicial, as well as an administrative, body.

Under the Convention's General Provisions (Article 4), the parties are required to exchange any information that is "foreseeably relevant for the administration or enforcement of their domestic laws" and the requested state is permitted to "take all relevant measures" to provide the applicant state with the information requested if the information available in the tax files of the requested state is not sufficient to enable it to comply with the request for information.

The standard of "foreseeable relevance" is intended to provide for the exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the parties are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons.

The five main methods of exchanging information are the following:

- *Exchange on request:* The furnishing by the requested state of information relating to a particular case to an applicant state that has specifically requested it (Article 5).
- *Automatic exchange:* The systematic sending of information concerning specified items of income or capital from one party to another (Article 6).
- *Spontaneous exchange:* The passing on of information obtained during examination of a taxpayer's affairs or otherwise that might be of interest to the receiving state (Article 7).
- *Simultaneous tax examination:* The furnishing of information obtained in the course of the simultaneous examination in each party concerned, on the basis of an arrangement between two or more competent authorities, of the tax affairs of a person or persons in which these states have a common or related interest (Article 8).
- *Tax examination abroad:* The obtaining of information through the presence of representatives of the tax administration of the applicant state at an examination of a tax matter in the requested state (Article 9).

However, Article 4 does not restrict the possibilities of exchanging information to the five methods mentioned above. In general, the manner in which EoI will be effected can be decided upon by the parties, acting through their competent authorities.

The principal forms of EoI are described in more detail below.

Information On Request

Information exchanged on request will relate to a particular case indicated by the applicant state. Normally, the applicant state needs additional data to check the information supplied by the taxpayer in his return about income from, or assets in, the requested state. In many cases, the information will be requested because the applicant state suspects that the taxpayer did not give the complete or correct facts.

Requests are normally made in writing. However, requests can be expressed orally and confirmed in writing afterwards. In some situations where information is required without delay, the

competent authorities can use electronic or other communication and information technologies to improve the timeliness and quality of exchanges of information.

Automatic Information Exchange

Information that is exchanged automatically is typically bulk information comprising many individual cases of the same type, usually consisting of payments from and tax withheld in the supplying state, where such information is available periodically under that state's own system, and can be transmitted automatically on a routine basis. The aim of the parties will be to exchange such information in the most efficient way possible having regard to its bulk character.

Parties to the Convention may enter into separate agreements to narrow the scope of items to be exchanged automatically.

Spontaneous Information Exchange

Under the spontaneous EoI Article, a party to the Convention must, without prior request, forward to another party information that it has knowledge of, in the following circumstances:

- The first-mentioned party has grounds for supposing that there may be a loss of tax in the other party;
- A person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned party that would give rise to an increase in tax or to liability to tax in the other party;
- Business dealings between a person liable to tax in a party and a person liable to tax in another party are conducted through one or more countries in such a way that a saving in tax may result in one or the other party, or in both;
- A party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
- Information forwarded to the first-mentioned party by the other party has enabled information to be obtained that may be relevant in assessing liability to tax in the latter party.

Information Exchange Methods

EoI may take place in a variety of ways acceptable to the competent authorities (*e.g.,* personal contact, telephone or secure email, exchange of CD ROMs), but when the exchange is oral, it is normal to confirm it in writing afterwards.

With a view to speeding up the exchange, especially in a field where information is needed quickly, the competent authorities can agree to delegate powers for more direct contacts (*e.g.,*

by telephone). Furthermore, it is worth mentioning that the Convention covers not only the exchange of taxpayer-specific information, but also allows the competent authorities to exchange other sensitive information related to tax administration and compliance improvement, such as risk analysis techniques, and tax avoidance or evasion schemes.

Article 18 sets out the information to be provided by the applicant state. Under this Article, a request is required to indicate the name, address or any other particulars assisting in the identification of the person in respect of whom the request is made.

Under Article 21, a requested state cannot decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity, or because it relates to ownership interests.

Taxes Covered

The Convention covers a much wider range of taxes than is the case under traditional bilateral double tax avoidance agreements. Defined by Article 2, these taxes include all forms of compulsory payments to general government (including central government, political subdivisions or local authorities, and social security agencies) with the exception of customs duties, import/export duties, and taxes that are covered by the International Convention on Mutual Administrative Assistance for the prevention, investigation, and repression of customs offences, prepared under the auspices of the Customs Co-operation Council (now the World Customs Organization).

Namely, the Convention normally applies to:

- Taxes on income and profits;
- Taxes on capital gains imposed separately from taxes on income and profits;
- Taxes on net wealth;
- Compulsory social security contributions;
- Estate, inheritance, and gift taxes;
- Taxes on immovable property;
- Consumption taxes, such as value-added or sales taxes;
- Specific taxes on goods and services, such as excise taxes;
- Taxes on the ownership and use of motor vehicles;
- Taxes on the ownership and use of other movable property; and
- "Any other" taxes.

The Coordinating Body

A coordinating body, composed of representatives of the competent authorities of signatory countries, monitors the implementation and development of the Convention, under the aegis of the OECD. The coordinating body is able to recommend any action likely to further the general aims of the Convention. In particular, it acts as a forum for the study of new methods and procedures to increase international cooperation in tax matters and it may recommend revisions or amendments to the Convention. States that have signed but not yet ratified, accepted or approved the Convention are entitled to be represented at the meetings of the coordinating body as observers.

Confidentiality And Privacy Safeguards

According to the OECD, the Convention includes "very high standards of confidentiality and protection of personal data." The privacy safeguards are provided for in Article 22 of the Convention. This states that any information obtained by a party under the Convention must be treated as secret and protected in the same manner as information obtained under the domestic law of that party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards that may be specified by the supplying party as required under its domestic law. The key phrase here, however, is "under domestic law," and data protection and privacy standards are likely to vary widely between the signatory countries.

Furthermore, while the Convention attempts to ensure that taxpayers' rights under national laws are "fully safeguarded," it stipulates that national laws should not be applied in a manner that undermines the object and purpose of the Convention. In other words, the parties are expected not to unduly prevent or delay effective administrative assistance.

The Multilateral Competent Authority Agreement

The Convention has taken on increasing importance following the G20's call for automatic exchange to become the new international standard for the exchange of tax information, and the subsequent development of the Standard for Automatic Exchange of Financial Account Information (the Common Reporting Standard, or CRS).[4] Subsequently, Competent Authorities from 84 jurisdictions (as of August 2016) have signed the Multilateral Competent Authority Agreement (CAA) under Article 6 of the Convention, which provides for the EoI.[5] The CAA implements the CRS for automatic exchange, specifying the details of what information will be exchanged and when. While the CAA is multilateral, the actual

exchanges are bilateral. The first automatic information exchanges under the new standard are expected to begin in 2017.

Summary Of The Agreement

The Model CAA links the CRS and the legal basis for the exchange (such as the Convention or a bilateral tax treaty) allowing the financial account information to be exchanged. The Model CAA consists of a number of "whereas clauses" and seven sections, and provides for the modalities of the exchange to ensure the appropriate flows of information. The whereas clauses contain representations on domestic reporting and due diligence rules that underpin EoI to the CAA. They also contain representations on confidentiality, safeguards, and the existence of the necessary infrastructure for an effective exchange relationship.

The Model CAA contains a section dealing with definitions (Section 1), and covers the type of information to be exchanged (Section 2), the time and manner of exchange (Section 3), and the confidentiality and data safeguards that must be respected (Section 5). Collaboration on compliance and enforcement is dealt with in Section 4. Consultations between the competent authorities, amendments to the agreement, and the term of the agreement, including suspension and termination, are dealt with in Sections 6 and 7.

The Model CAA is drafted based on the principle that automatic exchange is reciprocal. There may also be instances where jurisdictions wish to enter into a non-reciprocal CAA (*e.g.,* where one jurisdiction does not have an income tax). The Model CAA can easily be adapted for such non-reciprocal exchanges, and further details on this are to be included in the Commentary.

The Model CAA refers to an "Annex," but once the CRS has been approved, the Model CAA would no longer require one. References to the Annex could be replaced by a reference to the CRS developed by OECD and G20 countries (including a reference to the CRS as adopted on a fixed date) and available on the OECD website, and a corresponding definition would then be added to Section 1 of the Model CAA.

Summary Of The Common Reporting Standard

The CRS contains the reporting and due diligence standard that underpins the automatic exchange of financial account information. A jurisdiction implementing the CRS must have rules in place that require financial institutions (FIs) to report information consistent with the scope of reporting set out in Section I and to follow due diligence procedures consistent with the

procedures contained in Section II through VII. Capitalized terms used in the CRS are defined in Section VIII.

The FIs covered by the standard include custodial institutions, depository institutions, investment entities, and specified insurance companies, unless they present a low risk of being used for evading tax and are excluded from reporting.

The financial information to be reported with respect to reportable accounts includes interest, dividends, account balances, income from certain insurance products, sales proceeds from financial assets, and other income generated with respect to assets held in the account or payments made with respect to the account. Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the relevant controlling persons.

The due diligence procedures distinguish between individual accounts and entity accounts. They also make a distinction between pre-existing and new accounts, recognizing that it is more difficult and costly for financial institutions to obtain information from existing account holders rather than requesting such information upon account opening:

- For pre-existing individual accounts, FIs are required to review accounts without application of any *de minimis* threshold. The rules distinguish between higher and lower value accounts. For lower value accounts, they provide for a permanent residence address test based on documentary evidence, or the FI would need to determine the residence on the basis of an indicia search. A self-certification (and/or documentary evidence) would be needed in case of conflicting indicia, in the absence of which reporting would be done to all reportable jurisdictions for which indicia have been found. For higher value accounts, enhanced due diligence procedures apply, including a paper record search and an actual knowledge test by the relationship manager.
- For new individual accounts, the CRS contemplates self-certification (and the confirmation of its reasonableness) without a *de minimis* threshold.
- For pre-existing entity accounts, FIs are required to determine: (a) whether the entity itself is a "reportable person," which can generally be done on the basis of available information (AML/KYC procedures) and if not, a self-certification would be needed; and (b) whether the entity is a passive non-financial entity and, if so, the residency of controlling persons. For a number of account holders, the active/passive assessment is rather straightforward and can be made on the basis of available information. For others, this may require self-certification. Pre-existing entity accounts below USD250,000 (or the local currency equivalent) are not subject to review.

- For new entity accounts, the same assessments need to be made as for pre-existing accounts. However, as it is easier to obtain self-certifications for new accounts, the USD250,000 (or local currency equivalent) threshold does not apply.

Section IX of the CRS describes the rules and administrative procedures an implementing jurisdiction is expected to have in place to ensure effective implementation of, and compliance with, the CRS.

The Hidden Costs Of Tax Cooperation?

Naturally, the OECD makes the whole transition to bulk, global EoI sound simple and seamless, and it is true that advances in technology make the collection, collation, and transmission of mass data far easier than it used to be. But it is undeniable that it will add considerably to companies' administrative and legal compliance burdens. What's more, the CRS is an addition to existing information reporting requirements, notably the US Foreign Account Tax Compliance Act (FATCA).

There is no precise figure available informing us how much the world's financial institutions have collectively spent on new information systems and administrative processes to ensure compliance with these tax reporting laws, although it is generally accepted that the figure is somewhere between USD5bn and USD10bn for FATCA compliance alone. However, this does not tell us if reporting entities are actually prepared for FATCA, the CRS, and other reporting programs such as the United Kingdom CDOT, a FATCA-style agreement between the UK and a number of its Overseas Territories, or if automatic EoI will work seamlessly in practice, as the OECD expects.

Surveys suggest that those required to report under FATCA and the CRS are largely ready to do so. But a recent study also found that a significant proportion of the industry is facing higher costs and risking fines by being under-prepared for new compliance requirements. Worryingly, this research, by Aberdeen Group and commissioned by Sovos Compliance, the tax compliance and reporting software firm, shows that there is "a large gap in preparedness" for reporting requirements under the CRS, FATCA, and CDOT. Many institutions, Sovos said, related high rates of inaccurate filings and excessive compliance costs, and expressed fears of significant business impacts, including reputational damage and falling customer numbers.[6]

In a survey of 100 leaders of financial institutions subject to the CRS, 64 percent of respondents said their organization is "significantly prepared" to cope with the demands of automatic

EoI. However, the report showed that less than half of filings under FATCA, which has been effective for more than two years and upon which the CRS is substantially based, are accurate and complete.

"This research shows that financial institutions are far less prepared for FATCA, CRS, and CDOT compliance than they feel and are putting themselves at risk of significant impact to their profit margins due to fines and the costs of compliance support," said Nick Castellina, Vice President and Research Group Director of Business Planning and Execution at the Aberdeen Group.

What's more, despite the OECD's assurances, doubts linger over the ability of so many parties involved in the automatic EoI process to keep taxpayer data confidential and secure. And given the alarming regularity with which hackers and cyber criminals seem to be breaching the defenses of corporate and government databases, these concerns are not without justification.

As EY observed in a taxpayer alert issued in June 2011, the confidentiality of taxpayer data "has always been a concern when that information is the subject of a treaty based exchange of information," and in view of the fact that the new Convention is now open to so many parties, it questioned whether taxpayer privacy can really be guaranteed.

"Are the laws of the requesting country sufficient to prohibit the unauthorized disclosure of taxpayer data?" the firm asked. "As the Protocol [to the Multilateral Convention] can potentially triple the number of countries that will be able to access a taxpayer's return information from another tax administration, taxpayers will need to increase both their awareness and diligence around requests for their tax data."[7]

In the US, the Internal Revenue Service (IRS) has already exchanged financial account information with certain foreign tax administrations under FATCA. But it has stressed that it will only engage in reciprocal exchange with foreign jurisdictions that, among other requirements, meet its stringent safeguard, privacy, and technical standards.

According to the IRS, before exchanging with a particular jurisdiction, the US conducted detailed reviews of that jurisdiction's laws and infrastructure concerning the use and protection of taxpayer data, cyber-security capabilities, as well as security practices and procedures. However, these actions have done little to assuage the concerns of some that sensitive personal data will be compromised somewhere along the line.

Conclusion

So, to conclude, it seems that administrative cooperation in the area of tax on a near-global scale, the most utilized form of which will be EoI, is an inevitability. Indeed, as more than 100 jurisdictions have signed the Multilateral Convention, we are probably past the automatic EoI tipping point already. However, while EoI may uncover hitherto uncollected tax for several governments, this prize will not be won without a cost, in terms of its impact on businesses, particularly in the financial services industry, and the potential loss of individual financial privacy.

Endnotes

1 http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page1

2 http://www.oecd.org/tax/multilateral-convention-for-tax-co-operation-breaks-through-the-100-mark.htm

3 http://www.oecd.org/general/taxrevisedoecd-councilofeuropetreatywillboostmultilateralcooperation.htm

4 https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf

5 http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf

6 http://sovos.com/blog/new-report-shows-financial-institutions-less-prepared-automatic-exchange-information-reporting-many-believed/

7 http://taxinsights.ey-vx.com/archive/archive-articles/multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-opens-possibility-of-adoption-by-all-countries.aspx

Entry Into Force Of Polish GAAR In July

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After months of discussions, Poland's new general anti-avoidance rule (hereinafter, "GAAR") came into force on July 15, 2016.

The GAAR gives the tax authorities the right to determine tax without taking into account artificial or contrived arrangements undertaken in order to gain tax advantages contrary to the object and purpose of the tax law. Under the GAAR, the tax consequences are determined according to the transactions that would have been performed if the taxpayer had acted appropriately (*i.e.,* had the taxpayer not acted in an artificial manner and had reasonable goals other than obtaining tax advantages). As a consequence of such re-classing, the taxpayer may be charged late-payment interest on potential tax deficiencies. It is not yet clear whether the application of the GAAR will also entail penalties of any kind.

Certainly, the GAAR introduces a new standard into Polish tax law that may entail more uncertainty, not only in relation to tax structuring but also in the course of day-to-day business operations.

Due to the potentially significant tax consequences, it is important to be familiar with some of the premises of the Polish GAAR right now.

The new Polish GAAR includes some specific terms/elements such as: tax advantage, relevant action, artificial action, *etc.,* the definition of which will be crucial when applying the GAAR. Apparently, the practical interpretation of these new elements will be crucial when applying the GAAR.

In this respect, one of the most significant new terms is a tax advantage. Pursuant to the new laws, a tax advantage is the result of an artificial action made contrary (in given circumstances) to the tax law. Examples of tax advantages include:

1. Not determining the tax liability;
2. Delay in determining the tax liability or reduction of its amount;
3. Establishing or overestimating tax loss;
4. Establishing overpayment or right to tax refund;
5. Increasing the amount of tax overpayment or tax refund.

Importantly, tax advantages can be challenged by the tax authorities if they are gained in an artificial manner. When determining artificiality of the taxpayer's conduct, the tax authorities will look at the following aspects:

1. Unjustified division of the transaction;
2. Unjustified economic involvement by third parties, despite lack of economic and business justification;
3. Appearance of elements leading to the same or similar position to the one existing before an activity;
4. Appearance of elements which annul or offset each other;
5. Economic risk which goes beyond the expected advantages other than tax advantages, to the extent that an entity would not reasonably choose such mode of action.

The new rules include some limitations on the use of GAAR. On this basis, the GAAR cannot be applied if:

1. The tax advantages obtained by the taxpayer in a given period do not exceed the amount of PLN100,000 (approximately EUR22,700);
2. The taxpayer has obtained a "protecting opinion" (see below);
3. The tax advantages concern VAT as well as charges or other non-tax budgetary payments (separate rules on anti VAT avoidance have been introduced in the VAT Law);
4. Application of other provisions allows to counteract the tax avoidance.

Regarding the "protecting opinion," it is a new measure similar to tax rulings by means of which taxpayers can get legal protection for their planned operations that might be considered as tax avoidance subject to the GAAR. A request for a "protecting opinion" should include, *inter alia*, the factual background, planned operations, business and economic justification, tax implications, and the taxpayer's own standpoint. Importantly, a fee is charged for issuing that "protecting opinion" which amounts to PLN20,000 (approximately EUR4,500).

The tax proceedings related to the GAAR are to be centralized, *i.e.,* if a tax decision is issued on the basis of the GAAR, the tax proceedings or audit must be initiated or overseen by the Minister of Finance.

In order to handle queries regarding the application of the GAAR, a special body has been set up – the Council for Prevention of Tax Avoidance. This Council will take part in tax avoidance proceedings by advising the Minister of Finance on the application of the GAAR.

Taxand's Take

The introduction of the new GAAR provisions is a significant change in the Polish tax system. It will undoubtedly give the tax authorities a new and powerful tool in the battle against tax avoidance practices.

On the other hand, it is unclear how far the new legislation will reach. It mainly depends on the practical interpretation of the new rules, in particular on the definition of what constitutes a tax advantage. According to the new provisions, the GAAR will apply to the tax advantages obtained after the new rules take effect. Hence, some questions arise such as, for example, whether the favorable tax results of previous transactions (*e.g.,* high amortization write-offs, increased cost of sale following share-for-share transaction) should also be deemed as tax advantages.

Another question concerns the validity of already issued tax rulings that should provide legal protection for taxpayers with respect to operations that have entailed some tax advantages. Should those tax rulings be repealed because of application of the GAAR?

It seems that the vagueness of several concepts in the GAAR would enable the tax authorities to challenge numerous transactions and treat them as a part of tax avoidance.

Understanding The PFIC Rules And The Implications Of Owning Foreign Mutual Funds

by Michael J. DeBlis III, Esq., and Randall Brody, EA

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Michael DeBlis graduated from the Thomas M. Cooley Law School. He then earned his LLM in International Tax. Michael's unique background in tax law puts him into an elite category of criminal defense attorneys who specialize in criminal tax defense. As a former public defender, he has extensive trial experience and solid grounding in all major areas of taxation.

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Proceed With Caution Before Investing In Foreign Mutual Funds

While many portions of the US tax code possess confusing and sometimes harsh rulings, the tax rules for Passive Foreign Investment Companies (PFICs) is almost unmatched in its complexity and almost draconian features. Countless times, Americans overseas uncover a startling revelation that the small foreign investment they had made in a non-US mutual fund is now subjecting them to all the significant filing requirements and tax obligations that apply to a PFIC.

The tax laws involving PFICs are extremely complex, and not very well known by the majority of investors and tax professionals. While it is beyond the scope of this article to cover all the numerous details related to PFIC reporting requirements, our hope is to provide guidance and awareness into the world of PFICs so that US taxpayers can be advised of the consequences by their US tax professional.

What Is A PFIC?

There are two central elements that form the basis of PFIC taxation:

(1) "The definition of a PFIC";[1] and
(2) "The tax regime imposed on US owners of shares." [2]

A PFIC is generally defined as an entity that receives mainly passive investment income or holds mainly passive investment assets. Specifically, a foreign corporation is defined as a PFIC if it meets either of the following tests that apply to passive income:

- **Income Test:** 75 percent or more of the corporation's gross income is passive income (interest, dividends, capital gains, rents, *etc.*);[3] or
- **Asset Test:** 50 percent or more of the corporation's total assets are passive assets. Passive assets include cash and any investments that produce passive income (such as interest, dividends, rents and/or capital gains).[4]

PFICs often include foreign-based mutual funds, exchange-traded funds (ETFs), money market accounts and other pooled investment vehicles (such as many foreign REITs) that have at least one US shareholder. Finally, a foreign holding company that possesses passive investments (like rental real estate or government bonds) would be subject to PFIC regulations if the company is set up as a foreign corporation (based on the US code definition of a foreign corporation).

PFICs are subject to complicated and strict tax guidelines, which cover treatment of these investments in Sections 1291 through 1297 of the income tax code. Both the PFIC and the shareholder must keep accurate records of all transactions, including share basis, dividends and any undistributed income earned by the company in order to complete all required reporting.

PFIC History

The PFIC tax regime was created *via* the Tax Reform Act of 1986 with the intent to level the playing field for US based investments (such as mutual funds). Prior to the legislation of 1986, US-based mutual funds were forced to pass-through all investment income earned by the fund to its investors (resulting in taxable income).[5]

US taxation of foreign corporations was strictly tied "to control of the corporation held by US persons." [6] This allowed not only foreign mutual funds to avoid US taxation, but also US persons who invested in the fund. For starters, the fund itself avoided US taxation because it was a foreign corporation that derived only foreign-source income. The fund was able to avoid the taint

of being classified as a controlled foreign corporation (or "CFC") because it was owned by a large number of US and foreign investors, each of whom owned a relatively small percentage.

The enactment in 1986 of the passive foreign investment company (or "PFIC") changed all of that. For starters, it significantly expanded the reach of US taxing authorities with respect to passive investment income earned by US persons through foreign corporations. An important feature of PFIC taxation is that it applies without regard to the extent of US ownership.

The taxation of PFICs is built on the idea of "denying to United States persons – and hence capturing for the US Treasury – the value of deferral of US taxation on all passive investments channeled through foreign entities." [7] The rules achieve this end in one of two ways: first, by directly taxing US investors in PFICs,[8] and second, by indirectly "imposing an interest charge on the deferred distributions and gains of these investors." [9]

After the passage of the Tax Reform Act of 1986, the main advantage of foreign mutual funds was effectively nullified by a tax regime that made the practice of delaying the distribution of income prohibitively expensive for most investors.

To employ this punitive regime, the IRS requires shareholders of PFICs to effectively report undistributed earnings *via* choosing to be taxed through one of three possible methods. Each method is designed to eliminate the benefits of deferral. However, each differs in the way it accomplishes this objective.

The specifics depend on whether the shareholders of the PFIC have made an election,[10] such as an election to treat the PFIC as a QEF (qualified electing fund), "election to mark-to-market PFIC stock," or whether the "default" PFIC tax regime of Section 1291 applies.

Qualified Election Fund (QEF)

The QEF is designed to "[ease] the complexities of PFIC taxation for US investors in foreign mutual funds." [11] The QEF election puts US shareholders in a position almost equal to as if they had invested in a domestic mutual fund. It accomplishes this goal by allowing shareholders the opportunity to elect to be taxed currently on their *pro rata* share of the PFIC's earnings and profits.[12] The included income is treated "as ordinary income to the extent of the taxpayer's *pro rata* share of the QEF's ordinary income, and capital gains to the extent of the taxpayer's *pro rata* share of the QEF's net capital gain." [13]

However, to make this election, shareholders must receive a PFIC Annual Information Statement every year the election is in effect (Regs. §1.1295-1(f)(2)(C)). It must be signed by an authorized

representative of the PFIC (Regs. §1.1295-1(g)(1)). For foreign mutual funds that are PFICs, this is not a very common election to qualify for – as very few foreign mutual fund companies are willing to issue the Annual Information Statement to shareholders as required.

Mark-To-Market (MTM)

To make an MTM election, the PFIC must be "marketable stock" that is regularly traded on a national exchange registered with the SEC or other exchange or market that meets IRS qualifications (§1.1296(e)). With this election at the end of each year, gains are calculated *versus* the beginning of year basis and taxed at ordinary tax rates under IRC Section 196. Most foreign mutual fund holdings will qualify for an MTM election if the election is timely made. However, the problem is that a timely election is often not made as the taxpayer is not even aware that they have a PFIC holding.

Default Rules?

A taxpayer who does not make an election is taxed under the "default" PFIC tax regime of Section 1291. Under this regime, taxpayers are permitted to defer taxation of a PFIC's undistributed income until the PFIC makes an excess distribution. An excess distribution includes the following:

- A disposition (*i.e.,* sale) gain realized on the sale of PFIC stock;
- Any actual distribution (*i.e.,* dividend) made by the PFIC, but only to the extent that the total actual distributions received for the year exceed 125 percent of the average actual distribution received in the preceding three taxable years (or, if shorter, the taxpayer's holding period before the current taxable year).

Section 1291 very roughly "negates the tax benefit of deferral." [14] Taking a "big picture" view makes it easier to understand how PFIC taxation undoes this advantage. First, the economic value of deferral of US taxation is the *time value* of the deferral itself. And second, PFIC taxation takes back the time value of deferral through the "deferred tax amount." [15]

Critical to understanding how PFIC taxation takes back the time value of deferral through the deferred tax amount is the treatment of excess distributions. "An excess distribution is treated as if it has been realized *pro rata* over the holding period for the PFIC's stock." [16]

With that in mind, the effect of a *pro rata* realization of an excess distribution becomes painfully obvious: the tax due on such a distribution is "the sum of deferred yearly tax amounts plus interest." [17] But the worst is yet to come. And that is that the "sum of the deferred yearly tax amounts is calculated using the *highest tax rate* in effect in the years that the income was accumulated." [18]

Very simply, this method unilaterally eviscerates the benefits of deferral by assessing an interest charge on the deferred yearly tax amounts. While there is no silver-lining, taxpayers can take some comfort in the fact that they can claim "a direct foreign tax credit with respect to any with-holding taxes imposed on PFIC distributions." [19]

To calculate the "excess distribution" for a sale (called a disposition), first the gain must be calculated and then the excess distribution (gain) is allocated to each day in the holding period and separated between current tax year and prior years. The portion allocated to the current tax year is taxed as ordinary income at the ordinary income tax rate applicable to the taxpayer during the current tax year.

Tax is then calculated on the allocated "excess distribution" applicable to the prior years based on the highest ordinary income tax rate in effect for the tax year to which it was allocated.[20] Current year tax is then increased by this "deferred" tax with interest as if the deferred tax were an under-payment for the prior years in which this "excess distribution" is attributed.

The purpose is to in effect change the recognition of income and impose an interest charge based on deemed tax underpayments for prior years.

An example will help illustrate how Section 1291 operates. This example is based on a similar hypothetical that comes from the creative genius of Professor Robert Misey in his book, *Practical Guide to US Taxation of International Transactions*:

> Fred is a US citizen who invests in mutual funds. On the advice of his broker in the United Kingdom, on January 1, 2013, he buys 1,200 shares of FORmut for USD2,400, a mutual fund incorporated in the United Kingdom. Because FORmut only earns passive income on passive assets, it is a PFIC.
>
> Not having any knowledge of international tax or the PFIC rules, Fred and his tax preparer fail to make any election. On December 31, 2015, Fred sells (disposes of) all 1,200 of his FORmut shares upon learning of the punitive tax treatment of PFICs for total proceeds of USD5,400.
>
> Because Fred never made any election, Fred must "throw-back" the entire USD3,000 gain received over the entire period that he owned the FORmut shares: USD1,000 to 2013, USD1,000 to 2014, and USD1,000 to 2015. "For each of these years, Fred will pay tax on the thrown-back gain at the highest tax rate in effect that year with interest." [21]

Form 8621 Filing Requirements

As far as filing requirements go, a US person must file, for each PFIC owned, the Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund* if the US taxpayer:

- Received direct or indirect distributions (*i.e.,* dividends) from a PFIC;
- Recognizes gain on a direct or indirect disposition (*i.e.,* a sale) of PFIC stock;
- Is reporting information with respect to a QEF or mark-to-market election;
- Is making an election such as a QEF or mark-to-market election; or
- The aggregate value of the US person's PFIC stock is more than USD25,000 and is required to file an annual report.

Adding to the complexity and volume of paperwork is that a separate Form 8621 must be filed for each PFIC (*i.e.,* each separate mutual fund) owned.[22]

Form 8621 is attached to the shareholder's tax return and both must be filed by the due date, including extensions, of the return at the Internal Revenue Service Center where the tax return is required to be filed.

What Are The Consequences Of Failing To File Form 8621?

Section 1298(f) and the regulations do not impose a specific penalty for failing to file Form 8621. However, the regulations coordinate the Form 8621 filing requirements with the Form 8938, *Statement of Specified Foreign Financial Assets* filing requirements.

Professor Misey explains how this works:

> "Under Section 6038D, a US individual must disclose any directly held foreign financial assets on Form 8938 if the aggregate value of the individual's foreign financial assets exceeds a certain filing threshold. An exception to this requirement applies to any foreign financial asset the individual reports on another disclosure form, such as Form 8621.
>
> A US individual shareholder who fails to disclose a directly held PFIC investment on either Form 8621 or Form 8938 can be subject to a USD10,000 penalty under Section 6038D(d). In addition, failure to file a required Form 8621 can result in suspension of the statute of limitations with respect to the shareholder's entire tax return until the Form 8621 is filed." [23]

This means that the IRS could potentially have "an [unlimited] amount of time to audit a US shareholder's tax return and assess tax if the shareholder fails to file a required Form 8621." [24] However, this comes with an important caveat. To the extent that the shareholder has reasonable cause for failing to file Form 8621 (*i.e.,* a defense), the "statute of limitations is suspended only with respect to unreported PFIC investments … [and not to any] unrelated portions of the shareholder's tax return." [25]

Foreign Mutual Fund Pitfalls

As one can imagine, many US taxpayers abroad invest in foreign mutual funds unbeknownst to the PFIC rules, so this ends up being a very common occurrence where they are unaware of the pitfalls of such investments. Taxpayers should be advised by their US tax professional to pay particular attention to investments in foreign mutual funds and other investments that could be deemed to be a PFIC, particularly when investing through foreign banks and brokerages.

Before making a foreign investment, taxpayers should proceed with caution and be aware of the punitive tax consequences and significant costs of compliance of investing in foreign mutual funds.

Endnotes

1 Joseph Isenbergh, *International Taxation*, Second Edition, Foundation Press, 2005, at p. 211.

2 *Id.*

3 IRC Section 1297(a).

4 *Id.*

5 *Supra* note 1, at p. 215.

6 *Id.,* at p. 211.

7 *Id.,* at p. 211.

8 *Id.,* at p. 211.

9 *Id.,* at p. 211.

10 *Id.,* at p. 212.

11 *Id.,* at p. 213.

12 *Id.,* at p. 213.

13 Robert Misey, *Practical Guide to US Taxation of International Transactions* (9th Edition), Wolters Kluwer, 2013.

14 *Supra* note 1, at p. 212.

15 *See* IRC Section 1291(a)(1)(C)

16 *Supra* note 13.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Id*.

Topical News Briefing: A Pleasure Doing Business With You, Mr. Modi

by the Global Tax Weekly Editorial Team

If one of Indian Prime Minister Narendra Modi's key goals is to improve the country's "doing business" rating, then he's certainly got his work cut out.

The phrase "doing business" is frequently mentioned by Modi and his Finance Minister Arun Jaitley when talking about economic reforms in India. Presumably it is a reference to the World Bank's annual Doing Business Index, which this year ranks 189 countries by regulatory efficiency. In the 2016 Doing Business Index, India languishes in 130th place, and fares particularly badly in the "paying taxes" component of the index, where it slips to 157th place. So it is understandable that both men would like to see an improvement.

After more than two years in power, Modi's Government cannot be accused of not trying to bring about improvements to India's tax framework; indeed, not insubstantial progress has been made in many ways.

Arguably the most significant achievement is the progress achieved towards the introduction of a goods and services tax, which is being framed as a major tax reform. This has been on the drawing board in one form or another for over a decade, and has confounded previous Indian administrations. As reported in this week's issue of *Global Tax Weekly*, following the passage of the necessary constitutional amendment bill earlier this year, more than half of India's states have ratified the legislation, clearing the way for its approval by the President – a highly significant development.

While the previous government was apt to shift the tax goalposts at any given moment and commited the cardinal sin in the eyes of taxpayers – taxing retrospectively – Modi's BJP administration has been at great pains to restore some stability and certainty back into the tax regime.

It is making a concerted effort to cut down on the amount of litigation between the tax authorities and taxpayers, particularly foreign investors, and to create a less adversarial tax environment in general. One way in which it is doing this is by concluding advanced pricing agreements, which have reached just short of the 100 mark since the first five APAs were signed over two years

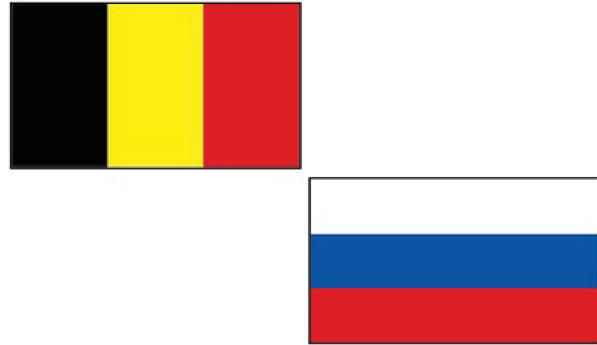
ago. Another example is the tax dispute settlement scheme announced by Jaitley as part of his 2016/17 Budget address earlier this year.

Yet, there are still reasons to be cautious. The reluctance on the part of the tax authorities to settle some high-profile, long-running, and ultimately damaging (for India's international reputation) tax disputes with certain taxpayers continues to alarm some foreign investors. The actions against Cairn Energy (which has gone to international arbitration) and Vodafone are two such much-reported cases.

Indeed, by the Government's own admission, the number of tax appeal cases pending in India remains at a startling level. As Jaitley revealed in his 2016 Budget speech in February, 300,000 cases are pending before the 1st Appellate Authority alone, with INR5.5 trillion (USD82.5bn) worth of tax in dispute. This is INR1.5 trillion higher than when the BJP came to power.

So, it will be some achievement if Modi presides over a substantial improvement in India's "doing business" rating. But it will be something of a hollow victory if his Government fails to reduce this caseload and ultimately win back investors' trust.

Belgium Treaty News: Bill For Ratification Of The New Convention Submitted To The State Duma



by Oksana Adyan and Nadezhda Konovalova, EY, Russia

Introduction

In July 2016, the Russian Government submitted to the State Duma a draft federal law "Concerning Ratification of the Convention between the Russian Federation and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and the Protocol to That Convention" ("The Bill"; "The Convention").[1]

The Convention and the Protocol were signed on May 19, 2015, in Brussels. The changes are intended to reflect contemporary developments in tax law (including the development of anti-tax evasion institutions), improve communication between tax authorities and the processes of information exchange on tax matters, and encourage investment activity between Russia and Belgium. A more detailed analysis of the provisions of the new Convention was presented in our May 2015 Russian Tax Brief.[2]

Highlighted below are the key elements of the expected changes in the tax treatment of residents of the two countries and the relationship between the competent authorities of the states.

Taxation Of Dividends And Interest

The lowest rate of withholding tax for dividends has been reduced to 5 percent and may be applied where the following conditions are met:

- Shares have been continuously owned for at least 12 months;
- Shares make up no less than 10 percent of capital;
- The participating interest in capital amounts to no less than EUR80,000.

The highest withholding tax rate for dividends has been increased to 15 percent.

The withholding tax treatment of interest is essentially unchanged – interest paid to the actual recipient is taxable at the rate of 10 percent.

Tax Residence Of Companies

Where a company is a resident of both states, its tax residence will now be determined on the basis of a new test – the place of effective management. This will be determined with reference to such criteria as:

- The location where meetings of the board of directors or a similar body take place;
- The location where day-to-day management takes place;
- The location where senior executive officers carry on their activities.

Limitation Of Benefits

A new provision has been introduced under which a person will not be granted reliefs in the form of lower tax rates or exemptions if his primary objective was to obtain those reliefs.

Information Exchange

The provisions concerning information exchange and assistance in the collection of tax have been brought into line with OECD recommendations.

Interpretation Issues

In interpreting provisions of the Convention that are identical or similar to the provisions of the 1977 OECD Model Tax Convention on Income and Capital (as subsequently amended), the tax administrations of the Contracting States will adhere to the general principles of the Commentaries on the Model Convention.

Entry Into Force

The Russia–Belgium tax treaty of June 16, 1995, is currently in force. Once the bill has been passed by the State Duma in three readings, it must be approved by the Federation Council and signed by the President. It is therefore possible that the new Convention will enter into force this year after the bill has been passed and ratification instruments have been exchanged, and its provisions would begin to apply in relation to tax periods commencing from January 1, 2017.

Endnotes

[1] At the time of publication, the text of the Bill was on the official portal of draft normative acts at the following address: http://regulation.gov.ru/projects#npa=38920 (in Russian), and is available on the Russian Government's information portal at the following address: http://government.ru/activities/23799/ (in Russian).

[2] *See* http://www.ey.com/Publication/vwLUAssets/EY-russian-tax-brief-may-2015/$FILE/EY-russian-tax-brief-may-2015.pdf

China Kicks Off Resource Tax Reform

by Daniel Chan, Windson Li and Henry Ji, DLA Piper

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Introduction

Enterprises that extract taxable natural resources within the territory of China are liable to pay Resource Tax. Recently, China's State Administration of Taxation (SAT) and Ministry of Finance (MOF) announced the commencement of a comprehensive reform of the Resource Tax system to modernize and strengthen China's approach to its natural resources.

The following three new tax circulars have been released by the SAT and the MOF, setting out the purpose, principles, contents and guidelines for the Resource Tax Reform:

- The Notice on the Promotion of Resource Tax Reform (Caishui [2016] No. 53);
- The Notice on the Policies for Resource Tax Reform (Caishui [2016] No. 54); and
- The Provisional Measures for the Trial Reform of Water Resource Tax (Caishui [2016] No. 55).

According to these Circulars, the first stage of this Resource Tax Reform is focusing on converting the tax basis of China's Resource Tax from quantity to price and on the implementation of a water resource tax pilot program in Hebei Province. Local tax authorities at the province level have been required to formulate their corresponding local tax rules. Implementation began on July 1, 2016.

The Current Resource Tax Regulation

The current PRC Resource Tax Provisional Regulation and its implementation rules (together, the Regulation) are over 20 years old, formulated in 1993 and slightly amended in 2011. The

Regulation lists crude oil, natural gas, coal, non-metallic ore, ferrous metal ore, non-ferrous metal ore, and salt as the seven categories of taxable natural resources.

The Resource Tax payable for most taxable items[1] is calculated based on the quantity of the natural resource sold/used and the tax rates. The tax rate ranges from a few RMB per tonne to RMB60 (USD8.98) per tonne, depending on the scarcity, grade and location of the taxable natural resource. Tax authorities at the provincial level are generally not allowed to decide or adjust the tax rate for a natural resource, unless the central government has not specifically indicated the applicable tax rate for such a natural resource.

As early as in 2009, the Chinese Government realized that this Resource Tax system was falling behind China's economic development. The Government agreed that the Regulation has the following critical issues.

- The quantity-based tax calculation method is very rigid and cannot respond to the fluctuation of resource market price;
- The range of taxable natural resources is narrow and does not include such important resources as water, forest and pasture;
- The Resource Tax overlaps with many local surcharges that are also calculated and imposed on a quantity basis, which significantly add to the taxpayer's burden, especially when the market goes down;
- Provincial governments do not have enough authority to change or adjust the tax rates based on local market and industry status.

The Resource Tax Reform

As defined by the SAT and the MOF, the purpose of the Resource Tax Reform is to increase the elasticity of the Resource Tax system, eliminate duplicate local surcharges, enhance the authority of provincial government, and gradually cover more natural resources as taxable items.

For these purposes, the Circulars set out the following new policies for implementation in the first stage of the reform:

- **Change the tax basis from quantity to price:** Except for certain low-value items such as clay, sandstone and non-metallic ores, all natural resources will be taxed based on their sales price and the applicable tax rates;

- **Grant provincial governments the power to determine the applicable local tax rates:** Within the range indicated by the SAT and the MOF, subject to the final approval of the SAT and the MOF. In particular, the Circulars provide an indicative tax rate range for certain key types of natural resources, *e.g.,* 1 percent to 6 percent for iron ore concentrate, and 3 percent to 9 percent for aluminum raw ore. Provincial governments may use any rate within such ranges for the resources extracted at their localities and adjust some tax rates based on local market and finance situations;
- **Eliminate the Mineral Resource Compensation Surcharge and the Price Regulation Fund Surcharge:** These are the two main local surcharges attached to the current Resource Tax system. They will be formally cleared out of the Resource Tax system, together with some other local surcharges identified as inconsistent with Chinese tax law and regulations;
- **Launch a Trial Water Resource Tax Pilot Program in Hebei Province:** In this pilot program, Hebei Province has, from July 1, 2016, begun to levy a resource tax on the consumption/use of both surface water and groundwater, and the resource tax will be calculated based on water quantity and corresponding tax rates. Different tax rates will be applied based on local water resource status and the nature/purpose of water consumption. Punitive tax rates may also be imposed if a taxpayer exceeds the prescribed water consumption quotas.

With an aim to encourage resource saving and environmental protection, the Circulars also provide some preferential treatments. For example, resources extracted by way of filling mining may enjoy a 50 percent reduction on the resource tax that is due, and resources extracted from a depleting mine may enjoy a 30 percent reduction. At the same time, provincial governments are also allowed to formulate other preferential tax treatments for extraction/utilization of low-grade ore and wastes.

Our View

The implementation of this Resource Tax Reform is a very complicated and challenging task for China's local government authorities. Along with the slowing down of China's economy, China's demand for natural resources is expected to stay on the downslope in the next few years, which provides a window for testing and adjusting Resource Tax policies. However, China will still remain a major natural resource consumer, and the growing pressures of natural resource preservation and environmental protection have to be considered in implementing the new Resource Tax policies and setting the local tax rates.

As indicated in the Circulars, **the Resource Tax Reform should not increase the tax burden of taxpayers** from an overall perspective. Given this guiding principle, provincial governments will

most likely initially orient the new tax rate based on the current tax level, rather than trying to make drastic changes right away.

A possible strategy that may be taken by provincial governments would be to slightly increase the Resource Tax on natural resources for conventional energies, such as coal and iron, and to slightly reduce the Resource Tax on natural resources related to clean energies, such as natural gas. In the long run, the differentiated tax rates in different provinces may create some new opportunities for investors, and the provincial governments may also use their power to further lower local tax rates to attract investment in natural resources related to new energies.

Because many domestic small-scale enterprises may not have the necessary technologies and capability to do filling mining and satisfy other conditions for tax reduction, they are likely to fade out of the market more quickly. In this regard, there will be more opportunities for investors to take in valuable assets in the market, and a further increase of merger and acquisition cases in the mining industry is likely to be observed in the next few years.

For taxpayers, the Resource Tax Reform's actual impacts could vary depending on their location, the natural resources they are targeting, and local tax rates. To help address the coming changes arising from new local policies, taxpayers may wish to build strong communications lines with the local authorities in the areas where they do business.

Endnotes

1 Starting in 2010, the Resource Tax on crude oil and natural gas has been calculated based on price rather than quantity.

Topical News Briefing: The Unifying Power Of Tax

by the Global Tax Weekly Editorial Team

Few issues unite the nations of the world in quite the same way as does tax, or more specifically the avoidance and evasion of it.

Countries have long been willing to assist each other as they attempt to track down tax fraudsters beyond their shores, recognizing that such cooperation could be mutually beneficial.

Hence, most modern bilateral tax avoidance agreements have clauses inserted allowing for the exchange of tax information on request. And the OECD has of course been leading the charge against international tax and financial crime, and the lack of transparency in many parts of the world, for almost 20 years.

However, as the OECD observed in its recent BEPS progress report to the G20 (reported in this week's issue of *Global Tax Weekly*), it has only been in the last seven years that substantial progress has been made towards the goal of eradicating cross-border tax evasion and opportunities for aggressive tax avoidance. And it was certainly no coincidence that 2009, when many national treasuries were reeling from the impact of the financial crisis, turned out to be perhaps the watershed year in this ongoing campaign.

Since then, automatic exchange of information (EoI) for tax law enforcement purposes has been the standard that the OECD and influential nations have aspired to, and it hasn't taken long for most of the world to be convinced to sign up, including those jurisdictions with a strong reputation for confidentiality.

The numbers bear this out: at the last count, 113 jurisdictions had either signed intergovernmental agreements, or had agreements in substance, with the US Treasury to automatically exchange information under the US FATCA legislation, which was approved in 2010; by August 2016, 103 jurisdictions had signed the Multilateral Convention on Mutual Administrative Assistance; and more than 80 jurisdictions had signed the Multilateral Convention on Administrative Assistance, which binds them to automatic exchange of financial account information under the new global Common Reporting Standard.

These automatic EoI schemes are largely focused on tax avoidance by individuals. But the OECD's crowning glory in its mission to reduce corporate tax avoidance is, of course, the BEPS project. And given the scale of the exercise – essentially to rewrite the global corporate tax rulebook – this has also come together remarkably swiftly. It was in mid-2013 that the OECD released its BEPS Action Plan, and little more than two years after that that its final recommendations were published. Fast forward less than a year to the present day, and 85 jurisdictions have committed to implementing the BEPS package.

However, it could be argued that so much change in the area of international taxation, although well intended, is having a destabilizing effect on the global economic and investment framework. It is well known that several billion dollars have been spent by the financial industry globally to come into line with new EoI requirements – requirements that some companies admit are having a detrimental impact on their business.

Furthermore, senior company managers have informed us in many a survey that the international tax environment is becoming more and more uncertain, as countries pick and choose which bits of the BEPS package to implement, often applying their own national stamp to such legislative and regulatory changes in the process. The inevitable consequence of this is rising compliance costs – and much more difficulty in forward planning.

With regard to BEPS, the inconsistent application of the OECD's recommendations was always going to be the greatest obstacle to the project's success. And despite the OECD's remarkable achievements in bringing the exercise to a conclusion, it is hard to deny that a multispeed approach to BEPS implementation is being taken, with the risk that global trade and investment levels could suffer as a result.

As the International Chamber of Commerce warned earlier this year: "In order to establish a level playing field, implementation of the BEPS recommendations would need to be consistent across global markets. Unilateral disparate tax rules will introduce double or multiple standards that not only create compliance challenges for business but essentially undermine the consistency of the international tax system."

Despite these concerns, there seems little chance that cracks will appear in the edifice of international unity on tax, even if the foundations of the global tax system itself are being shaken violently.

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China, Canada Discuss Free Trade Agreement

The Governments of China and Canada have agreed to deepen their trade and investment relationship, and could soon begin talks towards the conclusion of a bilateral free trade agreement (FTA).

Chinese Premier Li Keqiang told reporters following his recent meeting with Canadian Prime Minister Justin Trudeau that the Chinese Government will begin a feasibility study in due course on a possible China–Canada FTA, although the two leaders have not formally agreed to begin full FTA talks.

A Foreign Investment Promotion and Protection Agreement between Canada and China was signed on September 9, 2012. However, no formal trade agreement exists between the two countries, although the possibility of a bilateral FTA was on the agenda of the previous Conservative Government.

It is believed that certain contentious issues have prevented FTA talks from starting, especially in the area of labor rights and environmental protections.

A joint press release issued after Li's meeting with Trudeau nevertheless confirmed that the two leaders had agreed to more proactive cooperation in the area of trade.

"The two sides agreed on the importance of enhancing economic growth by promoting the Canada–China economic relationship. On this, both sides agreed to deepen their trade and investment relationship in the areas of energy, clean technology, agriculture, infrastructure, transportation, financial services, as well as innovation, science and technology for mutual benefit," the statement said.

UK Exploring Post-Brexit Free Trade Options

UK Prime Minister Theresa May made clear the UK's "determination to secure trade deals with countries from around the world" during a series of bilateral talks at the G20 summit in China.

The summit is the first gathering of the world's leading economies since the UK referendum on leaving the EU in June. According to May, her Government's ambition is for the UK "to become the global leader in free trade" post-Brexit.

"The leaders from India, Mexico, South Korea, and Singapore said that they would welcome talks on removing barriers. And the Australian Trade Minister will visit the UK this week to take part in exploratory discussions on the shape of a UK–Australia trade deal," she told a press conference.

Stressing the importance of the summit, Carolyn Fairbairn, Director-General of the Confederation of British Industry (CBI), commented: "Signing ambitious trade deals after concluding negotiations with the EU will ultimately lead to more jobs being created here at home, and so should be top of the Prime Minister's agenda. The G20 is an excellent opportunity for May to begin to build the foundations for these trading relationships, face to face, which will be critical to making a success of Brexit."

"However, redefining our economic and trading links with Europe must be the first priority. Europe remains our biggest trading partner and the terms of our exit from the EU will help to shape what future trade deals look like."

European Parliament Debates Canadian Trade Deal

The European Parliament's International Trade Committee has held its first meeting on the Comprehensive Economic and Trade Agreement (CETA) with Canada, the initial stage in parliamentary ratification procedures.

Artis Pabriks, who is responsible for steering the agreement through the Parliament, told the committee: "If we conclude this very ambitious and really modern trade agreement, Europeans will be able to save up to EUR12bn (USD13.4bn) immediately. For Canadians we are the second largest trading partner in the world. After this agreement is conclude[d], ratified, and comes into force, we would have as Europeans, a better chance to trade with Canadians on Canadian soil than their respective neighbors, the United States."

He added: "From day one, CETA will eliminate almost all customs duties, at a value of EUR400m for goods originating in the EU, but there are also some restrictions for market access, so several agricultural goods considered as sensitive to us or to Canadians, will be put under quotas or excluded completely. This is a compromise between two good partners which is good for both sides."

In July, the European Commission formally proposed the signature and conclusion of CETA. The Commission must obtain support from the European Council and European Parliament. Any vote will only take place once the Council has officially referred CETA to the European Parliament.

Once this process is complete, the agreement can be applied provisionally. The Commission hopes that the agreement will be signed during the next EU–Canada Summit, which will be held in October.

National parliaments will also have the opportunity to vote on CETA. Pabriks said: "Getting the national parliaments involved increases the bureaucratic burden, but at the same time we

live in a democratic world and if people want to have a double-check, let's do it."

Australia Keen On Post-Brexit FTA With UK

Australia intends to "negotiate a very strong, very open" free trade agreement (FTA) with the UK, Prime Minister Malcolm Turnbull has said.

Turnbull met with his UK counterpart, Theresa May, on the sidelines of the G20 summit in China. He told a press conference that "the expected time line" for the UK's exit from the EU is "no later than the end of 2018 or early 2019." He pointed out that "Britain has an enormous amount of work to do to put in place new free trade agreements, to replace in their own system all of that European legislation," and that the UK does not currently possess any trade negotiators.

Australia has offered to second experienced negotiators to the UK, to help it establish a new trade policy team. According to Turnbull, May is "very grateful" for the assistance Australia is providing, in "making available our resources to them, our resources to help them address the trade challenges they have."

From an Australian point of view, "getting in to deal with the British early" will be crucial to negotiating a strong, post-Brexit FTA, Turnbull added.

At a separate press conference, May said: "I think we have real opportunity. It is an historic decision for British people, it will be a complex and challenging process leaving Europe Union. But I'm very clear that it doesn't mean that we're going to be inward looking. In fact we want to be even more outward-looking around the whole of today and obviously Australia, with our longstanding ties and our close relationship, will be one of the first countries we'll be looking to."

Ireland Confirms Apple Ruling Appeal, To Affirm CIT Rate

Irish Finance Minister Michael Noonan has announced that the Government has agreed unanimously to challenge the European Commission's decision in the Apple state aid case.

Noonan said: "I believe that there are some very important principles at stake in this case and that a robust legal challenge before the courts is essential to defend Ireland's interests. The full amount of tax was paid in this case and no state aid was provided. Ireland did not give favorable tax treatment to Apple. Ireland does not do deals with taxpayers."

Immediately following the announcement of the Commission's decision on August 30, the Irish Finance Department said that Noonan would seek Cabinet approval to appeal the ruling. In a statement, it argued that "it is not appropriate that EU state aid competition rules are being used in this new and unprecedented way in the area of taxation, which is a member state competence and a fundamental matter of sovereignty.

Following an in-depth state aid investigation launched in June 2014, the Commission concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991. "This selective tax treatment of Apple in Ireland is illegal under EU state aid rules, because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules," it contended.

The Commission has ordered Ireland to recover "unpaid taxes" from Apple for the years 2003 to 2014 of up to EUR13bn (USD14.5bn), plus interest. Ireland has until November 12 to lodge an appeal. The Government will hold the recovery amount in escrow until the case has been concluded, as it may ultimately be returned to the company in the event of a successful appeal.

In an open letter to customers, Apple stated that the Commission is "effectively proposing to replace Irish tax laws with a view of what the Commission thinks the law should have been." It added that the company "never asked for, nor did we receive, any special deals."

Noonan also announced that the Government will propose a parliamentary motion in support of its appeal. The motion will affirm the Government's commitment to the 12.5 percent corporation tax rate, the research and development tax credit, and the knowledge development box. In addition, the Government will commission an independent review of the corporation tax code, which will exclude any

possibility of a change to the 12.5 percent corporation tax rate.

He said: "It is good practice to undertake periodic reviews of key areas of government policy. The last review of corporation tax policy took place in 2014. Since then a wide range of new international developments have emerged in international taxation, such as the Organisation for Economic Cooperation and Development base erosion and profit shifting project. We need to ensure that Ireland's corporation tax code meets these new standards while remaining competitive as the economy continues to grow."

Businesses Fear Breakdown In BEPS Consensus

The International Chamber of Commerce (ICC) has expressed concern about the possible broader implications of the European Commission's ruling against Apple.

In a statement published on September 1, the ICC warned that unprecedented rulings of this nature fall outside the scope of the recommendations of the OECD's base erosion and profit shifting (BEPS) project and threaten to destabilize the international consensus working towards harmonized implementation of BEPS measures on a global basis.

"While we respect the enforcement of state aid rules by the [Commission], we believe that the Commission should ensure the integrity and legal certainty of the tax system, which remains critical for businesses seeking to invest in the EU," said Christian Kaeser, Global Head of Tax at Siemens and Chair of the ICC Commission on Taxation.

The ICC said that coherent and coordinated implementation of the internationally agreed guidelines across all countries and in close cooperation with business is imperative in order to align tax systems, protect government revenues, and safeguard cross-border trade and investment.

The increased uncertainty likely to be brought about by the Apple ruling also highlights the need for international dispute resolution mechanisms to be put in place, the ICC argued.

Kaeser added: "Business fears the potential precedent and the legal uncertainty set by rulings of this nature as well as the possibility of counter actions that could undermine the consensus approach achieved within the context of the BEPS project and thus negatively impact cross-border trade and hamper foreign direct investment."

Paul Morton, Vice-Chair of the ICC Commission on Taxation, said: "This ruling brings to the forefront the ever-more pressing need to have effective dispute resolution mechanisms in place to address potential tax disputes and

strengthen global efforts to establish a consistent international tax landscape."

Apple Tax Ruling Prompts Bipartisan Criticism In US

The European Commission ruling requiring Ireland to recover EUR13bn (USD14.5bn) in supposedly illegal tax breaks from Apple has been condemned by members of both parties in the US Congress.

On August 30, the Commission announced its finding that Ireland has granted undue tax benefits to Apple since 1991, and ordered the Irish government to recover unpaid tax from the company for a ten-year period beginning in 2003.

It was a ruling that provoked an angry response from some members of Congress, who have already criticized the Commission for attempting to use EU state aid rules to collect tax retroactively from US firms.

Describing the decision as "awful," House Speaker Paul Ryan (R – Wisconsin) said: "Slamming a company with a giant tax bill – years after the fact – sends exactly the wrong message to job creators on both sides of the Atlantic. It's also in direct violation of many European countries' treaty obligations."

On the other side of the aisle, Senator Ron Wyden (D – Oregon), the senior Democrat on the Senate Finance Committee, called the Commission's ruling "extremely concerning" and agreed that it could undermine internationally accepted legal principles in the area of taxation.

According to Wyden, "the European Commission has effectively stepped outside the terms of existing bilateral tax treaties to hand an American firm a massive, retroactive tax bill."

"This ruling could set a dangerous precedent that undermines our tax treaties," he noted.

Furthermore, Wyden warned that the ruling could disrupt multilateral efforts to change the global corporate tax system under the OECD's BEPS project.

"Right now countries ought to be working in partnership to prevent tax evasion and crack down on the unfair practices that have eroded tax bases in the US and around the world, but [the] ruling could make that kind of partnership more difficult," he said.

For his part, Kevin Brady (R – Texas), Chairman of the House Ways and Means Committee, denounced the move as a "predatory and naked tax grab." However, he also observed that the case highlighted major flaws in the US corporate tax system.

"This is occurring because our uncompetitive tax code strands American profits overseas

instead of allowing businesses to bring those profits home to reinvest in our jobs, research, and growth," Brady contended.

"Instead of standing by and allowing other countries to deliver multibillion-dollar tax bills to American companies, Washington should act now to ensure this doesn't happen again," he said, urging Congress to approve long-awaited reform to the US corporate tax code.

BVI Consults On Country-by-Country Reporting

The British Virgin Islands (BVI) has launched a private sector consultation on the impact of implementing the OECD's proposals on country-by-country (CbC) reporting.

CbC reporting is a key element of the OECD/G20's BEPS Action Plan and, if implemented in the territory, would require multinational enterprises incorporated in the BVI with annual group revenues of EUR750m (USD837m) or more to file a detailed return annually with the territory's tax authorities.

This return would automatically be shared between countries signed up to the BEPS initiative to provide greater transparency on the tax affairs of companies operating across borders.

The BVI Government said the consultation is intended to develop its "understanding of the impact of [CbC] reporting in the BVI and assess how the territory's private sector defines economic substance providing the BVI Government with greater clarity on the future opportunities this may create for the territory."

As part of the consultation, the BVI Government is asking for views on the issue of "economic substance," with BEPS measures being proposed to ensure that the right amount of tax is paid where economic activity takes place.

Lorna Smith of BVI Finance, the territory's financial services promotion agency, said: "We recognize the importance of international collaboration between jurisdictions to ensure that the global tax system remains robust and effective and we welcome the OECD's work in this area."

"We pride ourselves on our track record of engaging stakeholders in the private sector and to ensuring that our regulatory framework is fully supportive of their needs. We look forward to receiving responses to our consultation and to further progressing our work on this important international initiative."

Responses are requested by September 16, 2016.

Indian States Approve GST Legislation

India's proposed goods and services tax (GST) is one step closer to introduction, with the completion of ratification procedures by more than half of India's states.

Odisha was the 16th state to ratify the Constitutional Amendment Bill, which will allow states to tax services.

Lawmakers from half of India's states (including the two union territories with legislatures) had to agree to the legislation for it to be forwarded to the President for approval.

The President's approval of the Bill will trigger the final negotiations towards the introduction of the levy, which will agree vital elements such as the headline rate. India is reported to currently favor a rate of about 18 percent.

Under the GST proposals, the various elements of the existing indirect tax regime in India will be replaced by a comprehensive dual-GST system, with Central GST and State GST to be levied concurrently by the center (federal Government) and the states, respectively.

Indian Revenue Secretary Hasmukh Adhia tweeted: "Glad to inform that we are ahead of our schedule for implementation of GST so far. Instead of 30 days kept for this, it is achieved in 23 days."

Providing there is no further delay to the introduction of GST, the levy would be in place from April 1, 2017.

13 Percent VAT Confirmed For Egypt

Egyptian lawmakers have agreed to the introduction of a value-added tax (VAT) regime with a 13 percent headline rate from the 2016/17 fiscal year.

The rate is to rise to 14 percent from 2017/18.

In May, Egypt's Finance Minister disclosed that 52 goods and services will be exempt from the VAT. This list reportedly includes basic foodstuffs. Businesses targeting tourists, including restaurants and hotels, will not be subject to the VAT also.

Certain companies operating in the natural resources sector will be exempt, as will banks, although further clarification on the taxation of these sectors is expected. Education, scientific research, and religious organizations will also receive exemptions.

The long-awaited introduction of VAT is a key part of plans to significantly reduce the nation's budget deficit, which is expected to

reach about 11.5 percent of gross domestic product this year.

EU: Reform Vital To Fix EUR160bn VAT Gap

The European Commission has said new figures revealing that the EU's value-added tax (VAT) gap was EUR160bn in 2014 demonstrates the need for member states to get behind its proposals for far-reaching EU VAT rule reform.

The VAT gap is the difference between the estimated VAT revenues that a member state could expect to receive compared with the amount of VAT actually collected. It measures the effectiveness of a member state's VAT enforcement and compliance measures, covering revenue lost to fraud and evasion, tax avoidance, bankruptcies, financial insolvencies, and miscalculations.

The Commission acknowledged that the VAT gap had fallen by EUR2.5bn since 2013, but noted the performance of individual member states varies enormously; 18 member states had closed their VAT gap, while the gap widened in eight states.

Publishing the report, the Commission said that the VAT gap continues to be at an "unacceptably high level," stating that the findings support recent calls by the Commission to overhaul the EU's VAT system to tackle fraud and make it more efficient.

The VAT Gap rate ranged from a high of 37.9 percent of uncollected VAT in Romania to a low of only 1.2 percent in Sweden. In absolute terms, the highest VAT gap of EUR36.9bn was recorded in Italy, while Luxembourg had the lowest of EUR147m.

Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, said: "Our member states are losing tens of billions of euros in uncollected VAT revenue. This is unacceptable. The current regime is woefully ill-equipped to deal with the problems of VAT fraud and miscalculations, and it's clear that the numbers will not get better by themselves. Member states must now quickly agree on a definitive fraud-proof EU VAT system, as laid out by the Commission earlier this year. I therefore urge all of our member states to have a frank and meaningful discussion in order to feed into next year's proposals, so we can tackle this issue once and for all."

Typically VAT fraud occurs when a supplier pretends to have transported goods to another member state but the goods are in fact consumed VAT-free locally. It also occurs when a client of a cross-border transaction purchases goods or services VAT-free and charges VAT without remitting it to tax authorities while his/her customer can deduct it, known as

missing trader fraud. In addition, other types of fraud can arise, *e.g.,* fraudsters claiming to be taxable persons to obtain goods intended for final consumption VAT-free.

In its Action Plan on VAT reform, the Commission said that fighting organized crime networks engaged in missing trader fraud requires joint efforts between tax administrations and law enforcement authorities within and between member states. The Commission also intends to investigate the possibility of extending the use of automated access to data. It will also explore with member states the possibility to develop an automated mechanism that would allow a cross-matching between the data reported by each party of every single transaction. This would allow detecting fraud in early stages and ultimately prevent a missing trader fraud, be it domestic or intra-Community.

Further, since May 2012, the Commission has engaged member states and other stakeholders on possible options for implementing the "destination principle" in B2B cross-border trade, to establish a "definitive regime" in place of the current transitional rules. This has included a proposal for a generalized reverse charge system, which appears to have been dismissed as flawed.

Under a generalized reverse charge system, VAT would be "suspended" along the whole economic chain and would be charged only to consumers. This means that total VAT collection is shifted to the retail stage. Such a system would not have the self-policing nature of the current VAT system (*i.e.,* under the principle of fractionated payment), which ensures that a small number of fairly large, reliable taxable persons in the economic chain account for most of VAT.

The Commission has concluded that, instead of a generalized reverse charge system, the best option for the EU as a whole would be to tax B2B supplies of goods within the EU in the same way as domestic supplies, thereby fixing the great flaw of the transitional arrangements while keeping the underlying features of the VAT system intact. Such a system of taxation of cross-border supplies will ensure consistent treatment of domestic and cross-border supplies along the entire chain and re-establish the basic features of the VAT in cross-border trade, *i.e.,* the fractionated payments system with its self-policing character, the Commission said.

According to the Commission, "this change should reduce cross-border fraud by about EUR40bn (80 percent) a year in the EU. The intermediate and final consumption of the goods will continue to be taxed where the goods are transported to, which is a reliable proxy of the place of consumption. Such an objective criterion would make it difficult for taxable persons to engage in tax planning or commit

fraud. This will enable tax administrations to concentrate resources on other challenges."

Some significant simplification measures will be taken to accompany this change. For instance, the One Stop Shop that already exists for telecommunication, broadcasting, and electronic services, and which is due to be extended to all e-commerce transactions as part of the Action Plan, will be even more widely implemented and rebooted, so as to fully exploit the opportunities presented by digital technology to simplify, standardize, and modernize processes. Businesses will need to register for VAT purposes in the member states where they were established only. Collectively, businesses should save an average of around EUR1bn.

Such a system would require more trust and cooperation between tax administrations, the Commission says, as the member state where the goods arrive would have to rely on the member state of departure to collect the VAT due on the cross-border supply.

South African VAT Regime Largely Appropriate, DTC Says

The Davis Tax Committee (DTC), in its recently released final report on tax policies to support small and medium-sized enterprises (SMEs), made a number of recommendations in the area of value-added tax (VAT).

The Committee said South Africa's compulsory VAT registration threshold compares favorably to international standards, and said there does not appear to be any justification for raising it.

Likewise it said that there is no reason to review the threshold for cash basis VAT reporting, which is currently limited to those companies with a turnover of no more than SAR2.5m per year.

The Committee noted the distress caused to SMEs by long outstanding debts and said the issue cannot be ignored. The DTC recommended that the National Treasury should investigate the introduction of a debtors' allowance where SMEs are allowed to adjust the VAT computation when debtors' balances exceed 90 days.

Last, it said the DTC VAT sub-committee should consider time limits to be imposed on the South African Revenue Service with regard to all tax refunds.

Australia To Increase Middle Tax Bracket

The Australian Government has said that taxpayers will benefit from a AUD7,000 (USD5,303) increase to the "middle income" tax bracket within weeks.

The Government introduced the Treasury Laws Amendment (Income Tax Relief) Bill 2016 to Parliament on September 1. It provides for the implementation of a Budget 2016 proposal to increase the entry threshold for the 37 percent tax rate from AUD80,000 to AUD87,000.

According to Treasurer Scott Morrison: "This will prevent around 500,000 taxpayers going onto the higher 37 percent marginal tax rate. By pushing out the tax threshold on the middle tax bracket, we'll keep average full time wage earners on the lower rate of 32.5 percent for longer."

The reform will be applied retrospectively, with effect from July 1, 2016. "Once the legislation is passed, individuals will get every dollar of their personal income tax relief backdated to July 1, 2016. This may mean a larger refund for some but it will mean lower tax is paid across the whole year for everyone," Morrison explained.

Earlier, the Australian Taxation Office (ATO) confirmed to the Government that it will issue new Pay As You Go (PAYG) withholding tax schedules this week, to reflect the changes introduced in the Income Tax Relief Bill. As a result, from October 1, employers will be required to lower the amount of tax withheld for affected taxpayers. Any tax overpaid prior to this date will be refunded by the ATO on assessment after the end of the 2016/17 financial year.

New Zealand Tax System Now More Progressive

The top decile of income earners in New Zealand is forecast to pay 37.2 percent of income tax in 2016/17, compared with 35.5 percent in 2007/08.

The Government has released data showing that the tax and welfare system has become more progressive. "This latest data confirms that New Zealand's income tax and support system significantly redistribute incomes to households in need," Acting Finance Minister Steven Joyce said. "Higher income households are paying a larger share of income tax than they were in 2008, and lower income households are paying less – the 30 percent of households with the lowest incomes are forecast to pay just 5.4 percent of income tax, compared with 6.3 percent in 2007/08."

"This is before the effect of redistribution from Working For Families and benefits. The Government has increased support for low-income families to help New Zealanders through times of need. So at any particular time, a large number of households effectively don't pay income tax," Joyce said.

The Treasury estimates that, in 2016/17, 42 percent of households will pay less in tax than they receive from welfare benefits, Working for Families tax credits, New Zealand Superannuation, and accommodation subsidies. This compares with 39 percent in 2007/08.

"For the 30 percent of households with the lowest incomes, the NZD1.7bn of income tax they are expected to pay will be more than offset by the NZD10.6bn they will receive in income support," Joyce said.

Japan Reviewing Spousal Tax Break

Yoichi Miyazawa, the head of Japan's ruling Liberal Democrat Party, has said that the Government will consider amending the spousal tax deduction as part of a broader tax reform package.

The measure was originally introduced in 1961. Where one spouse earns JPY1.03m (USD10,005) or less a year, the other can claim a deduction of up to JPY380,000.

In an interview with *Nikkei*, Miyazawa said that "more than 20 years have passed since the last big reform, and the world has changed a lot since then." He said the country needs to incentivize women to work.

Miyazawa added that the Government could consider replacing the deduction with a single tax break for married couples, which could take into account their level of income.

Miyazawa's comments were echoed by the party's Secretary-General, Toshihiro Nikai. According to the *Japan Times*, Nikai told reporters that the reform "is necessary to adjust our tax system in accordance with changing societal landscapes." He did however stress that any changes must not "destroy our traditional family model."

UK To Introduce Pension Advice Tax-Exempt Allowance

The UK Government has announced a new tax break to encourage people planning their retirement to take financial advice.

The Pensions Advice Allowance (PAA), which will be on offer from April 2017, will allow those nearing retirement to take up to GBP500 out of their pension pots, tax free, towards the cost of financial advice. This is intended to enable individuals to receive advice on all the financial products that contribute towards their retirement

income, such as multiple pension pots and other assets like individual savings accounts (ISAs).

Research found that when approaching retirement, only 22 percent of people know the value of their pension pot, and only 14 percent of people would be confident planning their retirement goals without financial advice.

Launching a consultation on the PAA, Economic Secretary to the Treasury Simon Kirby said: "Pensions and savings decisions are some of the most important a person will make during their lifetime. It is therefore vital that people can access the financial help they need and feel confident choosing the support that works for them in their retirement."

"I look forward to the industry engaging with the pensions advice allowance consultation, and taking this opportunity to tell us how the allowance could best meet the needs of both consumers and firms."

The PAA was first announced in Budget 2016 after a recommendation from the Financial Advice Market Review (FAMR), which suggested that high-quality financial advice can have a significant impact on retirement incomes if that advice is received early.

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Finland Forms Corporate Tax Working Group

Finland's Ministry of Finance has announced the establishment of an expert working group to examine how corporate tax affects Finland's competitiveness.

According to a statement issued on August 31, the remit of the working group is to study how the current corporate taxation framework, including the level of corporate tax, affects competitiveness, economic growth, and productivity.

In particular, the panel will examine the tax treatment of investments in tangible and intangible assets, the Ministry said.

The working group is chaired by Director General of the Finance Ministry's Tax Department, Terhi Järvikare, and includes five members drawn from academia and public administration.

China Accelerates Resource Tax Reform

China has confirmed that a new system of taxing natural resources, which had been operating on a pilot basis, has been extended.

Under the reforms, China is switching the basis of taxation of natural resources from a volume-based system to an ad-valorem system (based on value).

The Government first extended nationwide the new resource tax in November 2011. Since then, the taxation of such resources as crude oil and natural gas, coal, and rare earths has been changed.

Currently seven kinds of resources are subject to resource tax: crude oil, natural gas, coal, other crude non-metal ores, crude ferrous metal ores, crude non-ferrous metal ores, and salt. According to an August 29 English translation of an announcement originally made on June 27, 2016, the Government began rolling out the resource tax reform "in an all-round way" on July 1, 2016.

The release also confirmed that "efforts will be made to pilot the collection of resource tax on water on an ad-valorem basis."

The Government believes that the resource tax reform, when fully implemented, will improve the pricing mechanism of resource products by taking account of the differences between China's producing regions; promote coordinated and enhanced regional development; and enable the conservation and environmental exploitation of resources.

It is intended that the resource tax rates imposed should take account of the economics

involved in the production of each mineral, so that the overall tax burden on producing companies should not be increased.

According to the State Administration for Taxation, resource tax revenue has grown at an annual average of 27 percent since the tax was introduced, to reach RMB103.5bn (USD15.5bn) in 2015, representing 1.8 percent of local tax revenues.

Geneva To Slash Corporate Tax Rate

Swiss canton Geneva has announced plans to gradually reduce its headline corporate tax rate from 24.2 percent to 13.49 percent.

The rate cut is scheduled to enter into force in 2019. Until then, a temporary 13.79 percent rate will apply. The estimated revenue loss is CHF440m (USD447.6m).

A consultation on the proposals will close on October 14.

The change is thought to respond to Switzerland's corporate tax reform plan, approved in 2015, which committed the territory to repealing many federal and cantonal preferential tax regimes to bring arrangements into line with international best practices. The significant cut is intended to ensure Geneva's continued appeal to international investors.

AICPA Recommends Changes To US Manufacturing Deduction

The American Institute of Certified Public Accountants (AICPA) has recommended modifications to the manufacturing deduction to reduce disputes between taxpayers and the Internal Revenue Service (IRS) and to improve the application of the relevant tax law.

Specifically, the AICPA has called for changes to the regulations determining qualifying gross receipts from dispositions of computer software under Internal Revenue Code Section 199, often referred to as the manufacturing deduction. The AICPA believes implementation of its recommendations would result in fewer controversies between taxpayers and the IRS, and a more equitable application of Section 199.

In the letter, Troy K. Lewis, Chair of the AICPA Tax Executive Committee, wrote: "The current regulatory framework makes a determination of whether gross receipts from software development are qualified for Section 199 purposes based on whether the software is disposed via a tangible medium, by download, or through local or remote servers connected to the internet ('online'). The statutory language of Section 199 does not provide for this distinction. The AICPA believes the distinction in the regulations denies taxpayers developing certain software in the United States a Section

199 deduction for otherwise qualifying activities. The result is inconsistent with the broad legislative intent of Section 199 to incentivize domestic production."

Lewis recommended that the IRS and the US Department of the Treasury "eliminate the distinction and allow gross receipts derived from the disposition of computer software to include gross receipts derived from providing software online without relying on the disposition of comparable software via download or tangible medium."

He wrote that the AICPA recognizes the concern that eliminating the regulatory distinction with respect to the means of software disposition may result in taxpayers claiming, as domestic production gross receipts, amounts derived from non-qualified services. The IRS and Treasury could, he wrote, clarify the definition under Section 199 that the provision of software online excludes the provision of non-qualifying services. "Specifically," he stated, "we recommend that Treasury explicitly state that the use of software by a customer online, while connected to the Internet, is not by itself considered the provision of a non-qualifying service."

Lewis also recommended that, where an allocation of gross receipts is required, the IRS and Treasury include a safe harbor in the regulations, providing for the allocation of gross receipts between the provision of software and non-qualifying services. Such a safe harbor would eliminate the need for taxpayers to pay for specialists or perform burdensome computations to determine gross receipts attributable to qualifying software dispositions versus non-qualifying services, he stated.

"We believe that these modifications to the regulations under Section 199, for determining qualifying dispositions of computer software and qualifying gross receipts, are necessary to provide taxpayers with much-needed clarity in applying the rules," Lewis wrote. "We also believe the modifications will reduce future controversies between taxpayers and the IRS, and are consistent with the legislative intent to incentivize domestic development of all software, regardless of the medium of its disposition."

AUSTRALIA - GERMANY

Legislation

Australia has introduced legislation to bring a new DTA with Germany into force.

COSTA RICA - GERMANY

Ratified

Costa Rica and Germany completed their domestic ratification procedures in respect of a DTA on August 10, 2016, to enable the treaty to become effective from January 1, 2017.

HONG KONG - RUSSIA

Effective

The DTA between Hong Kong and Russia became effective on July 29, 2016.

INDIA - CYPRUS

Forwarded

The Indian Cabinet on August 24, 2016 approved the signature of a DTA protocol with Cyprus.

INDIA - MAURITIUS

Ratified

On August 10, 2016, India completed its domestic ratification procedures in respect of the DTA Protocol signed with Mauritius.

INDIA - VIETNAM

Signature

India and Vietnam signed a DTA Protocol on September 3, 2016.

IRELAND - ETHIOPIA

Into Force

The DTA between Ireland and Ethiopia entered into force on August 12, 2016.

IRELAND - VARIOUS

Negotiations

According to an August 15, 2016 update from the Irish Revenue, Ireland is currently negotiating a DTA with Oman, a new DTA with the Netherlands, and a DTA Protocol with South Africa.

IRELAND - UNITED STATES

Negotiations

In an August 25, 2016 consultation paper, the Irish Finance Department indicated that Ireland and the United States may amend their DTA.

JAPAN - PANAMA

Signature

On August 25, 2016, Japan and Panama signed a TIEA.

MAURITIUS - KOREA, SOUTH

Signature

The Mauritian Government has announced that, on August 11, 2016, a TIEA was signed with South Korea.

PANAMA - VIETNAM

Signature

Panama and Vietnam signed a DTA on August 30, 2016.

SINGAPORE - AUSTRALIA

Signature

Singapore and Australia have reached an agreement to exchange tax information automatically under the Common Reporting Standard.

SINGAPORE - ETHIOPIA

Signature

Singapore and Ethiopia signed a DTA on August 24, 2016.

UKRAINE - MALAYSIA

Signature

Ukraine and Malaysia signed a DTA on August 4, 2016.

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

THE AMERICAS

International Tax Issues 2016

9/12/2016 - 9/12/2016

PLI

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

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

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2016/_/N-4kZ1z11j97?ID=259130

Basics of International Taxation 2016

9/19/2016 - 9/20/2016

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)

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2016/_/N-4kZ1z11j8u?ID=259120

The 23rd World Offshore Convention Cuba 2016

10/12/2016 - 10/13/2016

Offshore Investment

Venue: Meliá Cohiba, Calle 1ra, La Habana, Cuba

Key speakers: TBC

http://www.offshoreinvestment.com/pages/index.asp?title=The_23rd_World_Offshore_Convention_Cuba_2016&catID=12853

Athletes and Entertainers – US International Tax Issues

10/18/2016 - 10/18/2016

CCH

Venue: Webinar

Chair: Robert J. Misey

http://www.cchgroup.com/media/wk/taa/pdfs/training-and-support/seminar/cch-seminars-calendar-fact-sheet.pdf

Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2016

10/18/2016 - 10/20/2016

Practising Law Institute

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

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered) and Eric Solomon (EY)

http://www.pli.edu/Content/Seminar/Tax_Strategies_for_Corporate_Acquisitions/_/N-4kZ1z11j8r?ID=259147

Hot Issues in International Taxation – Washington, DC

10/20/2016 - 10/21/2016

Bloomberg BNA

Venue: KPMG, 1801 K Street NW, Washington, DC 20036, USA

Key Speakers: TBC

http://www.bna.com/hot-issues_dc/

International Trusts & Private Client Forum: Cayman Islands

10/24/2016 - 10/25/2016

Informa

Venue: The Ritz-Carlton, W Bay Rd, Cayman Islands

Key Speakers: George Hodgson (STEP), Jon Conder (Macfarlanes), Peter Cotorceanu (G&TCA), Henry Mander (Harneys), among numerous others.

http://www.iiribcfinance.com/event/private-client-international-trusts-private-client-forum-cayman-islands-conference

Introduction to US International Tax – Raleigh

10/31/2016 - 11/1/2016

Bloomberg

Venue: Renaissance Raleigh North Hills Hotel, 4100 Main at North Mills St, Raleigh, NC 27609, USA

Key Speakers: TBC

http://www.bna.com/intro_raleigh/

Intermediate US International Tax Update – Raleigh

11/2/2016 - 11/4/2016

Bloomberg

Venue: Renaissance Raleigh North Hills Hotel, 4100 Main at North Mills St, Raleigh, NC 27609, USA

Key Speakers: TBC

http://www.bna.com/inter_raleigh/

International Tax Issues In The Manufacturing Industries

11/9/2016 - 11/9/2016

CCH

Venue: Webinar

Chair: Robert J. Misey

http://www.cchgroup.com/media/wk/taa/pdfs/training-and-support/seminar/cch-seminars-calendar-fact-sheet.pdf

2016 Annual Conference on Taxation

11/10/2016 - 11/12/2016

National Tax Association

Venue: Baltimore Renaissance Harborplace, The Gallery, 202 E Pratt St, Baltimore, MD 21202, USA

Key Speakers: TBC

https://editorialexpress.com/conference/NTA2016/program/NTA2016.html

Tax-Effective Global Value Chain – Post BEPS

11/23/2016 - 11/25/2016

IBFD

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

Key Speakers: Carlos Gutiérrez Puente (IBFD), Tamas Kulcsar (IBFD)

http://www.ibfd.org/Training/Tax-Effective-Global-Value-Chain-Post-BEPS

US International Tax Compliance Workshop – New York

11/28/2016 - 11/29/2016

BNA

Venue: AMA Conference Center, 1601 Broadway (at 48th and Broadway), 8th Floor, New York, NY 10019, USA

Key Speakers: TBC

http://www.bna.com/compliancenyc2016/

US Tax Issues for Foreign Persons Investing in the US Real Property: FIRPTA, PATH Act and More – New York

11/30/2016 - 12/1/2016

Bloomberg BNA

Venue: AMA Conference Center, 1601 Broadway, 8th Floor, New York, NY 10019, USA

Key Speakers: TBC

http://www.bna.com/FIRPTA_nyc/

The Private Equity Tax and Accounting Forum

12/5/2016 - 12/5/2016

Financial Research Associates

Venue: The Princeton Club of NY, 15 West 43rd St., New York 10036, USA

Key speakers: TBC

https://www.frallc.com/conference.aspx?ccode=B1028

Fundamentals of US International Taxation

12/6/2016 - 12/6/2016

CCH

Venue: Webinar

Chair: Robert J. Misey

http://www.cchgroup.com/media/wk/taa/pdfs/training-and-support/seminar/cch-seminars-calendar-fact-sheet.pdf

ASIA PACIFIC

TP Minds Asia 2016

9/21/2016 - 9/22/2016

Informa

Venue: Novotel Singapore Clarke Quay, 177A River Valley Road, Singapore, 179031

Key Speakers: Mayra Lucas (OECD), Terence Yuen (BP), Paul McSavage (Bank of America Merrill Lynch), Kari Pahlman (TTI), Duo Wu (Siemens), among numerous others.

http://www.iiribcfinance.com/event/TP-Minds-Asia-Transfer-Pricing-Summit

Principles of International Taxation

11/14/2016 - 11/18/2016

IBFD

Venue: InterContinental Kuala Lumpur, 165 Jalan Ampang, 50450 Kuala Lumpur, Malaysia

Key Speakers: TBC

http://www.ibfd.org/Training/Principles-International-Taxation-4

International Taxation Conference 2016

12/1/2016 - 12/3/2016

IBFD

Venue: ITC Maratha, Sahar Andheri (E), Mumbai 400 099, Maharashtra, India

Chairs: Sohrab Dastur (Senior Advocate, India), Girish Vanvari(KPMG), Anita Kapur (Central Board of Direct Taxes), Dinesh Kanabar (Dhruva Advisors LLP), Nishith Desai (Nishith Desai Associates), among numerous others

http://www.ibfd.org/IBFD-Tax-Portal/Events/International-Taxation-Conference-2016#tab_program

CENTRAL AND EASTERN EUROPE

7th Annual International Taxation in CEE

10/13/2016 - 10/14/2016

GCM Parker

Venue: Prague, Czech Republic

Key Speakers: TBC

http://gcmparker.com/gcm-conference-listing?conferenceid=74&menuid=1

The 2nd Offshore Investment Conference Cyprus

11/23/2016 - 11/24/2016

Offshore Investment

Venue: Amathus Beach Hotel, Amathountos, Agios Tychon, Cyprus

Key Speakers: TBC

http://www.offshoreinvestment.com/pages/index.asp?title=The_2nd_Offshore_Investment_Conference_Cyprus_2016&catID=12854

MIDDLE EAST AND AFRICA

TP Minds Africa

11/2/2016 - 11/3/2016

Informa

Venue: TBC, Johannesburg, South Africa

Key Speakers: Seyi Alao (Lafarge), Sam Sim (IBM), Nikki Oberholzer (Vodacom), Ben Stewart (The World Bank), among numerous others

http://www.iiribcfinance.com/event/TP-Minds-Africa-conference

Substance in International Tax Planning

11/13/2016 - 11/15/2016

IBFD

Venue: Hilton Dubai Jumeirah Hotel, Jumeirah Beach Road, Dubai Marina, Dubai

Key speakers: Boyke Baldewsing (IBFD), Ridha Hamzaoui (IBFD)

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

WESTERN EUROPE

Taxation of UK Commercial and Residential Property

9/14/2016 - 9/14/2016

Informa

Venue: TBC, London, UK

Chair: Patrick Soares (Field Court Tax Chambers)

http://www.iiribcfinance.com/event/uk-land-tax-conference-2016/agenda

Update for the Accountant in Industry & Commerce

9/14/2016 - 9/15/2016

Wolters Kluwer

Venue: Aztec Hotel and Spa, Aztec W, Almondsbury, Bristol, BS32 4TS, UK

Key speakers: Chris Burns (Chris Burns Consulting Ltd), Louise Dunford, Paul Gee, Dr Stephen Hill, Ralph Tiffin (McLachlan + Tiffin), Toni Trevett (CompleteHR Ltd) and Kevin Bounds.

https://www.cch.co.uk/sites/default/files/aic_2016_brochure.pdf

Private Client Tax Landed Estates Conference 2016

9/21/2016 - 9/21/2016

Informa

Venue: TBC, London, UK

Key speakers: Rhoddy Voremberg (Farrer & Co), Patrick Cannon (15 Old Square Tax Chambers), Fiona Graham (Boodle Hatfield), Etienne Wong (15 Old Square Tax Chambers), among numerous others

http://www.iiribcfinance.com/event/landed-estates-tax-wealth-planning-conference

3rd Annual Duets on International Taxation: Global Tax Treaty Commentaries

9/22/2016 - 9/22/2016

IBFD

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

Key Speakers: Prof. Dr. Richard Vann (University of Sydney), Prof. Dr. Pasquale Pistone (IBFD), D.P. Sengupta (Former Chief Commissioner of Income-Tax (Central)), Prof. Frank Pötgens (De Brauw Blackstone Westbroek), Prof. Patricia Brown (University of Miami), Prof. Frans Vanistendael (Emeritus Professor at K.U. Leuven), Prof. Diane M. Ring (Boston College Law School), Prof. Xavier Oberson (University of Geneva), Prof. Wolfgang Schön (Max Planck Institute for Tax Law and Public Finance)

http://www.ibfd.org/IBFD-Tax-Portal/Events/3rd-Annual-Duets-International-Taxation-Global-Tax-Treaty-Commentaries#tab_program

STEP Annual Tax Conference 2016

9/22/2016 - 9/22/2016

STEP

Venue: Waldorf Astoria, Edinburgh, The Caledonian, Princes Street, Edinburgh EH1 2AB, UK

Key Speakers: John Barnett (Burges Salmon LLP), Julie Butler (Butler & Co Chartered Accountants), Emma Chamberlain (Pump Court Tax Chambers), Alexander Garden (Turcan Connell), Robert Jamieson (Mercer & Hole Accountants), Julia Rosenbloom (Smith & Williamson), Edward Stone (Irwin Mitchell Private Wealth), Paula Tallon (Fellow) ADIT (Gabelle LLP), Chris Whitehouse (5 Stone Buildings)

http://www.step.org/sites/default/files/Events/2016/Autumn_Tax/Autumn_Tax_2016_19.pdf

UK Landscape for Non-Dom Property Investment

9/22/2016 - 9/22/2016

Informa

Venue: TBC, London, UK

Key Speakers: Nick Dunnell (Farrer & Co), Emma Chamberlain (Pump Court Tax Chambers), Dominic Lawrance (Charles Russell Speechlys) and Mark Davies (Mark Davies & Associates Ltd).

https://finance.knect365.com/uk-landscape-for-non-dom-property-investment-conference/

International Trusts & Private Client Forum: Isle of Man

9/27/2016 - 9/27/2016

Informa

Venue: Mount Murray Golf and Country Club, Mount Murray Road, Santon, IM4 2HT, Isle of Man

Key speakers: Nick Jacob (Gowling WLG), John Spellman (Isle of Man Government), Mark Hubbard (New Square Chambers), Nick Dunnell (Farrer & Co), among numerous others.

http://www.iiribcfinance.com/event/international-trusts-and-private-cient-forum-isle-of-man-IOM-conference/key-speakers

Tax Accounting

9/28/2016 - 9/30/2016

IBFD

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

Key speakers: Tjeerd van den Berg (Deloitte), Albert Hartholt (Heineken), Ed Rijkers (Ernst & Young), Koen De Grave (PwC Tax Belgium), among numerous others

http://www.ibfd.org/Training/Tax-Accounting

A-Z Guide to Residence and Domicile 2016

9/29/2016 - 9/29/2016

Informa

Venue: TBC, London, UK

Key speakers: Simon McKie (McKie & Co LLP), Peter Vaines (Field Court Tax Chambers), Keith Gordon (Temple Tax Chambers) and Pedro Gemal (Burges Salmon).

https://finance.knect365.com/residence-and-domicile-conference/agenda/1

BEPS for Investment Managers – 2016 Annual Forum

9/29/2016 - 9/29/2016

Informa

Venue: TBC, London, UK

Key Speakers: Malcolm Richardson (M&G Investments), Roger Exwood (Blackrock), Liza Taylor (Fidelity International), Malcolm Powell (Investec Asset Management), among numerous others

https://finance.knect365.com/beps-base-erosion-profit-shifting-for-investment-managers-conference/agenda/1

Tax Planning for Swiss/UK Private Clients

9/29/2016 - 9/29/2016

Informa

Venue: TBC, London, UK

Key speakers: Daniel Bader (Bär & Karrer), Russell Cohen (Farrer & Co), Andrew Goodman (Osbourne Clarke), among numerous others.

http://www.iiribcfinance.com/event/tax-planning-swiss-uk-conference/key-speakers

Private Investor: Russia & CIS

10/12/2016 - 10/13/2016

Informa

Venue: Hilton London Canary Wharf, Marsh Wall, London E14 9SH

Key speakers: Anna Matveyeva (Sberbank Private Banking), Igor Ryabov (UniCredit), Timur Artemiev (Euroset), Dmitry Klenov (UFG Wealth Management), among numerous others

http://www.privateinvestorrussia.com/

Trusts and Estate – International Tax Planning

10/12/2016 - 10/14/2016

IBFD

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

Key speakers: Joanna C. Wheeler (IBFD),

Bart Kosters (IBFD), Jonathan Schwarz (Temple Tax Chambers), Alessandro Bavila (Maisto e Associati)

http://www.ibfd.org/Training/Trusts-and-Estate-International-Tax-Planning

Principles of International Tax Planning

10/31/2016 - 11/4/2016

IBFD

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

Key speakers: Boyke Baldewsing (IBFD), Piet Boonstra (Van Campen Liem), Marcello Distaso (Van Campen Liem), among numerous others

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

Private Placements

11/2/2016 - 11/2/2016

Informa

Venue: Grange St Paul's Hotel, 10 Godliman Street, London, EC4V 5AJ, UK

Key speakers: Jane Pilcher (Anglian Water Group), Eilidh Mactaggart (Metlife), Frank Hermens (NN Investment Partners), Stuart Hitchcock (New York Life Investments), among numerous others.

http://www.iiribcfinance.com/event/Private-Placements-Summit-Europe

5th Annual European OffshoreAlert Conference

11/14/2016 - 11/15/2016

OffshoreAlert

Venue: Grange St. Paul's Hotel, 10 Godliman Street, London, EC4V 5AJ, UK

Key Speakers: Antoine Deltour (PwC Whistleblower), Bradley C. Birkenfeld (UBS Whistleblower), Brooke Harrington (Copenhagen Business School), Daniel Hall (Burford Capital), Dan Reeves (Offshore Compliance & Enforcement Consulting Group & Retired Senior Advisor, IRS Offshore Compliance Initiative), among numerous others

http://www.offshorealert.com/conference/london/

The New Era of Taxation: What You Need to Know in a Constantly Changing World

11/17/2016 - 11/18/2016

International Bar Association

Venue: TBC, Amsterdam, The Netherlands

Key Speakers: TBC

http://www.ibanet.org/Conferences/conf756.aspx

Meet the Experts 2016

11/21/2016 - 11/22/2016

Informa

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

Key Speakers: Stephen Cooper (IASB), Sue Lloyd (IASB), Patrina Buchanan (IASB), Stig Enevoldsen (FEE Corporate Reporting Policy Group), Chris Noves (University of London, University of Sydney), among numerous others.

http://www.meet-the-experts.org/

3rd Annual Corporate Tax Summit

11/24/2016 - 11/25/2016

IBFD

Venue: TBC, Berlin, Germany

Key speakers: Georg Berka (Raiffeisen Bank), Harm J. Oortwijn (Paramount), Evelyn Arnold (Zurich Insurance Group), Sophia Reismann (OMV), among numerous others

http://www.ibfd.org/sites/ibfd.org/files/content/marketing/Uniglobal%202016%20Berlin%20conference%20programme.pdf

International Tax Aspects of Corporate Tax Planning

11/30/2016 - 12/2/2016

IBFD

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

Key speakers: Jeroen Kuppens (KPMG), Ágata Uceda (KPMG), Luis Nouel (IBFD), among numerous others

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

International Taxation of Oil and Gas and Other Mining Activities

12/7/2016 - 12/9/2016

IBFD

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

Key speakers: Patrick Ellingsworth (IBFD), Bart Kosters (IBFD), Antonio Russo (Baker & McKenzie), among numerous others

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THE AMERICAS

Puerto Rico

Walmart has again won a ruling against changes to Puerto Rico's alternative minimum tax (AMT), with the US Court of Appeals for the First Circuit upholding a lower court judgment that they are unconstitutional in exclusively targeting Walmart.

A listing of recent key international tax cases.

Puerto Rico had raised the AMT's previous 2 percent rate to a top rate of 6.5 percent for tax years starting after December 31, 2014. That top rate was reserved for companies with a total income of USD2.75bn or above, capturing just Walmart.

Furthermore, the new AMT structure was said to have moved further away from its transfer pricing origins by the elimination of a previous provision that had allowed Treasury to exempt from the tax, in whole or in part, any transaction upon proof that its transfer price was "equal or substantially similar to or lower than" an arm's length price.

Walmart, the largest private employer in Puerto Rico, sells almost USD3bn of goods in the Commonwealth, of which around USD1.6bn is purchased from local suppliers each year and over USD700m is obtained from its parent company and related affiliates in the US.

On December 4, 2015, Walmart's Puerto Rico subsidiary commenced legal action against Puerto Rico Secretary of the Treasury, Juan Zaragoza-Gómez, in his official capacity. Walmart sought an injunction contesting that the AMT is unlawful under the dormant Commerce Clause; the Equal Protection Clause; the Bill of Attainder Clauses; and the Federal Relations Act.

In its judgment on March 28, (*Wal-Mart Puerto Rico Inc. v. Secretary of the Treasury of the Commonwealth of Puerto Rico* (No. 3:15-CV-03018)), the US Federal District Court in Puerto Rico held that the AMT increase is "discriminatory" and "patently unconstitutional" in its taxation of interstate commerce.

The Secretary conceded in testimony before the district court that the amended AMT is no longer targeted at profit shifting through transfer pricing abuse, but is instead simply "a revenue-raising measure," given that Puerto Rico is in financial dire straits.

In the district court's ruling, the judge agreed that, in addition to its unconstitutionality, the amended AMT was "a legislative money grab, pure and simple, funding the account of Puerto Rico's insolvent Treasury from the presumably deeper pockets of large multistate corporations and their local affiliates." It granted Walmart an injunction to stop all "levying, collection, and enforcement" of the increase to the AMT. Meanwhile, the original 2 percent levy would remain in force.

On appeal, the US Court of Appeals also agreed that the levy contravenes the dormant Commerce Clause and as such did not consider any of the other arguments put forward by Walmart.

The dormant Commerce Clause is an implied limitation from the Commerce Clause that "precludes states from 'discriminat[ing] between transactions on the basis of some interstate element'." The court pointed out that, in applying the dormant Commerce Clause, it first determines whether a law "discriminates on its face against interstate commerce."

While drawing on the earlier ruling, the Court of Appeals stated that: "It is indisputable that the amended AMT discriminates: it taxes only cross-border transactions between a Puerto Rico corporate taxpayer and a home office or related entity outside of Puerto Rico. The district court held that the amended AMT was facially discriminatory. We agree."

"Whether or not the AMT is one component in a broader tax scheme, the AMT nonetheless applies only to interjurisdictional transfers within a corporate family," it continued, noting that the resulting "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" is discriminatory.

Further, the court pointed out the levy fails the Supreme Court's "internal consistency" test. This looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

The court said: "The AMT fails the internal consistency test because if every state were to adopt the AMT, multistate corporations doing business across state lines would be disadvantaged relative to corporations whose operations are consolidated in one state."

The court further rejected that the discrimination could be warranted by Puerto Rico's (initial) objective of preventing abusive profit shifting. Were that to be argued, the court said, the amended AMT would be seen to be "a blunt and unnecessarily overinclusive approach to combating profit-shifting abuse. It essentially establishes an irrebuttable presumption that all intercorporate transfers to a Puerto Rico branch from related mainland entities are fraudulently priced to evade taxes." It pointed out that less extreme, and non-distortionary alternatives, such as transfer pricing audits and unitary taxation to ensure an arm's length outcome, are instead available to Puerto Rico.

The court concluded: "Having identified numerous less restrictive alternatives to advance Puerto Rico's legitimate local purpose, we hold that the AMT is a facially discriminatory law that does not survive heightened scrutiny under the dormant Commerce Clause."

This judgment was released on August 24, 2016.

http://cases.justia.com/federal/appellate-courts/ca1/16-1406/16-1406-2016-08-24.pdf?ts=1472068817

US Court of Appeals for the First Circuit: *Wal-Mart Puerto Rico, Inc., v. Juan C. Zaragoza-Gomez (16-1370 and 16-1406)*

United States

The US Chamber of Commerce and the Texas Association of Business have together petitioned the US District Court, asking it to set aside as unlawful the new temporary and proposed regulations issued by the Treasury to prevent multiple corporate tax inversions.

The new set of regulations announced by Treasury on April 4, 2016, is an attempt, in particular, to limit earnings stripping – a practice whereby inverted companies, by borrowing from their new foreign parent company (or another foreign affiliate), increase their interest payments and reduce their US taxable income by using the interest expense deduction.

According to the business groups, the April 4 regulations attempt to prevent certain corporate mergers that are otherwise permitted under the inversion rules under Section 7874 of the Internal Revenue Code (IRC). Section 7874, they argued, sets a specific numerical threshold governing combination transactions between US and foreign companies, in that as long as the shareholders of a foreign company own more than 40 percent of the combined entity's stock, the transaction will not be treated as an inversion subject to this statutory provision.

The Chamber and Association pointed out that:

> "In order to circumvent this numerical threshold, the rule, which was made immediately effective, artificially ignores any stock owned by the foreign shareholders that came from prior acquisitions of a US company within the three years before a merger. As a result, the rule disallows some mergers that clearly satisfy the 40 percent threshold."

US Chamber President and CEO Thomas J. Donohue argued:

> "Treasury and the IRS ignored the clear limits of a statute, and simply rewrote the law unilaterally. This is not the way Government is supposed to work in America. Instead of breaking the rules to punish companies engaged in lawful transactions, Washington should just do its job and comprehensively reform the tax code. The real solution is tax reform that lowers rates for all businesses, allowing American companies to compete globally and the US to attract foreign investment."

Lily Fu Claffee, chief legal officer of the US Chamber, went on to explain:

> "Treasury and the IRS rewrote the IRC and steamrolled over the Administrative Procedure Act, which requires that an agency provide interested parties with notice and an opportunity to comment before a rule becomes effective. Treasury and the IRS admitted to skipping over any prior notice or opportunity to comment on their Multiple Acquisition Rule, but offered no justification for dodging their legal obligations in this way. Treasury and the IRS should not act as if they are above the basic rules that govern all federal agencies."

The lawsuit was filed on August 4, 2016, in the US District Court for the Western District of Texas.

http://www.chamberlitigation.com/content/chamber-commerce-v-irs

US District Court, Western District Of Texas: *US Chamber of Commerce v. IRS*

ASIA PACIFIC

New Zealand

The New Zealand Court of Appeal has sided with Vector, New Zealand's largest distributor of gas and electricity, in its ongoing dispute with the Inland Revenue Department (IRD) over payments received for infrastructure access rights.

The case in question concerns a NZD53m (USD38.5m) payment received by Vector from Transpower, which owns and operates New Zealand's national electricity grid. The payment was a consideration for various rights Vector granted to Transpower, including access rights to a tunnel and a transmission corridor.

At the center of the dispute was the differing interpretations of this payment under New Zealand income tax law by the IRD and Vector. The IRD considered that such a payment should be considered as revenue, and therefore was taxable. Vector argued that the payment was capital in nature, and therefore not taxable.

In a decision released on August 12, the Court of Appeal upheld the decision of the High Court on the matter in 2014 that the payment received by Vector was not income for tax purposes.

Vector said in a statement that it had taken a "prudent approach" by returning the payment at issue as taxable, spread over six years from 2011. However, it will be entitled to a tax credit plus interest, subject to any further appeal proceedings by the IRD.

This judgment was released on August 12, 2016.

https://vector.co.nz/newsdisplay/Market-Release-Court-of-Appeal-rules-in-Vectors-favour

New Zealand Court of Appeal: *Commissioner of Inland Revenue v. Vector Ltd [2016] NZCA 396*

MIDDLE EAST AND AFRICA

Israel

The Supreme Court of Israel recently issued an interim order preventing the Israeli Government from transferring personal financial data to the US Internal Revenue Service (IRS) under the Foreign Account Tax Compliance Act (FATCA).

The petition calling for an injunction on information exchanges under FATCA was filed on August 8 by Republicans Overseas Israel and accepted by the Court on August 31, just one day before FATCA exchanges between Israel and the US were due to begin.

The US Congress enacted FATCA in 2010 to target non-compliance by US taxpayers using foreign accounts. Foreign governments had two options for complying with FATCA: they could either permit their financial institutions (referred to under FATCA as "foreign financial institutions,"

or FFIs) to enter into agreements with the IRS, or they could themselves enter into intergovernmental agreements (IGAs) with the US.

Alternatively, FFIs are required to withhold and pay to the IRS 30 percent of certain US-source income made to non-participating FFIs, individual account holders failing to provide sufficient information to determine whether they are a US person, or foreign entity account holders failing to provide sufficient information about the identity of its substantial US owners.

Under the terms of the Model 1 IGA between Israel and the US, Israeli FFIs are required to report their information to the Israel Tax Authority, who will then automatically exchange the information with the US Treasury.

However, the decision by Judge Hanan Meltzer places a temporary block on the transmission of information between Israel and the US pending a hearing on the petition, which is due to take place on September 12, 2016.

http://www.republicansabroad.org.il/articles-of-interest/fatca-to-be-or-not-to-be/

Supreme Court of Israel: *Republicans Overseas Israel v. Ministry of Finance*

Dateline September 8, 2016

Brazil has been rather quiet on the tax front recently. This is understandable, given the country has been busy hosting the greatest sporting event on earth, and impeaching its (now former) president. Brazil sneaked back into tax news recently however, and for a rather predictable reason: anti-dumping duties. Yes, it certainly knows how to put on a good show, both in the sporting and the political sense, but Brazil does have a tendency to lurch towards trade protectionism when times are tough.

But more generally, for investors, Brazil must feel like a highly uncertain place at the moment, as would any country undergoing such political ructions. If there is a silver lining to be found, perhaps it's the fact that its tax system surely can't get much worse. Indeed, Brazil is infamous for the complexity of its tax system, with the PwC Paying Taxes index informing us that it takes a medium-sized firm 2,600 hours a year on average to comply with Brazil's layer cake of taxes.

Unfortunately, improving the tax regime might not be an immediate priority for Brazil. If anything, tax hikes are on the cards as Michel Temer, the vice-president under ousted President Dilma Rousseff, and the man chosen to serve the remainder of her term, looks for ways to close the budget deficit, the full extent of which his former boss was accused of concealing.

One thing you can't accuse Brazil of being is boring. And things could begin to liven up on the tax front again fairly soon!

It's quite a feat on the tax front that war-torn **Ukraine** has a substantially better tax system than Brazil, according to Paying Taxes index. But at 107th in the league table, it is an understatement to suggest that there is still ample room for improvement. However, unlike Brazil, Ukraine is at least making an attempt to remedy the problem. The launch of a public consultation on the state of the tax system, intended to supply the Government with ideas on how things can be improved, is the latest in a number of recent initiatives designed to ease the country's tax and regulatory burden.

Other examples include the launch of a new customs management system earlier this month, the creation of an expert working group on tax reform in June, and the approval of draft tax administrative reforms in April, aimed at bringing about structural reform in the State Fiscal Service, in line with changes proposed by the International Monetary Fund.

Ukraine may be pulling out all the stops to make its tax regime more friendly for investors. But it certainly doesn't lack for friends in the international community. Ukraine now has preferential access to the **European Union** market thanks to the Deep and Comprehensive Free Trade Agreement signed in 2014, and a new free trade partner in the form of **Canada** after the two nations signed a free trade agreement in July that will eliminate the majority of tariffs on bilateral trade. It has also tapped into the technical know-how of the **United States'** customs officials, who have provided assistance to the Ukraine Government as it modernizes it customs regime.

You get the sense that the Western powers are heavily invested in the future economic success of Ukraine. And encouragingly, ongoing efforts to improve the tax regime are a signal that the country is not only relying on the goodwill of others, but is helping itself as well, as it attempts to secure more foreign investment. It is a shame, therefore, that tensions with Russia will continue to overshadow the economy, at least as long as Vladimir Putin sticks around.

Another country that has undergone a fairly extensive review of its tax regime is **South Africa**. However, you could argue that it didn't really need to go to the trouble, because its tax regime is viewed quite positively already. According to Paying Taxes 2016 index, South Africa, where it takes 200 hours to comply with business tax obligations, ranks 20th overall, with a fairly creditable total tax rate (the combination of corporate, labor and other taxes) of 28.8 percent.

The Government should of course take every opportunity it can to find and correct weaknesses in its tax regime. It's just that I suspect the **Davis Tax Committee** review was established by the Government more as a guide to where the goose could be plucked next with the minimum amount of hissing, given the deteriorating fiscal climate.

Problematically, the review, if anything, has merely highlighted the fact that the Government's options are limited. There's little scope for hiking income taxes, the report appeared to suggest, because doing so would likely encourage tax avoidance and damage South Africa's already fragile economy. There seems to be some mileage in increasing revenue through the VAT system, especially as the rate, at 14 percent, is well below VAT rates seen elsewhere. The trouble is, VAT is a regressive tax, and the Government is probably keen to avoid a scenario where it is accused of hiking taxes on the poor.

Interestingly, the report concluded that, in comparison to other large emerging economies, South Africa's regime is only "slightly progressive." In a sense, this conclusion might have been music

to the Government's ears, for it gives it a great excuse to go ahead and make the tax regime more progressive. This could mean tax hikes for high-earners and the wealthy. Additionally, the big mining companies, which have been in the Government's sights for a number of years, could be in line for higher taxes.

In the end, the Davis tax report probably contained few things that the Government didn't know already. You could say it was a case of "ask a silly question, get a very predictable answer." But it's not the only Government that has been guilty of this particular crime recently. Next on the stand, the **Netherlands**.

To be fair to Prime Minister Mark Rutte, it was probably quite sensible of him to ask Silicon Valley's thriving community of tech companies what his country should do to the tax regime to maintain the Netherlands' competitiveness. The reply, though fairly comprehensive in scope, was hardly earth-shattering however. Essentially, it urged the Dutch Government to do nothing. Sure, corporate tax could be a little lower, but all the essential ingredients are in place, he was told.

One gets the feeling that Rutte wanted to ask a different sort of question though. The Netherlands has been saying for about a year now that it intends to prioritize measures to prevent tax avoidance, to fall into line with the BEPS project, without actually doing a huge amount about it. That's probably because it knows it has a bit of a dilemma.

The Netherlands has created an ideal tax regime for multinational holding and headquarter companies, as well as for companies with large amounts of income derived from intellectual property. Just the sort of tax regime that is generating a lot of criticism internationally for facilitating tax avoidance, and that the OECD is trying to discourage through its BEPS work. Yet, as the Silicon Valley firms pointed out, it is a tax regime which helps support hundreds of thousands of Dutch jobs in US firms alone, and keeps the Netherlands punching above its weight as a business and investment location.

So, I suspect what Rutte really wanted to ask Silicon Valley was, "We're thinking about dismantling a tax framework that you all love. Would you still invest in us if we did?"

Now, that really would be a silly question!

The Jester