Wolters Kluwer

GLOBAL TAX WEEKLY
a closer look

ISSUE 208 | NOVEMBER 3, 2016

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

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

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

Wolters Kluwer

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.

Unique contributions from the Big4 and other leading firms provide unparalleled insight into the issues that matter, from today's thought leaders.

Topicality, thoroughness and relevance are our watchwords: CCH's network of expert local researchers covers 130 countries and provides input to a US/UK team of editors outputting 100 tax news stories a week. GTW highlights 20 of these stories each week under a series of useful headings, including industry sectors (e.g. manufacturing), subjects (e.g. transfer pricing) and regions (e.g. asia-pacific).

Alongside the news analyses are a wealth of feature articles each week covering key current topics in depth, written by a team of senior international tax and legal experts and supplemented by commentative topical news analyses. Supporting features include a round-up of tax treaty developments, a report on important new judgments, a calendar of upcoming tax conferences, and "The Jester's Column," a lighthearted but merciless commentary on the week's tax events.

Wolters Kluwer

GLOBAL TAX WEEKLY
a closer look

ISSUE 208 | NOVEMBER 3, 2016

CONTENTS

FEATURED ARTICLES

NEWS ROUND-UP

For article guidelines and submissions, contact GTW_Submissions@wolterskluwer.com

The EU's Tax Agenda For 2016/2017

by Klaus von Brocke, EY EU Direct Tax Leader and Steve Bill, EY Director of Tax Policy, Ernst & Young LLP

Contact: klaus.von.brocke@de.ey.com, Tel. +49 89 14331 12287; sbill@uk.ey.com, Tel. +44 7768 035 826

This article was first published in EY's 'Global Tax Policy and Controversy Briefing 2016'

Introduction

The rapid adoption in 2016 of two major tax directives and the publication of an ambitious Action Plan on VAT reflect the tenacious new approach of the European Union (EU) to improving corporate tax transparency and tackling value-added tax (VAT) fraud. In the same way that the BEPS initiative of the G20/Organisation for Economic Co-operation and Development (OECD) has flourished following countries' increased willingness to work collaboratively to modernize the international framework for taxing the profits of multinational enterprises, the public focus on tackling tax avoidance has drawn EU Member States to act together. Cooperation is now considered by the EU Member States as far more necessary, and action at the EU level far less a challenge to fiscal sovereignty.

The EU's collaborative, coordinated approach to tax generally comprises the following three key focus areas:

- Finding cross-border solutions to cross-border challenges;
- Addressing excessive social market imbalances; and
- Developing and applying tax policies in a way that helps growth and addresses fairness.

The EU's commitment to tackling tax matters in a timely, coordinated fashion has already produced results. As noted above, the European Commission (the Commission) successfully managed to get two key pieces of legislation – an EU Anti-Tax Avoidance Directive (the ATA Directive), which provides for a uniform legislative implementation of some of the OECD's BEPS recommendations; and a directive to implement the automatic exchange of country-by-country reports, as required by BEPS Action 13 – adopted by the Economic and Financial Affairs Council of the European Union (Ecofin) within a six-month period. Both pieces of legislation were included in an anti-tax avoidance package put forward by the Commission on January 28, 2016.[1]

As we close out 2016 and look ahead to 2017, we should expect to see multinational taxation, and corporate transparency in particular, remain high priority items on the EU's direct tax agenda. On the indirect tax side, the focus will likely be on proposals related to the Commission's Action Plan on VAT, which was adopted on April 7, 2016.

Following is an overview of what has happened so far, and what may be next.

Direct Tax Developments

The ATA Directive Is Adopted

On July 12, 2016, Ecofin formally adopted the ATA Directive.[2] Unanimous political agreement on the directive had been reached on June 21, 2016, following several months of discussions and compromises.

The ATA Directive establishes a minimum standard with respect to five areas:

- Interest deductibility limitation;
- A general anti-abuse rule (GAAR);
- Controlled foreign company rules;
- Hybrid mismatches; and
- Exit taxation.

The directive's provisions should be transposed into Member State' national laws no later than December 31, 2018, and should take effect as of January 1, 2019. Derogations apply to the interest deductibility limitation rule and the exit taxation rule. Member States that have national targeted rules preventing BEPS risks that are equally effective to the interest deduction limitation rule can continue applying these rules until the OECD has reached an agreement on a minimum standard with regard to OECD BEPS Action 4, but no later than January 1, 2024. The exit taxation rule needs to be transposed in Member States' national laws no later than December 31, 2019, and should take effect by January 1, 2020.

Ecofin has further requested that the Commission put forward by October 2016 a proposal on hybrid mismatches involving third countries that provides for rules consistent with, and no less effective than, the OECD BEPS recommendations under Action 2.[3] Ecofin expects that an agreement on such a directive will be reached by the end of 2016.

Comment

The fact that the Commission successfully managed to introduce a legislative proposal for an ATA Directive and obtain Ecofin's approval within a six-month period is a remarkable achievement, given Ecofin's traditional resistance to harmonization measures in the direct tax field. While it may be tempting to characterize Ecofin's agreement as a Damascene conversion, a more accurate assessment is that the agreement represents some small expansions of the scope of the BEPS measures that 23 of the Member States (who participated directly in the development of the OECD's BEPS Action Plan) had already accepted.

While rapid adoption of the ATA Directive is impressive, it appears that the expedited pace resulted in poorly drafted minimum standards that Member States now have to transpose into national law. It is not difficult to anticipate the controversies that may occur in applying the new GAAR (to take an obvious example) or resolving issues when the directive acts to the detriment of the taxpayer in contrast to more favorable double tax treaty provisions or national provisions. To a certain degree, this reflects the unwillingness of Ecofin to go beyond the OECD guidelines, which themselves are not precise and leave room for differing interpretations.

CbCR Directive Is Adopted

On May 25, 2016, Ecofin unanimously voted in favor of the amendments to the existing EU directive on exchange of information (Directive 2011/16/EU), which will implement Action 13 of the OECD's BEPS recommendations on country-by-country reporting (CbCR) within an EU context (the CbCR Directive).[4]

The CbCR Directive requires multinationals to report information on revenues, profits, taxes paid, capital, earnings, tangible assets, and the number of employees, on a country-by-country basis. This information must be reported for fiscal years starting on or after January 1, 2016 to the tax authorities of the Member State where the group's ultimate parent entity is tax resident. If the ultimate parent entity is not resident in the EU, the report would have to be filed through a surrogate parent (EU or non-EU based) or the EU-based subsidiaries. The CbCR Directive gives

Member States the option to either require secondary filing for fiscal years starting on or after January 1, 2016, or defer that obligation to financial years starting on or after January 1, 2017.

The CbCR Directive will require EU Member States to implement a CbCR obligation in their national legislation in line with the requirements of the directive within 12 months from the date of its entry into force. The first reports will have to be filed within 12 months from the end of the fiscal year to which they relate. Member States will have to exchange them within three months thereafter, except for the reports relating to fiscal years starting on or after January 1, 2016, where the term would be 18 months after the end of the fiscal year. The Commission will adopt the necessary practical arrangements for upgrading the existing common platform for automatic exchange in the EU to fit the needs of the new requirements.

Proposal For Public Reporting Of Tax-Related Information

On April 12, 2016, the Commission published a draft directive (the Draft Directive) that, if adopted, would amend Directive 2013/34/EU, the EU Directive regarding the disclosure of income tax information (the Accounting Directive).[5]

The proposed amendments to the Accounting Directive would require large multinational companies operating in the EU to draw up and publicly disclose reports on income tax information, including a breakdown of profits, revenues, taxes, and employees. The information would be reported separately for each Member State and each jurisdiction that is listed on a "Common Union list of certain tax jurisdictions," and on an aggregated basis for the rest of the world. The "Common Union list of certain tax jurisdictions," *i.e.*, the specific tax jurisdictions to be included, is still to be determined. These reporting obligations would apply to both EU and non-EU multinational companies doing business in the EU.

The Draft Directive is separate from the new CbCR Directive (described above), which will implement the OECD's BEPS Action 13 recommendations regarding non-public CbCR. It is also different from a new EU directive, adopted by Ecofin in December 2015, that will require Member States to automatically exchange information related to cross-border tax rulings and advance pricing arrangements (that information will not be made public).[6]

The Commission's Draft Directive is not as strong as an earlier suggestion by the European Parliament to introduce public CbCR. In July 2015, the European Parliament proposed amending the Accounting Directive to extend to all industry sectors the existing public CbCR obligations required of large undertakings in the banking, extractive and logging sectors.[7] The conflict between these proposals is currently being discussed between the European Parliament and Ecofin.

Because the Draft Directive is considered to relate to financial reporting obligations in respect to income taxation and not to the harmonization of taxes, it does not need Ecofin's unanimous consent in order to be adopted. The Draft Directive will instead be considered for adoption under the "ordinary legislative procedure," which is intended to give the same decision-making weight to the Council and the European Parliament. Furthermore, Ecofin can make its decision through a qualified majority, which would be met if 55 percent of Member States vote in favor (in practice this means 16 out of 28) that represent at least 65 percent of the total EU population.

Comment

The content of the Draft Directive will likely be subject to intense discussions during the legislative process, given that it not only goes beyond the OECD BEPS recommendations in Action 13, but also does not completely follow the impact assessment study done by the Commission[8] on which it was based.

More specifically, the proposal diverges from the impact assessment in the requirement to separately report information on jurisdictions outside the EU and in the requirement for reporting the accumulated earnings and explaining the material differences between taxes accrued and taxes effectively paid. The Commission has made it clear that the purpose of the proposed reporting requirements differs from the OECD reporting recommendations, in that it is aimed at helping EU citizens understand how much tax EU companies pay, and where. On the other hand, the proposal does not go as far as suggested by representatives of the European Parliament, who would have liked an even more transparent environment.

The timing of this legislative procedure is very difficult to predict at this stage. The current proposal may go through as many as four readings (two at the European Parliament and two at the Council), two of which are not limited in time, and the other two could take up to four months.

State Aid Developments

Commission Explains State Aid And Tax Rulings Investigations In Working Paper And Notice

On June 3, 2016, the Commission's Directorate-General for Competition (DG Comp), which is vested with special legal competence in relation to State Aid law matters, published a working paper that summarizes and explains its investigations into tax rulings by highlighting the history and procedures followed during these still ongoing examinations.[9] It also presents some guiding principles on when a tax ruling may give rise to State Aid.

The working paper serves only as a short summary of the Commission's preliminary considerations, and merely sets out a number of its initial findings after having examined more than 1,000 rulings (600 of which were obtained following the November 2014 illegal leaking of Luxembourg tax rulings). It does not bind the Commission and is without prejudice to any further cases the Commission may open. DG Comp concludes that, under the EU Treaty and jurisdiction of the Court of Justice of the European Union, it has competence to investigate cases under State Aid rules in the field of tax rulings.

DG Comp indicated that it continues to focus in particular on transfer pricing rulings when the Commission believes there could be a manifest breach of the arm's length principle.

The working paper followed a more general Notice on the notion of State Aid (Notice) that the Commission published on May 19, 2016, as part of the State Aid Modernization package. The Notice is intended to assist public authorities in identifying when, in particular, public investments do not entail State Aid under Article 107(1) of the Treaty on the Functioning of the European Union. The Notice also contains general guidance on the scope and definition of the EU State Aid rules as they are applied by the Commission.

Ireland Decision Released

On August 30, 2016, the Commission released its decision in its investigation into the (alleged) State Aid issues associated with a multinational company's (MNC's) tax arrangements agreed with the Irish Government.[10] The Commission concluded that two tax rulings issued by Ireland have substantially and artificially lowered the tax paid by the MNC in Ireland since 1991.

The Commission has ordered that Ireland must now recover the unpaid taxes in Ireland from the MNC for the years 2003 to 2014 of up to EUR13bn, plus interest. Having sought and gained Cabinet approval, Irish Government has confirmed that it will appeal the decision, as it disagrees profoundly with the Commission's decision. A press release issued by the Irish Department of Finance confirms that "Ireland's position remains that the full amount of tax was paid in this case and no State aid was provided." The MNC has also said that it will appeal the decision.

More Details Provided In Luxembourg Cases

On June 9, 2016, the Commission published its final decision in the State Aid case relating to Luxembourg, rendered on October 21, 2015, in which the Commission determined that Luxembourg had granted illegal State Aid to a Luxembourg resident company that forms part of an MNC group.[11] The Commission found under the EU State Aid rules that Luxembourg granted a selective tax advantage in agreeing to transfer prices that allegedly deviate from market practices.

The Commission ordered Luxembourg to recover the alleged advantage from the taxpayer (consisting of the tax benefit that the taxpayer has received since 2012). Luxembourg and the MNC have filed appeals.

In a separate case relating to Luxembourg, the Commission on June 6, 2016, published a non-confidential version of the opening decision in which it formally informed Luxembourg of its preliminary conclusion that two rulings granted to an MNC involving a Luxembourg company with US and Swiss branches constitute State Aid.[12] The investigation, first announced in December 2015, focuses on the exemption granted in respect of profits attributable to the US branch and, in particular, the fact that these profits are not currently subject to tax in the United States, which was disclosed and analyzed in detail in one of the rulings.

Contrary to the other ongoing State Aid investigations, this case does not concern transfer pricing arrangements, but instead focuses on the way the Luxembourg tax authorities have applied the 1996 Luxembourg–US double tax treaty. The Commission considers that the exemption granted by Luxembourg for the US branch profits should not have been granted based on the fact that the US branch was not subject to taxation in the US.

This case can be considered as the Commission applying the "New Extended Approach," under which the Commission tries to apply what it may consider a universally applicable anti-abuse standard in the form of a subject-to-tax clause. At this stage, the Commission has not ultimately decided that State Aid exists. It is expected that a final decision in the investigation will take a considerable period of time.

Comment

In the wake of international tax policy developments, the Commission has continued combating certain international tax planning strategies on the basis of the EU State Aid rules. At an April

4, 2016 hearing of the European Parliament's special committee on tax rulings and other measures similar in nature or effect (TAXE 2), EU Competition Commissioner Margrethe Vestager confirmed that the Commission's current moves are part of a broader agenda, saying that "no matter how well we apply the State Aid rules, we also need to work on improving our tax laws at national, European and international levels."

On June 3, 2016, DG Comp confirmed that that it had looked at more than 1,000 tax rulings.[13] DG Comp seems to not exclude any transfer pricing method from the outset from considering it acceptable under its own standards.[14] However, DG Comp's focus still "is on cases where there is a manifest breach of the arm's length principle."[15]

The formal investigations opened with respect to the rulings granted by some EU Member States, which has so far resulted in four negative decisions by the Commission with recovery, can be placed in this light.

Panama Papers Inquiry And Other Transparency Initiatives

On June 8, 2016, the European Parliament agreed to set up an inquiry committee into the Panama Papers revelations. The committee, also known as PANA, is set to investigate whether EU laws on money laundering, tax evasion and tax fraud were breached in the structures revealed by the leak. On July 12, 2016, the German Member of the European Parliament, Werner Langen, was elected to chair this committee of 65 members. The committee started its work in late September 2016 and has a mandate of 12 months, at the end of which it is anticipated to deliver a final report.

On June 21, 2016, TAXE 2 adopted its report[16] containing recommendations for making corporate taxation fairer and clearer. The report, which was also approved in the Parliament Plenary session on July 7, 2016, calls for an EU register of beneficial owners of companies, a tax havens blacklist, sanctions against non-cooperative tax jurisdictions, action against abuse of "patent box" regimes, a code of conduct for banks and tax advisors, tax good governance rules in EU trade agreements, an EU Common Consolidated Corporate Tax Base (CCCTB), and a withholding tax on profits leaving the EU.

On July 5, 2016, the Commission published a communication on further measures to enhance transparency against tax evasion and avoidance. The Communication outlined the planned future work of the Directorate-General for Taxation and Customs Union, which will consist of harnessing the link between anti-money laundering and tax transparency rules, improving information exchange on beneficial ownership, increasing oversight of enablers and promoters of aggressive tax planning, promoting higher tax good governance standards worldwide, and improving the protection of whistle-blowers.

Comment

So far, no concrete legal draft work has emanated from the July 5 Communication, since each proposal will need to be accompanied by a detailed impact assessment. The Commission's focus for the rest of the year will likely be directed toward preparing a draft amendment directive to the ATA Directive regarding hybrid mismatch rules in relation to third countries, as well as the planned November 2016 relaunch of the proposed EU CCCTB Directive.

The revised CCCTB proposal is likely to be repackaged as a fair taxation measure, rather than a measure aimed at simplifying the way in which companies operate cross-border. However, to the extent that the proposal goes beyond the scope of measures agreed to under the OECD's BEPS project, it is unlikely to make rapid, if any, progress in Ecofin, since it would essentially represent a move toward direct tax harmonization within the EU.

Indirect Tax Developments

Commission Action Plan On VAT

On April 7, 2016, the Commission adopted a wide-ranging Action Plan on VAT that sets out the Commission's vision for modernizing the EU VAT system so that it can better support the Single Market, facilitate cross-border trade, and keep pace with the digital and mobile economy. The Action Plan addresses four main areas of concern.

The first is the removal of VAT obstacles to e-commerce in the Single Market, which is an essential part of the Commission's Digital Single Market strategy. The Commission plans to put forward a proposal for a directive by the end of 2016 that will include, among other provisions, an extension of the one-stop shop used for e-services to cover business-to-consumer (B2C) distance sales of goods, together with the removal of the VAT exemption at import for small consignments imported from third countries. Given that Ecofin was prepared to adopt a previous proposal by the Commission to modernize the EU VAT rules in respect of e-services, it is not unreasonable to expect that this proposal might make progress in Ecofin.

The Action Plan's second focus area is the need for further measures to reduce the VAT gap (the difference between VAT collected and the theoretical expected revenue). The Commission has put forward 20, mainly non-legislative, measures designed to enhance cooperation between tax administrations (both within the EU and with third countries), improve the efficiency of national VAT administrations and improve VAT compliance by businesses. In this context (although not part of the Action Plan), it is worth noting that two Member States, Austria and the Czech Republic, have requested that the Commission make a proposal to Ecofin that would enable them to introduce a generalized reverse charge mechanism. The Commission has previously resisted such requests, but there are signs that it may now be prepared to make such a proposal (it would need to be unanimously adopted by Ecofin).

The third and most ambitious area addressed in the Action Plan is the Commission's intention to present in 2017, proposals for a "definitive" VAT regime for intra-community business-to-business trade based on taxation in the country of destination and the principle that the supplier should charge VAT both on domestic and intra-community supplies. This would, as with the proposed reform of B2C sales, entail the use of a one-stop-shop mechanism for the reporting and collection of VAT charged. This would re-establish the self-policing nature of VAT whereby the tax is charged at every stage, and would thus help to eliminate the considerable fraud that takes place under the current "transitional" regime in which tax is not charged on intra-community supplies.

The final area covered by the Action Plan is the question of reduced rates. The Commission points out that under a definitive system based on taxation in the country of destination, there would be scope for Member States to have far greater autonomy in deciding their policy on VAT rates and, in particular, on reduced VAT rates. The Commission has acknowledged, however, that this is a highly political issue and that it would wish to obtain a political mandate from Ecofin before making an appropriate proposal in 2017. In the meantime, the Commission has launched a public consultation on the issue of reduced rates for electronically supplied publications, with a view to making a proposal on this specific matter in 2016.

Other Indirect Tax Measures

Financial Transaction Tax (FTT)

In 2016, one Council working party meeting took place on the proposal to introduce an FTT by enhanced cooperation in ten Member States (Estonia formally withdrew from the group of participating countries in March 2016). However, the ten Member States appear unable to agree on a number of issues, so there is no immediate sign of any adoption of this proposal.

Tobacco Taxation

In 2015, the Commission presented a report to Ecofin on the directives governing the structure and rates of excise duty applied to manufactured tobacco. Following Ecofin's discussion of this report, the Commission has been invited to consider what, if any, legislative changes are necessary. This includes consideration of "new generation products" such as heat-not-burn products and e-cigarettes. The Commission is now carrying out a detailed impact assessment, and will launch a public consultation before deciding whether to make any legislative proposal in 2017.

Alcohol Taxation

In a similar vein, the Commission intends to present a report to Ecofin on the structure of excise duties applied to alcohol and alcoholic beverages to enable Member States to make any necessary changes.

Endnotes

1. *See* EY Global Tax Alert, European Commission releases anti-tax avoidance package designed to provide uniform implementation of BEPS measures and minimum standards across Member States, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-releases-anti-tax-avoidance-package-designed-to-provide-uniform-implementation-of-beps-measures-and-minimum-standards-across-member-states, dated January 28, 2016.
2. *See* EY Global Tax Alert, Update on recent EU tax developments, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--update-on-recent-eu-tax-developments, dated July 13, 2016.
3. The Commission released proposals on this issue on October 26, 2016, as part of a new package of corporate tax reforms. *See*, *e.g.*, https://ec.europa.eu/taxation_customs/business/company-tax/corporate-tax-reform-package_en_en and http://europa.eu/rapid/press-release_MEMO-16-3488_en.htm
4. *See* EY Global Tax Alert, ECOFIN formally adopts directive on country-by-country reporting in the EU, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--ecofin-formally-adopts-directive-on-country-by-country-reporting-in-the-eu, dated May 25, 2016.
5. *See* EY Global Tax Alert, European Commission proposes Directive for public CbC reporting of tax information, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-proposes-directive-for-public-cbc-reporting-of-tax-information, dated April 13, 2016.

6 *See* EY Global Tax Alert, EU Council adopts directive on exchange of information on tax rulings, agrees on other corporate tax issues, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--eu-council-adopts-directive-on-exchange-of-information-on-tax-rulings--agrees-on-other-corporate-tax-issues, dated December 10, 2015.

7 *See* EY Global Tax Alert, European Parliament calls for expansion of country-by-country reporting to large groups, self-publication of data by multinational companies and suggests an additional range of new tax measures, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-parliament-calls-for-expansion-of-country-by-country-reporting-to-large-groups--self-publication-of-data-by-multinational-companies-and-suggests-an-additional-range-of-new-tax-measures, dated July 15, 2015.

8 "Banking and Finance," European Commission website, http://www.ec.europa.eu/finance/company-reporting/index.htm

9 *See* EY Global Tax Alert, European Commission further outlines its views on state aid and tax rulings, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-further-outlines-its-views-on-state-aid-and-tax-rulings, dated June 6, 2016.

10 *See* EY Global Tax Alert, European Commission finds Ireland granted illegal State aid and orders recovery, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-finds-ireland-granted-illegal-state-aid-and-orders-recovery---a-further-review, dated August 31, 2016.

11 *See* EY Global Tax Alert, European Commission publishes final decision finding Luxembourg granted State aid in transfer pricing case, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--european-commission-publishes-final-decision-finding-luxembourg-granted-state-aid-in-transfer-pricing-case, dated June 14, 2016.

12 *See* EY Global Tax Alert, EU publishes opening decision on State aid investigation into US branch structure, at: http://www.ey.com/gl/en/services/tax/international-tax/alert--eu-publishes-opening-decision-on-state-aid-investigation-into-us-branch-structure, dated June 13, 2016.

13 DG Competition Working Paper on State Aid and Tax Rulings of June 3, 2016, para. 6.

14 *Id*, paras 17–22.

15 *Id*, para. 23.

16 "European Parliament," European Parliament website, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+TAX2-OJ-20160621-1+01+DOC+XML+V0//EN

Foreign Investment In US Real Estate: Structuring Techniques And Traps For The Unwary

by Kathryn von Matthiessen, Partner, and Paul J. D'Alessandro, Jr., Associate, The Cantor Group, Attorneys at Law

Contact: kathryn@cantorgrouplaw.com,
Tel: +1 (305) 537 9635; paul@cantorgrouplaw.com, Tel. +1 (305) 537 9631

Introduction

For most Americans, purchasing a home represents a big investment. From providing a home for loved ones, to passing down a piece of property throughout generations, or holding it for commercial investment – the stakes are high. For international investors, the stakes are even higher. Although Americans may enjoy many tax benefits associated with real property and particularly home ownership, these same benefits are not typically available to foreign investors.

This article will summarize the strategies available to foreign investors seeking to structure their investments in US real estate in a US tax-efficient manner.[1] This article will then discuss some of the more nuanced issues associated with foreign investment in US real estate, highlighting some traps for the unwary. The article concludes by offering brief insight on how a foreign investor can avoid the traps that can so often go overlooked.

Holding Structures: Balancing Income *Versus* Estate Tax Objectives

US real estate ownership can produce various US income and estate tax consequences for a foreigner.[2] A foreigner looking to invest in US real estate will therefore usually have two main objectives. On the US income tax side, the foreigner will want to minimize the US income tax due on the gain from a sale, paying no more than the preferential long-term capital gains tax rate available to individuals (currently a maximum rate of 20 percent).[3] On the US estate tax side, the foreigner will want to decrease – and eliminate altogether if possible – the US estate tax that would be imposed if the foreigner died owning the US real estate directly.[4] The foreigner must therefore weigh the relative importance of each of these two objectives in determining the holding structure that makes the most sense, as each holding structure will produce different US income and estate tax outcomes.

Corporate Structure

Ownership of US real estate through a foreign holding company may be perhaps the most common holding structure utilized by foreigners looking to invest in US real estate due to the estate tax advantages that the structure offers. Stock of a foreign corporation is not considered to be a US situs asset for US estate tax purposes. Provided the foreigner abides by the appropriate corporate formalities and respects the holding company as a separate entity, a foreign corporation will act as a "blocker" against the imposition of US estate tax upon the foreigner's death.[5]

Although it may offer the most certainty in terms of protection against US estate tax, use of a foreign holding company may not produce the most efficient result from a US income tax perspective. Most notably, corporations do not enjoy a preferential long-term capital gains tax rate. Gain from a sale of US real estate by a foreign corporation would be subject to US income tax at normal graduated rates (currently 15 percent to 35 percent). A foreign corporation may also be subject to a second level of tax that would not be imposed in the case of other holding structures. This tax, known as the "branch profits tax," is generally imposed at a flat rate of 30 percent and can be triggered as a result of the foreign corporation's failure to reinvest its after-tax earnings back into the United States.[6] When the branch profits tax is imposed, the effective US income tax rate on the gain from a sale is increased to a maximum rate of approximately 54.5 percent.

It may therefore make sense for a foreigner to utilize a corporate structure if he intends to hold the property long term to pass on through generations. If, however, the foreigner is looking to purchase the property with the intent of receiving a quick return on his investment, a corporate structure may not be the wisest choice.

Partnership Structure

If the foreign investor is more concerned with securing advantageous US income tax treatment upon a sale of the property, then the use of a partnership structure may make sense. Because a partnership is viewed as a "flow-through" entity for US income tax purposes, the partnership itself is not subject to US income taxation on gain from the sale of US real estate. Rather, each partner is subject to US income tax with regard to his distributive share of the partnership's income. The importance of this tax treatment is that when a foreign partnership sells US real property, gain from such sale is eligible for preferential long-term capital gains tax treatment. Accordingly, use of a partnership would result in US income taxation at a maximum rate of 20 percent (provided the property has been held for over a year).[7]

While it may produce more beneficial US income tax results than the use of a foreign corporation, use of a partnership structure comes at the expense of a higher risk for US estate tax purposes. This increased risk is due to the uncertainty over the "situs" of a partnership interest for US estate tax purposes. This uncertainty, in turn, is due to the long-standing contradiction between the "aggregate theory" *versus* the "entity theory" for viewing partnerships under US tax law.

Under the aggregate theory, a partnership is merely a conduit entity – an aggregation of the partners. Accordingly, each partner is viewed as directly owning the partnership's assets. On the other hand, the entity theory views a partnership as an entity separate from its partners. Under this theory, the partners are viewed as owning interests in the partnership itself, and not the underlying assets of the partnership. The contrast in these two theories has produced various approaches for determining the situs of a partnership interest for US estate tax purposes.

On the one hand, it would seem clear that if the aggregate theory were adopted, the situs of a partnership interest would be determined based on the location of the underlying assets owned by the partnership. On the other hand, if the entity theory were adopted, then the situs of the partnership interest for US estate tax purposes could be determined based upon where the partnership conducts its business, or where the partnership was formed, or even the domicile of the owner of the partnership interest.[8]

All of this uncertainty simply means one thing for the foreign investor looking to utilize a partnership holding structure – a certain degree of risk regarding US estate tax exposure upon the foreigner's death. That being said, a foreigner may be willing to accept a certain amount of estate tax risk as a trade-off for improved US income tax results.

Trust Structure

Much like a partnership, the use of a trust produces beneficial US income tax results with regard to foreign investment in US real estate. Although the ultimate incidence of taxation will depend on the classification of the trust for US income tax purposes as a grantor or nongrantor trust, in either case, gain from the sale of US real estate will be eligible for preferential long-term capital gains tax treatment. Also because the branch profits tax does not apply to trusts, significant US income tax savings can once again be achieved when compared to the results of using a corporate structure.

But just as a partnership presents obstacles for US estate tax purposes, a trust may not provide the US estate tax protection that a foreigner wants. For instance, in order for a trust to act as a "blocker" against the imposition of US estate tax, the trust grantor (in this case, the foreigner looking to invest in US real estate) cannot retain any problematic powers or interests in the trust. Perhaps most notably for a foreigner, the trust would have to be irrevocable, at a minimum, in order to serve any estate tax benefit.[9] Many times, a foreigner may not be willing to give up this type of control when making a significant investment like a US real estate purchase. Based on the foreigner's investment objectives and the amount of control he is willing to give up, it may be difficult to structure the trust properly so that it acts as a viable US estate tax blocker.

Traps For The Unwary

Restructuring To Achieve The Desired Objectives

In an all-too-common scenario, a foreigner will often purchase US real estate in his own name and then later realize that an appropriate holding structure may have been more beneficial. Upon learning this, the foreigner may want to restructure his investment in order to achieve his desired objectives. Unfortunately, restructuring is not always a simple – or even a tax-free – matter.

It may be suggested to the foreigner that a simple contract assignment prior to the closing date may solve any issues. The contract itself, however, is considered to be a US real property interest. An assignment of the contract rights is subject to FIRPTA (Foreign Investment in Real Property Tax Act) in the same manner as the disposition of the underlying US real estate. Foreigners should therefore be aware of the US income tax consequences and reporting obligations that can attach to the assignment of a real estate contract.

If the foreigner has already closed on the purchase of the property, then he will need to transfer the real estate directly in order to restructure his investment as desired. Any transfer that constitutes a "disposition," however, will trigger FIRPTA. For instance, if the foreigner contributes the US real estate to a foreign holding company, the transfer will be treated like a sale for US income tax purposes. Moreover, even if the transfer is entitled to nonrecognition treatment under US income tax principles (*e.g.*, a contribution to a partnership), the foreigner will need to comply with special FIRPTA rules and filing requirements in order to receive nonrecognition treatment on the transfer. Accordingly, any contemplated restructuring must be examined carefully so that the foreigner does not unknowingly trigger US income tax liability.

Geographic Targeting Orders (GTOs) For All Cash Purchases

A recent spotlight has been cast on the use of "shell companies" to facilitate foreign investment into high-end US real estate. Concerned about the flow of illicit money into luxury US real estate, the US Treasury Department has taken steps to combat the perceived money laundering technique. In January of this year, the department's Financial Crimes Enforcement Network ("FinCEN") issued GTOs requiring certain US title insurance companies to identify the ultimate beneficial owners behind companies used to purchase high-end real estate in certain markets. The markets first targeted by the GTOs were New York City (Manhattan, specifically) and Miami, and required disclosure of the buyers behind the companies for all cash purchases above certain dollar thresholds (USD3m in Manhattan and USD1m in Miami).

Since January, FinCEN has expanded the reach of the real estate GTOs to include all boroughs of New York City, Broward and Palm Beach Counties in Florida, various counties in California (Los Angeles, San Francisco, San Diego, *etc.*), and parts of Texas. Once again, the GTOs will require US title insurance companies in these markets to identify the ultimate beneficial owners behind companies making all cash purchases of high-end US real estate. The new thresholds range from USD500,000 (for the Texas markets) up to USD2m (for the California markets).

New Reporting Requirements For Foreign-Owned US Disregarded Entities

Furthering its tax transparency efforts, the US Treasury Department issued proposed regulations in May of this year that impose certain reporting requirements on foreign-owned US limited liability companies (LLCs). Prior to the regulations, an LLC with a single owner (a "disregarded entity" by default for US tax purposes) would generally not be subject to US tax filing requirements and would not be required to obtain an employer identification number. Under the proposed regulations, foreign-owned single member LLCs would be treated as corporations for certain reporting, record maintenance, and other compliance requirements. Among other things, the new rules would require the LLC to identify its beneficial owner to the IRS on an annual basis.

Individual Taxpayer Identification Numbers

Many foreign investors may not realize just how intertwined they become with the US tax system once they make an investment in US real estate. For example, a foreigner's disposition (*e.g.*, a sale) of a US real property interest generally requires the filing of an IRS Form 1040NR, US Nonresident Alien Income Tax Return. In order to file such return, however, the foreign investor must obtain an Individual Taxpayer Identification Number ("ITIN"), which is not always the easiest process.

A foreign investor must submit documentation to establish his or her identity and connection to a foreign country. This is typically accomplished by submitting a "certified copy" of the foreign investor's passport.[10] A foreign investor may be able to request a certified copy of documents at an embassy or consulate, but securing an appointment to do so may take time. Special "acceptance agents" can also be used to obtain a certified copy of a passport. If a passport is not provided, then various other documentation is required (*e.g.*, visa issued by the US Department of State, foreign driver's license, foreign voter's registration card, *etc.*).

Even before a foreign investor sells his US real estate investment, he may still be required to obtain an ITIN. For instance, the various FIRPTA forms that must be filed to comply with the relevant withholding rules generally require all parties listed on the form to have an ITIN (or other application identification number, such as an employer identification number). Obtaining the ITIN within the timeframe required by FIRPTA (*e.g.*, 20 days after the closing date in the case of a sale) can often be impractical – even sometimes impossible. It can behoove the foreign investor to obtain an ITIN well in advance of making an investment in US real estate, if possible to do so.

Conclusion

Investing in US real estate is no small matter – particularly for foreign investors. Different rules apply regarding the tax treatment of a foreigner's investment in US real estate (as opposed to that of a US taxpayer), making matters that much trickier. Quite possibly the biggest trap for a foreigner to avoid is signing a purchase contract for US real estate in his own name. By signing a purchase contract directly, the foreign investor significantly limits his structuring options for the ownership of the real estate, and indeed may even trigger unintended tax consequences if he tries to restructure his investment either before or after the closing.

The foreign investor should also bear in mind the filing obligations that attach to making an investment in US real estate, not the least of which can be the filing of a US income tax return to report the gain on the sale of the property. Even before the sale of the property, the foreign investor may have to comply with certain FIRPTA filing requirements. All of the foregoing necessitates the foreign investor's obtaining an ITIN, which can often be a time-consuming process.

The foreign investor may wish to consider obtaining an ITIN well in advance of making an investment, if possible, in order to save time and aggravation down the road.

As with any matter involving the US tax system, the foreign investor would be well advised to seek qualified legal counsel in advance of making an investment in US real estate. By doing so, the investor may avoid the traps that can so often catch the unwary. Moreover, the foreign investor will gain a better understanding of the US tax considerations at play and the various factors that go into choosing the desired real estate holding structure.

Endnotes

1. Unless otherwise specified, all references to taxes herein shall be to federal taxes.
2. For purposes of this article, a "foreigner" refers to an individual who is a "nonresident alien" for US income tax purposes and a "non-domiciled" alien for US estate tax purposes. The terms "foreigner" and "foreign investor" are used synonymously throughout this article.
3. Gain from the sale of US real estate is subject to US income tax under the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"). FIRPTA also imposes a withholding tax regime in order to insure collection of the tax produced by a disposition of US real estate.
4. The estate of a foreigner is subject to US estate tax with regard to the "US situs" assets owned by the foreigner at the time of his death. The top US estate tax rate is currently 40 percent and, unlike many Americans whose estates enjoy a rather large exemption amount against US estate tax (currently, USD5.45m this year, scheduled to increase to USD5.49m in 2017), a foreigner's estate only enjoys a USD60,000 exemption against US estate tax.
5. If, however, the foreigner does not respect the company as a separate entity, he runs the risk of the company being considered a "sham" for US tax purposes.
6. With careful planning, however, it may be possible for a foreign corporation to avoid the application of the branch profits tax. A US income tax treaty may also apply to reduce or eliminate the application of the branch profits tax.
7. The branch profits tax that is imposed on foreign corporations does not apply to foreign partnerships.
8. The IRS appears to have utilized an entity approach, taking the position that the situs of a partnership interest for US estate tax purposes is the location in which the partnership carries on its business.
9. Other retained rights and powers would also be problematic. For example, rent-free use of the property by the trust grantor could taint the entire trust, causing US estate tax exposure for the foreigner's estate upon the foreigner's death.
10. A certified document is one that the original issuing agency provides and certifies as an exact copy of the original document and contains an official stamped seal from the agency.

Recent Developments In Australian Real Property Taxation

by Andrew Lam, Tax Director, Hill Rogers, Australia, and Adrian Rosa, Associate Director, Leebridge Group, Australia, independent members of Morison KSi

Contact: andrew.lam@hillrogers.com.au, Tel. +61 2 9220 0381; adrian.rosa@leebridgegroup.com.au, Tel. +613 9854 3100

New Withholding Obligations On Purchasers Of Direct And Indirect Interests In Australian Real Property

A new withholding regime was passed into law in late February 2016. Under this regime, purchasers of Australian real property, interests in entities that predominantly hold Australian real property or options over these may have an obligation to withhold 10 percent of the gross sales proceeds and pay the amount to the Commissioner.

The new regime applies to contracts entered into on or after July 1, 2016.

The purpose of these changes is to address the low levels of tax compliance by foreign residents who dispose of real property, and interests in real property.

The obligation to withhold applies to the purchase of taxable Australian property that is:

- Real property, *e.g.*, land and buildings in Australia;
- An indirect Australian real property interest, *e.g.*, shares or units in entities whose value is predominantly derived from Australian land and buildings;
- Lease premiums paid for the grant of a lease over real property;
- An option or right to acquire the above property or interest.

There are a number of exemptions. The more common exemptions are:

- Transactions involving Australian land which has a market value of less than AUD2m;
- Where a clearance certificate or declaration is obtained by the seller.

Importantly, in the case of shares in a company or units in a unit trust, there is no AUD2m threshold and sellers will need to provide a declaration to the purchaser. Without the declaration, the risk of having to pay withholding tax of 10 percent to the Australian Taxation Office (ATO) is with the purchaser.

Before applying any exemption, we strongly recommend that a purchaser obtain professional advice to ensure that withholding is not required and they are legally protected in that respect.

Clearance Certificates

The ATO will allow vendors to apply for a clearance certificate online, and this can be done at any time the vendor is considering a sale and is valid for 12 months. The clearance certificate must be valid at the time the certificate is given to the purchaser prior to settlement. The ATO has implemented an automated process for issuing a clearance certificate involving:

- The vendor (or their agent) completing an online application form;
- The information on the application being automatically checked against information held by the ATO to assess if the vendor should be treated as an Australian tax resident for the purposes of the transaction;
- The automatic issuance of a clearance certificate which removes the obligation for the purchaser to withhold the 10 percent from the sale proceeds.

The ATO has indicated that straightforward cases should take 1–14 days. Non-straightforward cases may require 14–28 days, and high risk and unusual cases could take longer.

New Stamp Duty Surcharges

Various states around Australia have recently introduced stamp duty surcharges on the purchase of property by foreign persons. Stamp duty is a state based tax and therefore each state will have slightly different regimes. In this article we focus on the two largest state economies of New South Wales (NSW) and Victoria (VIC).

NSW

NSW has introduced a 4 percent surcharge on the purchase of residential real estate by foreign persons from June 21, 2016. The surcharge is in addition to the duty payable on the purchase of residential property.

Foreign persons will also cease being eligible for the 12 month deferral of the payment of stamp duty for purchases of off-the-plan residential property.

Buyers should note that purchasing an indirect interest in NSW residential property may also be caught. For example, if a foreign person buys a company that holds residential land, then the surcharge can also apply. The definition of foreign person does not include an Australian Citizen, irrespective of where they reside.

As an example, if a foreign person purchases a residential property in NSW for AUD2m, the total duty payable is AUD175,490 calculated as follows:

- Duty payable on AUD2m is AUD95,490;
- Surcharge of 4 percent on AUD2m is AUD80,000.

VIC

VIC has introduced a 7 percent surcharge for acquisitions of residential property by foreign purchasers from July 1, 2016. (A foreign purchaser of residential property can include a foreign natural person, a foreign company, and/or a foreign trust.)

This surcharge means foreign purchasers who sign a contract on or after July 1, 2016 to purchase residential property in VIC will pay duty of 12.5 percent[1] of the dutiable value of the property (for property exceeding AUD960,000).

New Land Tax Surcharges

The state governments of NSW and VIC also levy an annual land tax on the owners of real property situated within the respective state.

NSW

Unless exempted, an owner of land as at December 31 each year will be required to pay land tax to the state government. In NSW, a tax-free threshold of AUD482,000 (2016 tax year) applies, and the rate of land tax is 1.6 percent. The rate increases to 2 percent for land values over AUD2,947m.

It should be noted that land tax is applied on the unimproved value of land, not market value of land.

From the 2017 land tax year, a 0.75 percent land tax surcharge applies to the taxable value of residential land owned by a foreign person. There is no threshold for the surcharge. This means that an owner of land in NSW on December 31, 2016 that is a foreign person will be required to pay the surcharge in addition to the standard rate of land tax.

VIC

An annual land tax surcharge of 1.5 percent (currently at 0.5 percent) will apply to land in VIC from January 1, 2017 that is owned by an absentee owner (an absentee owner can be a natural person, company or trust).

From the 2017 land tax year (based on land owned on December 31, 2016), the top rate of land tax (including this additional surcharge) for absentee owners will be up to 3.75 percent (this is applicable to taxable land values of AUD3m and above).

Endnotes

1 An existing stamp duty rate of 5.5 percent is currently imposed on residential property purchases in VIC.

Topical News Briefing: For The Common Good?

by the Global Tax Weekly Editorial Team

For the European Commission, the proposed common consolidated corporate tax base kills not just two birds with one stone, but several.

For a start, the CCCTB would, in theory, strengthen the Single Market by harmonizing the European corporate tax base, which would have the added bonus of substantially simplifying compliance and administrative procedures for companies operating across the EU.

Second, and just as importantly for the EU, the CCCTB would eliminate at a stroke the mismatches between the corporate tax regimes of member states – the sort of gaps that encourage companies to shift profits from one place to another, often to the detriment of the treasuries of certain member states. In other words, if implemented, it would represent a significant victory in the fight against BEPS.

Furthermore, the CCCTB would usher in a system of unitary taxation and eliminate the system of transfer pricing under the arm's length standard, which many would argue fuels corporate tax avoidance.

But, as the well-worn saying goes, if something sounds too good to be true …

No tax reform can be claimed to be perfect, and this certainly holds true for something as wide-ranging and ambitious as the CCCTB. In fact, many commentators had already pointed out serious flaws in the plan before the Commission relaunched the proposals with much fanfare on October 25, as reported in this week's issue of *Global Tax Weekly.*

The problems are not so much with the "common" aspect of the CCCTB, but more with the "consolidated" bit. A number of critics have pointed out that the formula, which would be used to determine where profits and losses should be allocated, would be biased against small member states home to relatively less economic activity than larger economies. As advisory firm Grant Thornton pointed out in reaction to the relaunched proposals, this could have a serious impact on the corporate tax base of Ireland in particular. Indeed, a 2015 study suggested that the formulary apportionment approach could wipe out as much as 80 percent of Ireland's corporate tax revenues.

The flip side of this is that, under a harmonized corporate tax base, EU member states will have very few levers left with which to compete with one another on tax, apart from corporate tax rates themselves. The consequence of this therefore could be more aggressive corporate tax rate competition, not less – an outcome that the Commission and many influential member states clearly wouldn't want.

It has also been suggested that while the CCCTB is a "BEPS" initiative of sorts, it could actually undermine global tax reform efforts if implemented before the BEPS project is allowed to fully play out. As the Tax Executives Institute observed in commentary earlier this year, "the adoption of the CCCTB on a compulsory basis by a large number of OECD member countries before the full implementation of the base erosion and profit shifting project and any opportunity to determine the benefits would regrettably indicate [that] the arm's length standard and BEPS approach has been discounted."

What's more, the adoption of the CCCTB by the EU could present tantalizing tax planning opportunities as companies exploit the differences between it and the arm's length standard still being used in the rest of the world.

So the CCCTB is far from perfect, and it is expected that there will be winners and losers under the system. Small countries like Ireland will be clearly concerned for their future all the while that the Commission and key member states push the idea. However, the fact that the Commission has chosen to split the much more difficult consolidation aspect, which it intends to tackle at a much later date, suggests that it knows this will be a hard sell across the EU. And without the backing of all member states – however many there are when it comes to the crucial votes – the CCCTB is likely to remain merely an ambitious idea.

New Regulations Change Allocation Of Partnership Liabilities

by Jonathan S. Brenner and Elizabeth J. Stevens, Caplin & Drysdale, Chartered

Department of the Treasury
Internal Revenue Service

Contact: jbrenner@capdale.com, Tel. +212 379 6050; estevens@capdale.com, Tel. +202 862 5039

Introduction

On October 4, 2016, the US Treasury Department and Internal Revenue Service (IRS) issued revised regulations governing how recourse partnership liabilities are allocated among partners. These temporary regulations, which are binding on taxpayers immediately, relate to so-called "bottom-dollar payment obligations" (BDPOs). Generally, if a partner guarantees a recourse partnership liability, the liability will be allocated to that partner and will increase his basis in his partnership interest – thereby increasing the amount of money or property the partner may receive in distributions from the partnership or the amount of partnership losses that he can be allocated, without incurring income tax. Under the new regulations, certain guarantees, indemnities and similar arrangements (collectively, "guarantees") classified as BDPOs will be disregarded for purposes of characterizing partnership liabilities as recourse obligations and instead such liabilities will be treated as nonrecourse obligations and allocated among the partners accordingly. Although the "bottom-dollar" moniker implies that only guarantees of the last dollars of a recourse partnership obligation will be disregarded, the temporary regulations sweep much more broadly. The new rules generally do not apply to obligations in place before October 5, 2016 unless they are modified. ***Partners and partnerships planning to enter into or modify guarantees should ascertain whether and how the new rules affect their intended structures.***

I. Changes In The Rules

A partnership's liabilities are allocated among its partners for purposes of determining each partner's tax basis in his partnership interest, and accordingly the amount of money or other property that each partner can receive as a distribution from the partnership or the amount of partnership losses that can be allocated to each partner without incurring income tax. The new rules were intended to curb perceived abuses – in particular, the use of guarantees lacking significant non-tax, commercial purposes to characterize obligations as recourse liabilities and thereby artificially increase the guaranteeing partner's basis in the partnership.

Generally, a recourse partnership liability would be allocated to the partner who, if the partnership were liquidated and the obligation became due and payable, would be obligated to make a payment or a contribution to the partnership with respect to that liability. Formerly, all statutory and contractual obligations relating to a partnership liability were taken into account, including guarantees relating to less than all of the partnership liability, such as a tranche-based or "horizontal slice" guaranty. If, for example, Partner A guaranteed the first USD500 of a USD1,000 recourse partnership liability, and Partner B guaranteed the second USD500, the liability would be allocated 50/50 to Partners A and B.

Under the new rules, because Partner B's guaranty does not extend to any portion of the first dollar of the liability, it will be disregarded, and the second USD500 of the USD1,000 liability will be allocated among the partners as if it were a non-recourse liability. The new rules presumptively disregard BDPOs, subject to limited exceptions. They also require disclosure on the partnership's information return of any BDPO as well as the partnership's position as to whether (and why) that BDPO should be respected under the rules.

II. Bottom-Dollar Payment Obligation

BDPOs are not limited to guarantees of the last dollar of an obligation. A BDPO is any payment obligation on which the obligor-partner would not be liable up to the full amount of his obligation if, and to the extent that, *any* amount of the partnership's liability were unsatisfied. Separate prongs of the BDPO definition address indemnities and arrangements involving tiered partnerships, intermediaries, senior and subordinate liabilities, and other structures that convert what would otherwise be a single liability into multiple liabilities.

In the simple example above, Partner B's guaranty is a BDPO because, if the partnership were to satisfy its recourse obligation in part, Partner B would not necessarily be required to make good on any portion of his guaranty. If the partnership failed to satisfy half (or less than half) of its USD1,000 liability, for example, Partner A – not Partner B – would be liable for the balance. Alternatively, suppose that Partner B guarantees the full USD1,000 of the partnership liability, and instead of guaranteeing a portion of that liability directly, Partner A agrees to indemnify Partner B for the first USD500 that Partner B pays out on his guaranty. Partner B's guaranty is again a BDPO because Partner B is liable only to the extent that any amount beyond USD500 of the partnership liability is not satisfied; Partner A is on the hook for the first USD500, albeit indirectly.

As these examples illustrate, the BDPO definition generally captures payment obligations with respect to horizontal slices of a partnership liability. A guaranty of any slice that does not include a portion of the first dollar of the partnership's obligation is a BDPO. However, a guaranty will not qualify as a BDPO merely because it does not extend to the full amount of the partnership liability, and vertical-slice guarantees (covering a fixed percentage of every dollar of the partnership liability) are generally not BDPOs. Moreover, where partners are co-obligors on a guaranty or indemnity for which they are jointly and severally liable, their proportionate rights of contribution do not cause the guaranty to become a BDPO.

III. Effective Date

By their terms, the temporary regulations apply only to recourse liabilities incurred by a partnership, and guarantees undertaken with respect to recourse partnership liabilities, on or after October 5, 2016. Liabilities incurred and guarantees undertaken pursuant to a binding contract executed before that date are excepted. The regulations do not explicitly address modifications of partnership liabilities, but the preamble states that such modifications and refinancings of pre-existing obligations that are subject to guarantees trigger application of the new rules. A partnership can elect to apply the new rules to *all* pre-existing obligations.

The application of the BDPO rules to modifications and refinancings is tempered by a transition rule. A partnership may choose to disapply the BDPO rules with respect to any partner (a "Transition Partner") whose share of partnership recourse obligations determined under prior law exceeded such partner's basis in his partnership interest on October 5, 2016, to the extent of such excess. A partnership may apply this grandfathering treatment to a Transition Partner for up to seven years from the effective date of the temporary regulations.

IV. Effect On Taxpayers

Because the new rules define BDPOs broadly, they reach obligations that represent standard practice in some industries. Consequently, partners and partnerships that anticipate relying on guarantees to characterize partnership obligations as recourse liabilities or modifying any partnership liability subject to an existing guaranty, should determine:

- Whether any proposed modification would result in application of the BDPO rules to a pre-existing guaranty;
- Whether any guaranty would be a BDPO;
- Whether any BDPO would qualify for an exception to the presumptive disregard of BDPOs; and
- The partnership's reporting obligations with respect to any such BDPO.

Given the immediate effect of the new regulations, such determinations should be made before *any* new recourse partnership liabilities are incurred or new partner guarantees undertaken, and before *any* existing recourse partnership liability subject to a guarantee is modified.

Everything You Never Wanted To Know About FBAR But Must

by Mike DeBlis Esq., DeBlis Law

The Culprit: US Worldwide Taxation

The US is one of the only countries left in the world that still taxes its citizens and residents on their worldwide income, regardless of where it is earned. Live and work in Rio De Janeiro? You must pay taxes to the US government on your foreign-source income. Own a business in Bangladesh? The US will tax the profits of that business. Very simply, US taxpayers must report all of their income on their US tax returns, even income earned outside the United States.

For those unfamiliar with worldwide taxation, some background may be in order. Worldwide taxation is one of two systems by which a country can exercise jurisdiction to tax. The other type is a territorial tax system. As defined in "Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile" by Edward Zelinski, as published in the *Iowa Law Review*, worldwide taxation is based on "political allegiance," Political allegiance refers to the allegiance of the taxpayer who owns the income or assets. How a country defines the phrase, "political allegiance" leads to two different types of worldwide taxation: (1) "citizenship-based" and (2) "residence-based." [1]

Taking what might be considered a "unique" position for a country that is at the epicenter of the global economy, the United States defines "political allegiance" as "an individual's citizenship, regardless of his residence." [2] Other nations define "political allegiance" for tax purposes on "the basis of residence." [3] In so doing, these countries tax an individual's global income and holdings only if the individual resides in that nation.

As the poster-child of residence-based taxation, Canada imposes worldwide taxation on all of its residents without regard to Canadian citizenship. Many a taxpayer has asked the question, "Is the distinction between citizenship-based taxation and residence-based taxation one without a difference?" Or, to use a Shakespearean reference, "Is it much ado about nothing?" No.

So then what is the primary difference between the US system of citizenship-based taxation and the Canadian system of residence-based taxation? A non-resident Canadian citizen – one who lives outside Canada – does not pay Canadian income tax on the income that he earns in the foreign country in which he now resides.[4] Instead, he only pays Canadian income tax on the income that is generated in Canada, if any. A non-resident US citizen, on the other hand, must pay US taxes not only on the income that is generated in the United States but also on the income that is generated in the foreign country in which he now resides.[5]

No discussion of international tax systems would be complete without discussing the second type of tax system: a territorial tax system. Under a territorial tax system, taxation is limited to taxation of income or assets located within a country's borders, no matter who derives it – a citizen, resident, or anyone else. "Territorial tax systems accommodate other tax systems in the simplest way possible – by not extending their own." [6]

Why is US worldwide taxation so loathed? Because when a US person or resident derives income or holds assets in a foreign country, the foreign country already taxes the item as their own. By the United States taxing the same item as if it was their own, a serpent comes slithering out of the shadows to rear its ugly head: "US international double taxation."

What is the main cause of US international double taxation? "Inconsistent sourcing rules in different countries imposing overlapping taxes." [7] If it were the norm, US international double taxation would stop international commerce dead in its tracks.[8] Recognizing this, the US attempts to mitigate the harsh effects of worldwide taxation in three ways:

- Foreign tax credit;
- Foreign earned income exclusion;
- Section 911 exclusion for the personal service income of non-resident citizens and for non-resident citizens' housing costs.[9]

Of these three, the foreign tax credit can unilaterally blunt this quagmire in one fell swoop. It is for this reason that I refer to it as "the equalizer." As a preliminary matter, the foreign tax credit lies at the heart of the outbound system of US taxation. When foreign tax rates and US tax rates are roughly the same, the combination of worldwide taxation and the foreign tax credit virtually eliminates double taxation entirely.

What gives the United States the right to tax its citizens and residents on a worldwide basis in the first place? As may come as a surprise, the authority for US worldwide taxation is not found in the Internal Revenue Code. Nor is it found in any piece of legislation passed by Congress. Nonetheless, it has long been established that the US Constitution permits the federal government's worldwide taxation of non-resident US citizens.

Who do we have to thank for that? None other than the US Supreme Court in a little-known case by the name of *Cook v. Tait*, 265 US 47 (1924). In an opinion that has been widely criticized as obscure and unintelligible, the Supreme Court upheld the federal income tax assessed by the IRS on a non-resident citizen's Mexican-source income. In so doing, it interpreted the US Constitution to allow worldwide taxation of non-resident US citizens.

What rationale lies at the heart of the Supreme Court's justification for worldwide taxation? The Court relied on the "public benefits" stemming from US citizenship as the justification for US worldwide taxation.[10] Specifically, the Court reasoned that a citizen who lives abroad and whose property is located outside the United States receives benefits from the federal government.[11] Precisely what benefits the Court was referring to we will never know because the Court did not expound on them. However, according to T. H. Marshall, author of "Citizenship and Social Class," the Court viewed benefits as consisting of three distinct rights: "civil, political, and social rights." [12]

While the US system of worldwide taxation is a contentious issue that has been the source of lively debate, the Court's rationale for it, not to mention its pros and cons, are beyond the scope of this article.

More to the point, if you live, work, and/or own a business overseas, you more than likely have a foreign bank account. And if you do, the interest income generated by that account – no matter how small – is also subject to US taxation.

History Of FBAR

A brief history of the FBAR is in order. FBAR stands for "Foreign Bank Account Report." The FBAR is a tool used by the US government to identify persons who may be using foreign financial accounts to break US law.

Contrary to popular belief, the FBAR is not technically required by the tax code. Instead, it is a creature of the Bank Secrecy Act. A once obscure Bank Secrecy Act form, the FBAR was first instituted as a reporting requirement for US persons with overseas accounts. Today, the IRS has breathed new life into the FBAR as a tax enforcement and revenue-raising tool. The IRS has administered and enforced the FBAR since 2003.

Deconstructing The FBAR Filing Requirements

Overview

These are legal terms of art with precise meanings. They cannot be interpreted according to the everyday meanings that we give to them, no matter how familiar they might sound. To borrow a famous quote from Mark Twain, "the difference between the right word and the almost right word is the difference between lightning and a lightning bug."

An FBAR must be filed for a range of accounts, including savings and checking accounts, brokerage and securities accounts, certain types of insurance policies and non-cash assets like gold. The maximum value of an account is defined as the largest amount of currency – and non-monetary assets – that appear on any quarterly or more frequent account statement issued for the year.

Who Is A US Person?

Below is the list:

- A citizen or resident of the US.
- An entity created or organized in the US or under the laws of the US. An entity includes, but is not limited to, corporations, partnerships, and limited liability companies.
- A trust formed under the laws of the US.
- An estate formed under the laws of the US.

To determine if the filer is a resident of the US, one must apply the residency tests in 26 United States Code (USC) Section 7701(b). Let's take a slight digression to discuss the rules governing taxation of foreign nationals.

The Rules Governing Taxation Of Foreign Nationals

1. Residence of Individuals

Residence is the bedrock upon which US taxation for foreign nationals lies. Residence is a "measure of the extent and permanence of an individual's presence in a given place." (For the purposes of this section, all definitions are from the second edition of *International Taxation* by Joseph Isenbergh, unless otherwise stated.)

Foreign nationals can be subject to one of two forms of taxation depending on whether they reside in the US (*i.e.*, "resident aliens") or reside outside the US (*i.e.*, "non-resident aliens"). The United States taxes its resident aliens on their worldwide income, but only taxes its non-resident aliens on the income that they earn within the United States (*i.e.*, source-based taxation).

2. Resident Aliens (Section 7701(b))

An "arithmetic statutory definition" of "resident alien" was added to the Code in 1984. The definition of resident alien in Section 7701(b) "applies only to foreign nationals."

Under Section 7701(b), US residence is intricately tied to two "objective elements": first, "the immigration status of foreign nationals," and second, "the amount of time they spend in the United States." Section 7701(b) is by no means a "bright-line provision." At its core is a balancing of the individual facts and circumstances.

<u>(1) Immigration Status: Lawful Permanent Residence.</u> First, a foreign national who is a "lawful permanent resident of the United States" during a calendar year is a resident of the United States in that year, under Section 7701(b)(1)(A)(i). A lawful permanent resident, also known as a "green card" holder, is "an individual entitled to remain permanently in the United States."

Immigration status and tax status are inextricably tied. Therefore, no one admitted to the United States as a permanent resident can avoid tax residence, no matter how "little time he spends in the United States."

<u>(2) Substantial Presence in the United States.</u> The second major test of residence is "physical presence in the United States." "A foreign national who is present in the United States for 183 or more days during a calendar year is a United States resident in that year."

The philosophy behind the 183-day rule is relatively straightforward: "183 days is more (by a few hours) than half of a year." A foreign national who is in the United States for that period of time during a year "establishes a lengthier connection with the United States than with any other country in that year."

The 183-day rule is referred to in some circles as the "substantial presence" test. The substantial presence test has two forms, one of which can be viewed as the "strong form of the test," the other of which can be viewed as a looser form of the test.

Under the strong form, "US residence results from an individual's actual presence in the United States for 183 days or more during a calendar year." Actual presence establishes United States residence for the calendar year, and "this determination [supersedes] any showing of a contrary intention or of a stronger or more permanent connection to another country." [13]

This form of the substantial presence test is a veritable straightjacket provision in that if an individual is in the United States for at least 183 days during a calendar year, he is automatically deemed to be a US resident. A taxpayer's intentions regarding US presence are utterly meaningless. For example, "a foreign national serving a prison term in the United States and wishing every minute that he were back home, is nonetheless a US resident under this test."

If residence in the United States came down to nothing more than physical presence for 183 days in a given year, it would be relatively easy to circumvent this test. For example, an individual could "maintain a substantial connection with the United States by spending 180 days there for several years in a row and still avoid being labeled as a US resident."

Similarly, a stay of 182 days at the end of Year 1 followed by a stay equal to the same number of days in the beginning of Year 2 would amount to nearly one full year in the United States without establishing US residence. "With this much flexibility, the careful timing of gains and losses could significantly reduce the tax cost of US residence."

The second part of the substantial presence test eliminates this possibility completely. How so? By taking into consideration "not only time spent in the United States during the current calendar year, but also days spent in the United States during the two preceding calendar years."

The latter – *i.e.*, days spent in the two preceding calendar years – is added to days spent in the US in the most recent calendar year in order to calculate substantial presence. The practical effect of this is "to include periods of protracted … connection with the United States as periods of US residence."

Here, an important distinction must be made. Days from the preceding two years are given "less weight in arriving at the total than days of the actual calendar year." Specifically, days spent in the United States are given the following weight:

- Days from the current year are counted at their full value;
- Days from the first preceding calendar year are counted as 1/3 of a day; and
- Days from the second preceding calendar year are counted as 1/6 of a day.

<u>(3) Protected groups of individuals who are excluded from the substantial presence test.</u> Certain groups of individuals are excluded from the substantial presence test. These are foreign nationals whose presence in the United States, no matter how lengthy, is generally not permanent.

Among the protected groups are "full-time diplomats along with teachers and students." [14] Also excluded from the count are "days spent in the United States by an individual unable to leave due to a medical condition that arose while he or she was there." [15]

Below are two examples of residency *vis-à-vis* USC Section 7701(b):

> Example #1: Matt is a citizen of Argentina. He has lived in the US every day for the last three years. Because Matt is considered a resident by application of the rules under Section 7701(b), he must file an FBAR.
>
> Example #2: Kyle is a permanent resident of the US. He is a citizen of the UK. Under a tax treaty, Kyle is a tax resident of the UK and elects to be taxed as a resident of the UK. Kyle must file an FBAR. Tax treaties with the US do not affect FBAR filing obligations.

What Does A Financial Account Include?

A financial account includes the following:

- Bank accounts, such as savings accounts, checking accounts, and time deposits;
- Securities accounts such as brokerage accounts and securities derivatives or other financial instruments accounts;
- Commodity futures or options accounts;
- Insurance policies with a cash value (such as a whole life insurance policy);
- Mutual funds or similar pooled funds;
- Online poker accounts;
- Any other accounts maintained in a foreign financial institution or with a person performing the services of a financial institution. An example would be gold (or currency cash notes) maintained in a foreign financial institution and stored inside a vault at that institution.

Contrary to popular belief, not all foreign assets owned by US taxpayers must be reported. According to the FinCEN FBAR reference guide, a financial account does not include:

- *Individual Retirement Account (IRA) owners & beneficiaries:* Owners or beneficiaries of IRAs are not required to report a foreign financial account held in the IRA.
- *Participants in and beneficiaries of Tax-Qualified Retirement Plans:* A participant in or beneficiary of a retirement plan described in Internal Revenue Code Section 401(a), 403(a), or 403(b) is not required to report a foreign financial account held by or on behalf of the retirement plan.

- *Consolidated FBAR:* A US person that is an entity and is named in a consolidated FBAR filed by a greater than 50 percent owner is *not* required to file a separate FBAR.
- *Trust beneficiaries:* A trust beneficiary with a direct or indirect financial interest in more than 50 percent of the trust assets or income need not report the trust's foreign financial accounts on an FBAR if the trust, trustee of the trust, or agent of the trust: (1) is a US person, and (2) files an FBAR disclosing the trust's foreign financial accounts.
- *Signature authority:* Individuals who have signature authority over, but no financial interest in, a foreign financial account are not required to report the account in certain situations.

When is a financial account a "foreign financial account?"

A financial account is a foreign financial account when it is located outside the United States. The United States includes (1) all 50 states and the District of Columbia, and (2) all US territories and possessions.

What does it mean for the taxpayer to have a "financial interest" in a foreign account?

A US person has a financial interest in the following situations:

1. The US person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the US person or for the benefit of another person, including non-US persons.
2. The owner of record or holder of legal title is a person acting as an agent, nominee, attorney, or a person acting on behalf of the US person with respect to the account.
3. The owner of record or holder of legal title is a corporation in which the US person owns directly or indirectly:
   - More than 50 percent of the total value of stock, or
   - More than 50 percent of the voting power of all shares of stock.
4. The owner of record or holder of legal title is a partnership in which the US person owns directly or indirectly:
   - An interest in more than 50 percent of the partnership's profits, or
   - An interest in more than 50 percent of the partnership capital.
5. The owner of record or holder of legal title is a trust of which the US person:
   - Is the trust grantor, and
   - Has an ownership interest in the trust for US federal tax purposes.
6. The owner or record holder is a *trust* in which the US person has a greater than 50 percent *present* beneficial interest in the assets or income of the trust for the calendar year.

7. The owner of record or holder of legal title is any other entity in which the US person owns directly or indirectly more than 50 percent of the voting power, total value of equity interests or assets, or interest in profits.
8. Reporting Jointly Held Accounts: If two persons jointly maintain a foreign financial account, or if several persons each own a partial interest in an account, then each US person has a financial interest in that account. Therefore, each person must report the entire value of the account on an FBAR.
9. Limited Joint Filing For Spouses: Must the spouse of an individual who files an FBAR file a separate FBAR? No, but only if the following conditions are satisfied:
   - All the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse;
   - The filing spouse actually reports the jointly owned accounts on a timely filed FBAR electronically signed in item 44; and
   - The filers have completed and signed Form 114a, Record of Authorization to Electronically File FBARs.

   If even just one of these conditions is not satisfied, then both spouses must file separate FBARs and each spouse must report the entire value of the jointly owned accounts.

What does it mean for the taxpayer to have "signature authority" over a financial account?

A person has a "financial interest" in a foreign account not only if he is the owner of record or holder of legal title, but also if he has signatory authority of the account or maintains it jointly with another person. Signature authority is the authority of an individual to control the disposition of assets held in a foreign financial account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account.

How is the maximum account value of a foreign account defined?

The maximum account value is defined as "a reasonable approximation of the greatest value of currency or non-monetary assets in the account during the calendar year." How is the maximum account value determined? It can be reduced to a two-step process. First, determine the maximum value of the account during the year. Second, convert the maximum account value – for each account – into US dollars using the exchange rate in effect on the last day of the calendar year.

Delving Deep Into "What Is A Financial Account?"

According to Treasury Regulation 31 CFR § 1010.350, a "financial account" includes securities, brokerage, savings, demand, checking, deposit, time-deposit or other accounts maintained with a person engaged in banking. In 2011, the regulations expanded the term "other financial accounts" to include commodities, futures, or options accounts, insurance policies with cash value, and mutual funds or similar pooled funds that issue shares available to the general public and that have a regular net asset value determination and regular redemptions.

Financial account also includes an account with a person that is in the business of accepting deposits as a financial agency or a person who acts as a broker or dealer for futures or option transactions in any commodity or is subject to the rules of a commodity exchange or association. A foreign financial account is defined as one located outside the United States.

The owner of record or holder of legal title is a trust in which the US person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year.

Endnotes

1 Edward Zelinski, "Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile," *Iowa Law Review*, 2011, p. 1294.

2 *Id*, p. 1295.

3 *Id*.

4 *Id*, p. 1325.

5 *Id*.

6 Joseph Isenbergh, *International Taxation*, Second Edition, Foundation Press (2005), p. 12.

7 *Id*.

8 *Id*.

9 *Supra* note 1, pp. 1279–99

10 *Id*.

11 *Cook v. Tait*, 265 US at 56 ("government by its very nature benefits the citizen and his property wherever found").

12 T. H. Marshall & Tom Bottomore, *Citizenship And Social Class* (1992), p. 8.

13 IRC Sections 7701(b)(1)(A)(ii), 7701(b)(3).

14 IRC Section 7701(b)(5)(A).

15 IRC Section 7701(b)(3)(D)(ii).

Time For Another US Profit Repatriation Tax Holiday?

by Stuart Gray, Senior Editor, Global Tax Weekly

According to the latest estimate by the congressional Joint Committee on Taxation, foreign earnings held outside the United States by US corporations have grown to USD2.6 trillion[1] – roughly the same size as the gross domestic product of the United Kingdom, the world's fifth largest economy. For many in Congress and the Government, the 2.6 trillion dollar question is therefore, how can the US tax laws be changed to encourage firms to bring this money home, and to keep it there?

The Lock-Out Effect

It is generally accepted that under current tax law, US corporations are incentivized to keep income earned from foreign operations out of the US. The US taxes corporate income on a "worldwide" basis, but there is a deferral system for the active earnings of foreign subsidiaries of US multinational companies, as long as the profits remain abroad. Therefore, tax is only payable when these profits are repatriated to the US. But rather than repatriate income and face a high statutory corporate tax rate of 35 percent, US corporations have instead stockpiled cash overseas, normally in jurisdictions with a much lower corporate tax rate than the US, a state of affairs also known as the profit "lock-out."

Repatriation Proposals

Finding ways to unlock these profits has therefore become something of an obsession for many in Congress. We know from successive White House Budget plans that President Obama's preferred solution is to put an end to the deferral system so that the incentive for US multinationals to invest in foreign jurisdictions is removed. This would effectively extend America's worldwide system of taxation further, something that Republicans oppose; they see the solution in tax reform that would move the US towards a territorial regime with a lower income tax rate, as other G7 countries have done.

However, with tax reform proving politically difficult currently, many lawmakers favor a compromise whereby corporations are permitted to pay a special reduced rate of income tax on repatriated profits, usually temporarily and subject to certain conditions concerning domestic investment and employment levels. Some of these proposals are explored and assessed here.

Schumer And The Senate Finance Committee's International Tax Reform Working Group

One of the latest proposals comes from Senator Charles Schumer (D – New York), who emphasized in an interview with CNBC that international tax reform, which he will be pushing in 2017, should look to encourage the repatriation of US multinational companies' deferred foreign earnings, so as to finance a large infrastructure program.

"If you can get overseas money to come back here, even if it's at a lower rate than the 35 percent it now comes back at, and you can use that money for a major constructive purpose such as infrastructure," he said, "if you did an infrastructure bank, for instance, you could get USD100bn in equity in the bank and get a trillion dollars of infrastructure." [2]

Schumer made a similar proposal in last year's report of the Senate Finance Committee's international tax reform working group, which he led together with Rob Portman (R – Ohio). The working group backed the imposition of a transitional deemed repatriation tax at a rate significantly lower than the US statutory corporate rate (possibly as low as 10 percent), during the movement towards a new international tax system.

There have been other proposals of a similar nature put forward in recent times, usually with the proviso that money repatriated under special tax schemes be invested directly or indirectly back into the US economy.

McCain–Franks Foreign Earnings Reinvestment Bill

Bills introduced in Congress in February 2015 by Senator John McCain (R – Arizona) and Representative Trent Franks (R – Arizona) [3] would set the preferential tax rate at 8.75 percent, falling to 5.25 percent if companies were able to show that they were expanding their payroll by 10 percent through net job creation or higher payroll. However, the proposed bill would discourage US companies from reducing employment by adding a USD75,000 penalty per full-time position that is eliminated from a company's gross income calculation.

McCain observed of the bill that:

> "It is no secret that one of the main reasons why so much money is laying idle overseas and doing nothing to spur job creation is because our nation has the highest corporate tax rate in the free world. Our common-sense legislation would encourage American companies to bring foreign earnings back to the United States and create strong incentives for those companies to invest these earnings in US employees."

Franks added:

> "When factoring in state and local taxes, our current corporate tax rate is nearly 40 percent, a staggering number, but, more importantly, a prohibitive one to the large businesses that help drive our economy. By discouraging further business in the United States with exorbitant tax rates, billions of dollars remain overseas that could be added back into the American economy. This bill would be a much-needed boost to our economy."

Paul–Boxer Invest In Transportation Bill

Another bill, announced in the same month by Senators Rand Paul (R – Kentucky) and Barbara Boxer (D – California),[4] would allow companies to return their foreign income earned prior to 2015 voluntarily to the US at an effective tax rate of 6.5 percent. All tax revenues from the bill would be transferred into the troubled Highway Trust Fund (HTF) to help plug its deficit, and companies would be required to invest a portion of the repatriated funds in such items as increased hiring, wages and pensions, and research and development (R&D).

To qualify for the reduced tax rate, participating corporations would be obliged to complete the repatriation of such income during a specified five-year period and establish a domestic reinvestment plan under which not less than 25 percent of such income must be used for investment in the US, including for increased hiring, wages, pension contributions, energy efficiency, environmental and capital improvements, and R&D. No funds may be spent on increases in executive compensation. Additionally, a corporation that enters into a stock inversion to avoid US taxation within ten years after repatriating overseas income at a preferential tax rate would be required to recapture a portion of the income taxed at the preferential rate.

The bill places a requirement on the Department of the Treasury to make an initial estimate of the amount of tax revenue from repatriated income to be received by Treasury prior to October 1, 2019, and another estimate not later than October 1, 2023, and transfer such estimated amounts to the Highway and Mass Transit Accounts of the HTF.

Boxer suggested that:

> "This bipartisan repatriation proposal is a win-win for our economy and our country. First, it will bring back hundreds of billions of dollars in foreign earnings that are sitting offshore, which can be invested here in America to create jobs. Second, the taxes paid on those earnings will be used to extend the HTF, which supports millions of jobs nationwide."

President Obama's 2016 And 2017 Budgets

While President Obama's preferred stance on international taxation has been to wave the punitive "stick" at corporations that are exploiting the deferral rules, he also sees the potential that a special tax regime on foreign profits has to prop up the ailing HTF. Therefore, the 2016 Budget attempted to strike a balance between providing the "carrot" of incentives to companies to repatriate foreign profits while ensuring that foreign profits are adequately taxed.

Under this proposal (which has been recycled as part of the 2017 Budget proposals),[5] previously untaxed foreign income that US companies have accumulated overseas would be subject to a one-time 14 percent tax. Revenues from the tax would be used to replenish the HTF. Earnings subject to the one-time tax could then be repatriated without any further US tax.

However, Obama would also impose a 19 percent minimum tax on the foreign income of US multinationals, reduced (but not below zero) by 85 percent of the effective foreign tax rate imposed on that income. It was said that this minimum tax on foreign earnings "would directly address the incentives under the current system to locate production overseas and to shift and maintain profits abroad."

The Pros And Cons Of Repatriation Holidays

These ideas have also found favor beyond the Washington political bubble. For instance, a recent report by S&P Global proposed allowing US multinationals to repatriate their overseas earnings tax-free providing they invest at least 15 percent of those untaxed earnings into US infrastructure.[6] S&P argued that the plan "is necessary, economically feasible, and politically actionable," and would "fuel major economic growth and create hundreds of thousands of jobs in the years to come."

The funds generated from the tax holiday, S&P said, would be "directed toward investments such as infrastructure bonds sold by state and local governments. … [By] tying these funds to infrastructure bonds rather than tax revenue, the plan creates a more direct, dedicated path for infrastructure improvements."

In addition, it pointed out that "the 15 percent in our proposal is a fraction of the standard US statutory federal tax rate of 35 percent, and comparable with the 14 percent average effective US corporate tax rate companies typically pay. Further, infrastructure bonds are a comparatively stable, low-risk investment, and companies could eventually earn their money back – and then some."

Indeed, some, including Senator Paul, believe that repatriation tax breaks would achieve a double dividend, because there would be "no new taxes, but more revenue." And an added bonus, he observed, is that this is one of those rare occasions when the two major parties in Congress actually agree on something, to a large degree.

However, despite the weight of opinion behind special repatriation tax regimes, temporary or otherwise, not all are convinced of their merits. Testimony by tax experts and academics at a June 2015 hearing by the House Ways and Means Subcommittee on Select Revenue Measures certainly appeared to suggest that special profit repatriation regimes are not the panacea that their proponents make them out to be.

According to the Joint Committee on Taxation (JCT), far from increasing the tax take, a preferential tax rate of 6–8 percent on repatriated income would lead to a USD117.9bn revenue loss in the period 2015–2025. The JCT also warned that the temporary nature of such measures could be counterproductive because corporations may believe that further tax reductions will occur in the future, therefore strengthening the incentive to retain more earnings overseas.

Testifying before the subcommittee, Jane Gravelle of the Congressional Research Service (CRS) said: [7]

> "These voluntary repatriation proposals lose revenue because some of the funds would have been repatriated in any case, but would have been taxed at the statutory tax rate of 35 percent. For each dollar that falls into this category during the budget horizon, there is an overall revenue loss due to the difference in the normal tax rate and the lower repatriation rate. They also lose revenue because repatriation holidays create an incentive to delay future repatriations in anticipation of future holidays. Although there is some gain in revenue due to individual income taxes on dividends paid from repatriated funds to shareholders, overall the losses offset the gains, as illustrated by the JCT cost estimates …
>
> Increasing the tax rate applying to the repatriations during the holiday may reduce the revenue loss but is unlikely to result in significant (or any) gain. In 2011, a revenue estimate provided to Representative Doggett estimated a 10-year revenue loss of

> USD78.7bn for a 5.25 percent rate for a tax holiday; the revenue estimate for doubling the rate to 10.5 percent was a USD41.7bn loss. As the rate rises, firms would be expected to repatriate less so that the loss shrinks, but a gain is still unlikely."

The economic benefits of repatriation tax holidays are also debatable. According to a 2015 analysis by the Heritage Foundation,[8] such measures would have a minimal economic impact and would be the wrong way to pay for the HTF or any other project. In its opinion, a repatriation holiday "would not create jobs by boosting investment domestically because businesses' incentives for investing would not increase."

The Foundation also took issue with proposals for a "deemed" repatriation tax involving the immediate application of a tax on accumulated foreign earnings, even if the company has no intention to repatriate the profits. Such a policy, it said, would be a "tax hike because a portion of the income that would be taxed would be money that businesses decided to permanently invest offshore."

Just as importantly, the JCT warned lawmakers in its latest lock-out estimate that not all foreign assets are cash holdings anyway. [9] Companies, it said, may have already reinvested their earnings in their business operations, "such as by building or improving a factory, by purchasing equipment, or by making expenditures on research and experimentation."

The CRS also noted this potential flaw in a stand-alone deemed repatriation tax that does not form part of a wider domestic and international corporate tax reform plan, with Gravelle testifying to the Select Revenue Measures subcommittee that: "Unless a large tax is imposed to include physical plant and equipment abroad, which cannot be repatriated, it is unlikely that a stand-alone deemed tax will raise revenue."

She continued:

> "If a tax is imposed on deemed cash held abroad at the rate of the Paul–Boxer bill (6.5 percent), the deemed repatriation tax could raise slightly over USD60bn (45 percent of USD2.1 trillion times 0.065) from the repatriation tax. Some of this tax would be offset, however, by the foreign tax credit. If the offset is similar to the foreign tax credit offset reported for the 2004 holiday [*of which, see further below*], the yield would decline by 11.4 percent or to USD54bn. Potential revenues would also be reduced by the regular tax that would have been paid on the portion of funds that would otherwise be repatriated. There would be an additional revenue gain from dividend taxes to the extent

> cash was used to pay the shareholders of the parent firm, which amounts to about USD44bn. But once earnings abroad have been subject to tax and are available to return to the parent company, these earnings could be used to satisfy cash needs, such as dividend payment, and reduce the need to repatriate future earnings. Thus there would still be an offsetting negative effect that would likely overwhelm the deemed repatriation tax."

Republican presidential candidate Donald Trump is one prominent figure advocating a one-off deemed repatriation tax, suggesting a rate of 10 percent.[10]

The Homeland Investment Act

Although the potential outcomes of repatriation tax holidays are largely based on guesswork, we do have one recent precedent in the form of the Homeland Investment Act. Enacted as part of the American Jobs Creation Act of 2004,[11] this allowed companies to elect, for one taxable year, to receive an 85 percent deduction for eligible dividends coming from their foreign subsidiaries, effectively reducing the corporate tax rate on such earnings to 5.25 percent provided the company had drawn up a domestic investment plan. However, there is little hard evidence to suggest this measure encouraged companies to reinvest foreign profits in the US, while there also seems to be some disagreement on their revenue effect.

As Gravelle observed in her testimony before the Select Revenue Measures subcommittee:

> "Since money is fungible, there was no way to effectively enforce the restrictions on use. Subsequent studies indicated that most of the repatriated funds were used for share repurchase (equivalent to a dividend payment), acquisition of other firms, or debt reduction. These effects would not increase investment or stimulate the economy, thus undermining the stimulus justification for a repatriation holiday."

The Institute for Policy Studies (IPS) agreed that the Homeland Investment Act failed to create the jobs that had been promised by the measure. Indeed, it pointed to one government study which looked at the first two years after the repatriation windfall and found that 12 of the top recipients laid off more than 67,000 American workers.

Those firms, it added, collectively brought back home more than USD100bn, nearly a third of the total amount repatriated by all firms that took advantage of the tax holiday, and they saved an estimated USD32bn in taxes. In total, during the previous tax holiday, US companies repatriated USD312bn in profits and avoided an estimated USD92bn in federal taxes.[12]

The Heritage Foundation concurred in a 2011 study[13] that a tax holiday, similar to that of 2004, "would, like its predecessor, have a minuscule effect on domestic investment and thus have a minuscule effect on the US economy and job creation." According to the Foundation, a tax holiday would have little or no effect on investment and job creation because the repatriating companies are not capital-constrained:

> "Any investment (in the US) that they would deem worthwhile today can be and is being financed by current and accumulated earnings. For those rare instances in which outside financing is needed, interest rates remain at historic lows and few if any of these repatriating companies are constrained. Adding to their financing abilities will not increase the opportunities for investment."

For its part, the Tax Foundation is also of the view that repatriation tax holidays of a temporary nature are largely ineffective, for most the reasons already cited by critics here. Nevertheless, Tax Foundation contributor David S. Logan wrote in August 2011 that a permanent repatriation holiday has "great potential to make US-based corporations more globally competitive."

He continued:[14]

> "While US corporations essentially operate under a worldwide taxation system …, corporations based abroad are not taxed at all on income made overseas and brought back to the home country. This lower tax rate results in an advantage that makes it easier for a foreign company to make a given return on investment than one incorporated in the US. In other words, it is more difficult for domestic corporations than foreign ones to meet a given hurdle rate. Our current system decreases US corporations' competitiveness and makes them easier targets for foreign acquisition.
>
> At a time the country is experiencing serious fiscal woes, our economy could use whatever policies the government can enact to responsibly promote growth, as long as they adhere to principles of sound tax policy, such as stability. A permanent repatriation holiday is certainly one such viable policy."

In support of repatriation tax holidays, an August 2011 paper by Robert Shapiro, the Under Secretary of Commerce for Economic Affairs in the Clinton Administration, and Aparna Mathur, resident scholar at the American Enterprise Institute, disputes the JCT's estimates of the revenue effects of repatriation tax holidays.[15] The paper argued that contrary to the JCT's view, a repatriation tax incentive along the lines of the Homeland Investment Act would bring into the country a net revenue gain over ten years, plus several hundred billion more for the economy.

The study looked at reinstating the Homeland Investment Act of 2004. It took issue in particular with the JCT's approach and results for estimating the revenue effects of the legislation. Shapiro and Mathur argued that the JCT's approach was "flawed conceptually and its estimates of significant revenue losses are incorrect." Shapiro and Mathur estimated that a reprise of the Homeland Investment Act enacted in 2011 would produce an USD8.7bn gain over ten years, compared with the JCT's estimate of a ten-year revenue cost of USD78.7bn.

Shapiro noted:[16]

> "Enacting temporary tax relief for repatriated foreign earnings in 2004 brought back several hundred billion dollars for the US economy, and will end up providing billions for the Treasury. Enacting repatriation again should have the same effects at a time when revenues are scarce. While it would be better for the American economy to put in place corporate tax reforms suited to the realities of our new global economy, taking the temporary step of another round of 'repatriation relief' would be a fiscally sound option that policy makers should consider in the months ahead."

However, it is probably safe to say that, overall, Shapiro and Mathur appear to be in a minority among their academic peers with their support for the principle of repatriation tax holidays.

Reform *Versus* Repatriation

Some commentators argue that the real flaw with repatriation holiday proposals is that they are a distraction from the underlying issue, which is the uncompetitive US tax code. Ultimately, this will only be fixed by comprehensive reform of the US corporate and international tax systems, it is argued, rather than providing temporary or permanent profit repatriation tax breaks, which treat the symptoms of the problem, rather than its cause.

One of the causes is said to be the US's relatively high corporate tax rate. According to a recent study by the Tax Foundation, the US has one of the highest top marginal rates of corporate income tax in the world, as well as the highest statutory corporate tax in the 35-member OECD grouping.

In a sample of 188 countries, the US's general top marginal corporate income tax rate of 38.92 percent, made up of the federal corporate tax and the average state corporate tax, is now the third-highest in the world, exceeded only by the United Arab Emirates (55 percent on banking and oil firms) and Puerto Rico (39 percent).

The report also shows how the corporate tax rate gap between the US and the rest of the world is growing, with the average rate across the 188 countries now down to 22.5 percent. This is 7.5 percent lower than in 2003, with every region in the world seeing its average corporate tax rate decline over this period.

Other frequently cited reasons for the profit lock-out are America's worldwide income tax regime and the existing deferral rules. As Laura Tyson, an economic advisor to the Alliance for Competitive Taxation, observed in testimony before the Senate Finance Committee in 2015: "The tax disadvantages of a very high statutory rate, and a worldwide system, perhaps with a minimum tax attached to that, is basically an incentive to not incorporate [in the US]." That would surely defeat the purpose of what many members of Congress, both Democrat and Republican, are working towards: a more competitive US corporate tax system.

Curtis Dubay, Research Fellow in Tax and Economic Policy at the Heritage Foundation, observed in an exploration of this issue that: "Changes to repatriation policy are best left to tax reform. Taking changes to policy on previously earned foreign income off the table by misguidedly using them to pay for transportation would make achieving tax reform more difficult."

Similar sentiments were expressed in a paper published by the American Action Forum in April 2015, which concurred that the US is in "dire need of sweeping tax reform" that would offer "long-term economic growth; a temporary policy offers little economic benefit." Such tax reform, it believes, should produce "a permanently lower, statutory business tax rate that returns the United States to international norms."

And even the International Monetary Fund has said that the current corporate income tax structure is too complex; has a marginal rate that is too high; has a narrow base, rife with exemptions; favors debt financing; and incentivizes a range of cross-border avoidance and tax planning mechanisms to lower US tax liabilities.

According to the IMF's 2016 Article IV consultation report for the US, priorities for tax reform include reducing the rate to 25 percent, broadening the base by eliminating the bulk of corporate tax expenditures and repealing the corporate alternative minimum tax, eliminating certain tax incentives, and adopting a territorial system by excluding dividends of foreign subsidiaries from US taxation.

So what is Congress doing to bring about changes to the US tax code? The answer is that much debate has taken place on tax reform, and a number of tax reform options have been proposed by numerous members of Congress. However, while there is agreement between the two main parties that the US corporate tax rate is too high, and should be reduced, there is disagreement on the much more vexed question of the tax basis, with Republicans generally in favor of more territoriality, and Democrats more in favor of retaining a worldwide corporate tax system, and even in some cases strengthening it even further.

Yet, there is even some doubt about whether tax reform would alter the profit shifting patterns of US multinational companies. This is because other factors influence profit-shifting decisions besides tax, in particular the costs and availability of external financing.

This issue was considered in a report entitled *The Effect of Financial Constraints on Income Shifting by US Multinationals* by Scott D. Dyreng of Duke University and Kevin S. Markle of the University of Iowa, which concluded that companies are likely to shift more income abroad under a territorial tax system than under the currency worldwide tax basis.[17]

The study looked at the effects of financial constraints on income shifting from 1998 to 2011 by 2,058 US-incorporated multinational corporations if the US were using a territorial taxation system. Significantly, it concluded that had a territorial system been in place in the period under study, these companies would have increased outbound income shifting by 8 percent.

As an abstract of the report observed:[18]

> "When a US multinational corporation shifts income from the US to foreign jurisdictions, it incurs costs and reaps benefits. The benefits may be reduced if the shifted income must be returned to the US as a dividend in the short term and face the same US tax it would have if the income had not been shifted. Firms, then, have incentive to defer repatriation of earnings and to fund domestic cash needs with external financing. The cost of external financing, however, is increasing in financial constraints, leading to the prediction that constrained firms will be unable to defer repatriation and, therefore, will reap no benefits from shifting. Using a new methodology for measuring

income shifting, we find, consistent with predictions, that financially constrained firms shift less income from the US to foreign countries than their unconstrained peers. We estimate that financially constrained firms shift out 20 percent less of pre-shifted income than unconstrained firms. Translating this percentage to dollar values, the mean (median) constrained firm shifts USD16m (USD7m) out of the US each year while the mean (median) unconstrained firm shifts USD321m (USD134m) out of the US each year. Assuming that the inability to defer repatriation is the primary constraint preventing the US worldwide tax system from being a *de facto* territorial tax system, we use our findings to estimate that changing to a pure territorial tax system would increase outbound income shifting by US multinationals by 8 percent."

In Summary

While special rates of tax for repatriated profits might look like a sound idea at first glance, there are many arguments to suggest that, at best, they are ineffective, and, at worst, counterproductive. Despite the potential problems with such measures, and their uncertain outcomes, they appear to remain a popular policy with lawmakers on both sides of the congressional aisle. However, ultimately, as far as many repatriation holiday skeptics are concerned, the focus on this issue is distracting lawmakers from the underlying issue: the need for corporate tax reform.

Endnotes

1 https://waysandmeans.house.gov/brady-neal-highlight-another-reason-pro-growth-tax-reform/

2 http://www.cnbc.com/2016/10/18/schumer-what-trump-tolerates-is-poisonous-to-america.html

3 https://www.congress.gov/bill/114th-congress/senate-bill/397/text

4 https://www.congress.gov/bill/114th-congress/senate-bill/981/text

5 https://www.treasury.gov/press-center/press-releases/Pages/jl0344.aspx

6 https://www.spglobal.com/Market-Insights/Rebuilding-Through-Repatriation

7 http://waysandmeans.house.gov/wp-content/uploads/2015/06/2015-06-24-SRM-Gravelle-Testimony.pdf

8 http://www.heritage.org/research/reports/2015/02/changes-to-repatriation-policy-best-left-to-tax-reform

9 http://www.politico.com/tipsheets/morning-tax/2016/09/jct-finds-300-billion-216609

10 https://www.donaldjtrump.com/policies/tax-plan/

11 https://www.congress.gov/bill/108th-congress/house-bill/4520/text?overview=closed

12 http://www.ips-dc.org/wp-content/uploads/2011/10/america_loses_corporations_that_take_tax_holidays_slash_jobs.pdf

[13] https://thf_media.s3.amazonaws.com/2011/pdf/bg2610.pdf

[14] http://taxfoundation.org/blog/why-permanent-repatriation-holiday-rather-temporary-fix-prudent-policy

[15] http://ndn.org/sites/default/files/paper/Report%20on%20the%20JCT%20Revenue%20Estimate%20for%20HIA%20and%20Its%20Reprise%20-%20Shapiro-Mathur%20-%20Final%20%20with%20Exec%20Summary%20-%20August%2019%202011.pdf

[16] http://ndn.org/paper/2011/revenue-implications-temporary-tax-relief-repatriated-foreign-earnings-analysis-joint-tax

[17] https://www.law.upenn.edu/live/files/5335-dyreng-markle-21016pdf

[18] http://aaajournals.org/doi/abs/10.2308/accr-51420

Topical News Briefing: Taxpayers – South Africa Needs You!

by the Global Tax Weekly Editorial Team

For taxpayers in South Africa, the Medium-Term Budget Policy Statement must have had a familiar, and worrying, ring to it.

It's not for the first time in recent years that a finance minister, on this occasion Pravin Gordhan, has used a fiscal statement to warn that the Government must collect substantially more in tax if it is to stand any chance of balancing the books and stalling an alarming rise in the country's public debt.

The additional ZAR43bn that the Government plans to raise in extra taxation is the equivalent of about USD3bn, which to those of us living in the world's richest economies, is no longer a king's ransom. However, for South Africa, this represents about 1 percent of its predicted 2016 gross domestic product, which is not an insubstantial sum considering the economy will, according to the Government, only grow by 0.5 percent this year.

The worrying part for taxpayers is that the South African Government has already had significant success in increasing the size of the tax base and the flow of tax revenues in recent years. According to the OECD, since 2000, South Africa has seen its tax-to-GDP ratio increase by almost 6 percent. This has been driven by an astonishing increase in the number of registered taxpayers since the end of apartheid – the individual taxpayer base grew from just 1.7m registered taxpayers in 1994 to 15.4m in 2013, and the corporate taxpayer base grew from under 500,000 businesses in 1994 to 2.2m by 2012.

On April 1, 2016, the South African Revenue Service (SARS) disclosed that it had collected over ZAR1 trillion for the first time, in the 2015/16 fiscal year – and we can be pretty confident that this was no April Fool's joke. Yet, the Government still needs more. Indeed, even though tax revenues seem to be flowing like a newly struck oil well, Gordhan made the admission that existing tax revenues are "not nearly enough to generate the kind of revenue that enables us to fund all of Government's programs." And this despite the existence of an expenditure ceiling in the previous four years.

Gordhan is frequently heard to blame South Africa's weak economic growth for the consistent missing of budgetary targets, and the consequent increase in the budget deficit. Doubtless, this is a major contributory factor, but perhaps these results also point to other structural weaknesses in South Africa's budget.

Whatever the reason for the Government's apparently insatiable need for tax revenue, the outcome is that taxpayers should remain braced for further tax hikes. Recently, these have been concentrated on those with higher incomes, and on anti-avoidance initiatives. It may be that the Government can raise more revenue by rationalizing South Africa's array of tax incentives, perhaps shutting down those performing poorly. And other anti-avoidance initiatives, especially those influenced by the OECD's BEPS work, are almost guaranteed in the near future. However, increases in tax rates, whether on personal or corporate income, property, or VAT, cannot be ruled out.

Apple Expects To Credit EU Tax Against US Liability

Apple Inc. has stated it expects to be able to offset against US taxation any additional corporate tax it may pay due to the European Commission's state aid claim.

On August 30 this year, the Commission concluded that Ireland granted illegal state aid to Apple, and ordered Ireland to calculate and recover additional taxes from the company. While the Commission announced a recovery amount of up to EUR13bn (USD14.2bn), plus interest, Apple noted that the actual amount of additional taxes subject to recovery is still to be calculated by Ireland in accordance with the Commission's guidance.

In its Form 10-K, giving details of its Annual Report for the fiscal year ended September 24, 2016, Apple confirmed that, while it "believes the [Commission's] state aid decision to be without merit and intends to appeal to the General Court of the Court of Justice of the European Union, … once the recovery amount is computed by Ireland, the company anticipates funding it, including interest, out of foreign cash into escrow, pending conclusion of all appeals."

Apple added that "a substantial portion" of its undistributed foreign earnings (of around EUR125bn) has been generated "by subsidiaries organized in Ireland, for which no US taxes are provided." It also stated that it "believes that any incremental Irish corporate income taxes potentially due would be creditable against US taxes."

The US tax code allows US multinationals to designate foreign earnings as indefinitely reinvested abroad, thereby allowing US deferred tax liabilities to be ignored rather than being deducted from reported earnings at full value. US Treasury Secretary Jack Lew has already indicated that the Commission's action threatens "to erode America's corporate tax base. US companies could claim foreign tax credits against their US tax bill for any tax-related payments to EU member states."

For that reason, the US Treasury Department and the Internal Revenue Service (IRS) issued Notice 2016-52 in September this year, with the intention of preventing a US multinational that has been subject to a foreign-initiated tax adjustment to use foreign tax credits against its US tax bill without repatriating the associated income.

By deferring the right to claim credits until the related income is included in US taxable income, the IRS's new rules would negate any attempt by an affected company, such as

Apple, to split the additional taxes paid from the related income, and thereby reduce its US tax bill.

Panama Signs Up To OECD Tax Transparency Pact

Panama on October 27 became the 105th signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

The OECD, which sets global standards on tax information exchange and tax transparency, said the signing shows that Panama is now implementing its commitment to fully cooperate with the international community on transparency.

"Panama's decision to sign the multilateral Convention is a confirmation of its commitment to take the necessary steps to meet international expectations in the fight against tax evasion," OECD Secretary-General Angel Gurría said during a signing ceremony with Panama's Ambassador to France. "It also sends a clear signal that the international community is united in its efforts to stamp out offshore tax evasion. We will continue our efforts until there is nowhere left to hide."

The Global Forum on Transparency and Exchange of Information for Tax Purposes is expected to publish in early November a peer review assessment of how Panama's legal framework and practices over the last three years match up against existing international standards of transparency and exchange of information on request.

"The forthcoming report will reflect Panama's past record on transparency issues. [This] signing, combined with very recent legislative changes opening the door for wide-ranging international cooperation, illustrates the good disposition and commitment by Panama to move forward in the area of tax transparency," said Gurría.

The Convention provides for all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, facilitating tax examinations abroad, simultaneous tax examinations, and assistance in tax collection. It guarantees extensive safeguards for the protection of taxpayers' rights. It also allows automatic exchange of information on option.

The OECD said the global Convention is seen as a critical instrument for swift implementation of the new Standard for Automatic Exchange of Financial Account Information in Tax Matters, developed by the OECD and G20 countries, which is slated to go into effect from 2017.

IRS Confirms Start of 2017 PTIN Renewal Period

The Internal Revenue Service (IRS) has reminded the more than 725,000 federal tax return preparers in the US that they must renew their Preparer Tax Identification Numbers (PTINs) for 2017, as all current numbers expire on December 31, 2016.

The IRS reiterated that anyone who prepares or helps prepare any federal tax return or claim for refund for compensation must have a valid PTIN. The PTIN must be used as the identifying number on returns prepared.

For those who are renewing their PTIN, and for those registering for the first time, the process may be completed swiftly online; the fee is USD50. Paper Form W-12, IRS Paid Preparer Tax Identification Number Application and Renewal, is also available for paper applications and renewals, but it takes four to six weeks to process.

The IRS has also announced the beginning of participation in the voluntary Annual Filing Season Program (AFSP) for the 2017 filing season. AFSP Certification is offered to unenrolled tax preparers who complete a required amount of continuing education, including a course in basic tax filing issues and updates, and ethics, among other federal tax law courses. They receive a Record of Completion and are included in an IRS website database.

Preparers desiring to receive an AFSP Record of Completion for 2017 must complete their continuing education requirements by December 31, 2016; have a valid 2017 PTIN; and consent to adhere to specific practice requirements.

EU–Canada Comprehensive Economic And Trade Agreement Signed

The EU and Canada have signed their long-awaited Comprehensive Economic and Trade Agreement (CETA), which, when fully implemented, will eliminate 99 percent of trade tariffs.

The agreement was signed by European Council President Donald Tusk, European Commission President Jean-Claude Juncker, and Canadian Prime Minister Justin Trudeau. The signing took place at the 16th Canada–EU Summit, on October 30, three days later than planned.

In a joint statement, Tusk, Juncker, and Trudeau said: "CETA will deliver sustainable and inclusive economic growth and spur job creation. We are committed to the swift provisional implementation of CETA so that Europeans and Canadians are able to enjoy the benefits that CETA will bring as soon as possible. We remain fully committed to the principle that trade agreements should fully preserve the ability of governments to regulate in the public interest, especially with regard to public services as well as environmental and labor protections. We are firmly committed to ensuring that our stakeholders, including employers, trade unions, consumer and environmental groups, participate in the ongoing implementation of CETA."

CETA will eliminate duties quickly. Upon entry into force, 98 percent of EU tariff lines will be duty-free for goods that originate in Canada. Within seven years of CETA's entry into force, 99 percent of EU tariff lines will be duty-free. Currently, around 25 percent of EU tariff lines on which Canadian goods are exported enter the EU duty-free.

Customs duties on industrial products traded between the EU and Canada will be eliminated seven years after CETA's entry into force. Nearly 92 percent of EU agriculture and food products will be exported to Canada duty-free, and CETA will abolish tariffs on wines and spirits.

Preferential access for certain products – such as EU beef, pork, sweetcorn, and Canadian dairy – will be limited. CETA will not "open up" poultry or eggs on either side, and will maintain the EU entry-price system.

Once CETA enters into force, Canadian services exporters will be treated the same way as those from the EU (with certain exceptions). The EU will treat Canadian service suppliers no less favorably than it treats service suppliers from its existing or future FTA partners.

CETA contains commitments on customs and trade facilitation, aimed at reducing processing times at the border and making the movement of goods cheaper, faster, and more predictable and efficient. This includes providing access to advance rulings on the origin or tariff classification of products, the automation of border procedures, and the creation of a transparent system for addressing complaints about customs rulings and decisions.

The agreement also contains public procurement provisions to allow EU companies to bid for public contracts in Canada at all levels of government, and vice versa. It introduces a new investment protection and dispute settlement system, including a dispute settlement tribunal. The EU and Canada have committed to treating domestic and foreign investors in the same way, and to not imposing any new restrictions on foreign shareholdings. Investors will not be able to challenge genuine regulatory action by states, and CETA will not affect the right of governments to regulate in the public interest.

The Canadian Government said it will introduce implementing legislation as soon as possible. In the EU, as CETA has been classified a "mixed agreement," a European Parliament vote must be followed by ratification by each of the EU's 28 member states.

CETA negotiations were launched in 2009 and concluded in 2014. In July 2016, the European Council formally proposed the signature of the agreement, and both sides expressed their hopes that the signature would take place at the 16th Canada–EU Summit.

However, despite endorsement by 27 of the EU's 28 member states, Belgium's French-speaking regions initially refused to give their support, meaning that its federal government was unable to approve CETA. The deadlock was broken after an addendum to the text was agreed between Belgium's regions and the European Council on October 27.

Speaking at a joint press conference, Tusk cautioned that "the battle for CETA" has shown "how important impressions and emotions are in the modern word." He said: "Free trade and globalization have protected hundreds of millions of people from poverty and hunger. The problem is that few people believe this. Free trade and globalization protect humanity from total conflict, the problem is that few people understand this."

"The controversy around CETA has demonstrated that our first priority is to give people honest and convincing information about the real effects of free trade. That the alternative to free trade is isolationism and protectionism, a return to national egoisms, and, as a result, the threat of violent conflict. We should be able to convince our citizens that free trade is in their interest, and not just big companies and corporations."

Cormann Confident Of Australia–EU FTA

The Australian Government is hopeful that it can negotiate a free trade agreement (FTA) with the EU that is "mutually beneficial", Finance Minister Mathias Cormann has said.

Cormann made the remark during an interview with ABC radio. He was asked to comment on the prospects of securing a deal with the EU following the difficulties experienced by the EU and Canada in completing their Comprehensive Economic and Trade Agreement (CETA).

Cormann said the Australian Government would certainly like to sign an export trade deal with the EU. He explained: "We believe that helping Australian businesses get better access to the European market is good for business and jobs [in Australia]. Helping get access to competitively priced European products into Australia is good for Australian consumers and it is good for business in Europe."

"We are hopeful that we can negotiate a deal with Europe that is mutually beneficial."

Cormann was born in Wallonia, the region of Belgium that initially refused to back CETA, holding up the signing process. "If it would help me going over to meet with the government in Wallonia, which is indeed the part of the region where my parents still live, then I am sure that that can be arranged," he told ABC.

EFTA And India Resume Free Trade Talks

Delegations from the European Free Trade Association (EFTA) states (Iceland, Liechtenstein, Norway, and Switzerland) and India recently resumed talks towards a comprehensive free trade agreement.

The 14th round of negotiations was held in Geneva on October 26–28 during which a range of outstanding issues was discussed, including trade in goods, trade in services, rules of origin, and intellectual property rights.

The free trade negotiations started in October 2008, and 13 rounds were held until they were put on hold in November 2013. Chief negotiators decided to resume negotiations earlier this year.

Both sides agreed to continue negotiations with a view to concluding an agreement in the near future. The next round of negotiations will be held in New Delhi in early 2017.

Total bilateral trade between the EFTA states and India stood at more than USD4.4bn in 2014. India's main exports to EFTA include organic chemicals, precious stones and metals, and apparel. EFTA's principle exports to India consist of machinery, pharmaceutical products, and aircraft and spacecraft.

French Lawmakers Approve Tax Hike On Sharing Economy

The French National Assembly has voted to increase tax on "professional" renters of services using online sharing economy platforms such as Airbnb.

The bill, approved by French deputies on October 28, targets those earning relatively large amounts of money from renting out items like their homes and vehicles to the public on shared economy platforms.

Under the proposed legislation, amounts of more than EUR23,000 (USD25,200) per year made from renting out homes on shared economy websites would be considered professional income and subject to income tax.

Those renting out their cars and certain other items would be considered as providing a professional service if they receive more than EUR7,720 per year.

The bill will need the approval of the Senate before it can become law. The Senate is expected to consider the proposals in the coming weeks.

UK Updates Guide On Creative Industry Tax Breaks

HM Revenue & Customs has updated its guide for taxpayers on how to qualify and claim any of the UK's seven corporation tax creative industry tax reliefs.

These tax incentives are: Film Tax Relief, Animation Tax Relief, High-end Television Tax Relief, Children's Television Tax Relief, Video Games Tax Relief, Theatre Tax Relief, and Orchestra Tax Relief.

Orchestra Tax Relief became available from April 1, 2016. A company will be entitled to claim this relief if it is a qualifying orchestra production company putting on a qualifying orchestral concert. A qualifying orchestral concert is one which:

- is performed by instrumentalists in an orchestra, ensemble, group, or band;
- consists of a minimum of 12 instrumentalists;
- all or the majority of the instruments must not be electronically amplified;
- instrumentalists must be the primary focus of the concert;
- the primary focus is to play before the paying public or for educational purposes;
- has a minimum 25 percent European Economic Area (EEA) expenditure; and
- has no need for a cultural test.

Hong Kong Consults On BEPS Implementation

On October 26, Hong Kong's Government launched a public consultation on the implementation of base erosion and profit shifting (BEPS) measures proposed by the OECD.

"Hong Kong is supportive of international efforts to promote tax transparency and combat tax evasion," said Secretary for Financial Services and the Treasury K. C. Chan. "Implementation of measures to counter BEPS signifies our commitment to international tax cooperation."

It is noted that the top priority in the package put forward by the OECD is to monitor the implementation of four minimum standards: countering harmful tax practices, preventing treaty abuse, imposing country-by-country (CbC) reporting requirements, and improving the cross-border dispute resolution regime.

"Hong Kong will need to revise our existing tax laws to meet the [minimum] requirements of the BEPS package. In formulating our implementation strategy, we need to ensure that our model meets the international standard without compromising our simple and low tax regime," said Chan. In that respect, the Government's consultation paper confirms that it will "draw up a pragmatic strategy to implement the international requirements."

"The implementation timetable for BEPS is very tight," Chan continued. "To meet the OECD's requirement, our current target is to introduce the relevant amendment bill or bills into the Legislative Council in mid-2017." The consultation period will end on December 31, 2016.

The priority is to put in place the necessary legislative framework to update transfer pricing rules; exchange information on tax rulings; introduce CbC reporting requirements (which are expected to capture about 150 Hong Kong enterprises under the OECD's minimum EUR750m consolidated group revenue threshold); bolster cross-border dispute resolution mechanisms; and enter into the multilateral instrument to modify bilateral tax treaties.

Finally, the paper says "while no immediate action is required for other BEPS Actions, the Government will keep in view the pace of international developments, and draw up our response plan as appropriate."

First Countries For OECD's MAP Peer Review Selected

Belgium, Canada, the Netherlands, Switzerland, the UK, and the US will be the first territories whose mutual agreement procedure (MAP) framework will be peer reviewed under Action 14 of the OECD's BEPS Action Plan.

The OECD's Action 14 proposals concern making dispute resolution mechanisms more effective. The MAP is used to settle disputes between countries and taxpayers concerning cross-border tax arrangements for trade and investment where double taxation of the same income occurs.

The first batch of peer reviews, by countries that have signed up to the inclusive BEPS framework and therefore committed to implement minimum BEPS standards, will start from December 2016. Last month, the OECD released an assessment methodology for that process.

The OECD has now asked taxpayers, as the main users of the MAP, to provide input on specific areas relating to access to MAP, clarity and availability of MAP guidance, and the timely implementation of MAP agreements.

Taiwan Considering Personal Income Tax Cuts

Taiwan's Ministry of Finance has disclosed that it is studying cuts to personal income and dividend taxes for inclusion in its 2017 tax reform plans.

At a press conference in Taipei on October 27, Minister of Finance Sheu Yu-jer said legislation could be introduced "in April or May next year" to give effect to tax reductions, although the Ministry would need to be sure that revenue targets would still be met if the measures were adopted.

It has been indicated, for example, that five million taxpayers could see tax reductions if the standard individual income tax deduction were raised to TWD128,000 (USD4,040) from the present TWD90,000.

It has also been suggested that there could be a realignment of the individual income tax rates of up to 45 percent payable by domestic investors on dividends received, and the flat 20 percent payable by foreign investors.

It was said the tax cuts are possible because tax revenues have been higher than expected so far this year, despite weak economic growth.

Australian Backpacker Tax 'To Raise More Than Expected'

The Australian Treasury has underestimated the revenue the Government will receive from the so-called "backpacker tax," according to Australian Chamber – Tourism (ACT).

The ACT is the tourism advocacy body of the Australian Chamber of Commerce and Industry. Its chairman, John Hart, appeared before the Senate inquiry into reform of the Working Holiday Maker rules.

He presented the ACT's submission to the inquiry, which included research commissioned from Lateral Economics into the impact of removing the tax-free threshold from working holidaymakers and subjecting their earnings to a 19 percent tax.

Hart said: "Treasury estimated that it would collect AUD120m (USD90.9m) in a full year from a 19-cent-in-the-dollar base tax rate, but Lateral Economics says that figure would be AUD232m."

In its submission, the ACT said that removing the tax-free threshold for working holidaymakers "will constrict labor supply for tourism businesses … [and] have a negative impact on the economy, particularly regional economies, as taxation is substituted for direct spending in local businesses." However, it added that, "as the Government has made revenue targets the clear bottom-line objective, [the ACT] supports the 19 percent rate combined with measures to increase demand."

The ACT recommended that the proposal be passed by parliament, subject to the Government undertaking a review of whether revenue from the measure is meeting or exceeding targets, the impact on labor supply, and the demand for working holidaymaker visas.

In September, the Cabinet agreed to set the tax rate applying to working holidaymakers at 19 percent on earnings up to AUD37,000, with ordinary marginal tax rates applicable after that threshold. The new rate will apply from January 1, 2017.

The 2016 Budget, introduced in March, included a proposal to reform the tax residency rules to treat most working holidaymakers temporarily in Australia as non-residents for tax purposes, meaning that they would no longer be able to access the tax-free threshold. According to Budget documents, the aim was to "ensure that these people are taxed at 32.5 percent from their first dollar of income up to AUD80,000"

The tax-free threshold for Australian residents is AUD18,200. Afterwards, the following rates apply: 19 percent to income between AUD18,201 and AUD37,000; 32.5 percent to income between AUD37,001 and AUD87,000; 37 percent to income between AUD87,001 and AUD180,000; and 45 percent to income over AUD180,001. The Government recently passed legislation to increase the threshold for the 37 percent rate from AUD80,000 to AUD87,000.

To offset the impact of reducing the backpacker tax to 19 percent, the Government will increase the tax on working holidaymakers' superannuation payments when they leave Australia to 95 percent. In addition, the Passenger Movement Charge (PMC) for all passengers departing Australia will be increased by AUD5 to AUD60 from July 1, 2017.

The package is designed to raise at least the AUD220m a year that it was originally estimated the 32.5 percent backpacker tax would raise.

The ACT said the PMC hike should be rejected, on the basis that adequate revenue will be derived from the related income tax and superannuation changes. It said there has been no assessment of the impact of the higher PMC rate on the competitiveness of Australia's visitor economy, and that any future proposal to increase the rate should be made in consultation with the sector.

Hart commented: "Tourism is a rapidly growing contributor to Australia's balance of trade. Tourism-related exports consistently earn more than goods categories including rural goods and the coal trade. The PMC increase will make Australia less competitive as a destination for international tourism. Given the revenue is not needed to meet the Government's target it should be reconsidered."

US Commerce Chamber Supports Bill Against New Estate Tax Rules

The US Chamber of Commerce (Commerce) wrote a letter on October 24 in support of the legislation introduced in the House of Representatives that would eliminate the proposed changes to Section 2704 of the Internal Revenue Code on estate and gift tax valuation discounts.

The proposed Protect Family Farms and Businesses Act, introduced by Warren Davidson (R – Ohio), would prevent the Treasury Department's new Section 2704 rules, or any future similar regulations, from having any "force or effect."

Under present regulations, the fair market value of an interest in a family-held business where no current market is available is based on the "willing-buyer/willing-seller" test. However, the proposed rules would allow the Internal Revenue Service to produce significantly higher valuations by disregarding any lack of marketability from restrictions on liquidation or redemption that an heir can currently use to claim a valuation discount.

Commerce said "the proposed Treasury rules hurt the ability of businesses to apply proper valuation discounts for estate, gift, and generation-skipping taxes. These valuation discounts promote the continuation of family businesses by making it advantageous to transfer interests during life to children, which makes them more inclined to stay with the business, as compared to a situation where the parents hold on to assets during their lives and give them up only at death."

"In short," it added, "valuation discounts promote the flow of wealth to younger generations, which is good for the economy and the continuation of family businesses." Commerce stated that it would "prefer Treasury not take action to discourage or limit the ability for businesses to be passed on," and supported Davidson in his efforts "to prevent this backdoor estate tax hike."

IMF Works To Address Caribbean 'De-risking' Woes

The International Monetary Fund (IMF) has set out the actions being taken and further possible options to address bank de-risking for Caribbean nations.

"De-risking" refers to the practice of international commercial banks to withdraw from correspondent banking relationships with territories considered to be higher risk. Caribbean territories have been impacted in particular. De-risking has involved the sale of subsidiaries, banks ceasing to provide some types of banking services, and the closure of client accounts.

While acknowledging there is "no quick fix" to the problem, the IMF said actions that could be taken include addressing the problem of economies of scale, mitigating cost and technical limitations, and improving information flows.

It has been said that doing business in the Caribbean is no longer financially sustainable, as the cost of complying with the increasing volume of financial regulations is outweighing the potential benefits of continuing existing relationships with the region.

The IMF said small Caribbean banks could bundle transactions and potentially create the economies of scale required for global banks to maintain banking services.

To mitigate cost and technical limitations, the IMF urged that technology be used to reduce compliance costs and strengthen "know-your-customer" (KYC) frameworks. For example, one approach may be to take advantage of KYC software utilities, which store customer due-diligence information in a single repository and allow easy access to bank customer information.

The IMF said steps should be taken to improve the information flow between correspondent banks and respondent banks, including removing legal and contractual obstacles to sharing information across institutions and borders, such as data privacy laws and diverging regulatory frameworks.

The IMF reiterated its commitment to helping the Caribbean region resolve its banking challenges and to identifying concrete policy options. The IMF said that it is in the process of preparing a paper on the issue.

BVI Regulator Says Banking Sector Healthy

The British Virgin Islands Financial Services Commission, which regulates the territory's financial services industry, recently expressed confidence in the banks under its supervision.

The Commission's statement appears to have been prompted by concern it expressed earlier in the year over the health of the state-owned National Bank, which has recently come to light. The Government, in a widely reported statement in response to local media reports, said: "It is indeed fact that the Financial Services Commission did have some concerns in respect to the size of the Non-performing Loan Portfolio of the bank … these concerns were addressed immediately by the Bank in consultation with Central Government and the [Commission] itself."

The Commission said that while it was unable to comment on the financial condition of any individual financial institution operating in the BVI, banks licensed in the territory are "well capitalized and operate with adequate levels of liquidity, which are good indicators of their strength," adding that it does "not foresee any failure in the British Virgin Islands banking sector."

The Commission said it is committed to the effective supervision of all BVI licensed financial institutions and confident in its regulatory procedures and processes. When matters of concern are identified, it routinely engages the financial institution to satisfactorily resolve them, it said.

Governments Easing Tax And Regulation Burdens

The latest edition of the World Bank's Doing Business report shows there has been a steady improvement in regulatory efficiency around the world over the last ten years, including in the area of taxation.

The World Bank reported "continued successes in the ease of doing business worldwide, as governments increasingly take up key business reforms."

Doing Business 2017 finds that in the past year alone, a record 137 economies around the world have adopted key reforms that make it easier to start and operate small or medium-sized businesses. Starting a new business now takes an average of 21 days worldwide, compared with 46 days a decade ago.

This year's report also observes a growing trend towards simplification of tax compliance, with 443 reforms having been recorded under the Paying Taxes indicator since 2004 – the second-highest number of reforms under all indicators – with 46 tax reforms implemented in the past year.

In the area of tax administrative improvements, the World Bank highlights the case of the Philippines, which required a medium-sized company to make 48 tax payments per year a decade ago, but just 28 this year.

However, it is the United Arab Emirates and Qatar that jointly top the Paying Taxes sub-index, with both jurisdictions requiring companies to make just four payments annually, a process that takes 12 and 41 hours per year, respectively.

Hong Kong, Bahrain, Ireland, Kuwait, Denmark, Singapore, Macedonia, and the UK make up the remainder of the top ten.

Somalia sits at the foot of the Paying Taxes sub-index, below (in ascending order) Eritrea, Libya, Venezuela, and South Sudan.

The overall 2017 Doing Business index is topped by New Zealand, followed by Singapore in second place and Denmark in third. The remainder of the top ten (in descending order) includes Hong Kong, South Korea, Norway, the UK, the US, Sweden, and Macedonia.

Commenting on the report, Augusto Lopez-Claros, Director of the World Bank's Global Indicators Group, which produces the report, said: "Government policy plays a huge role in the daily operations of domestic small and medium-sized firms and onerous regulation can divert the energies of entrepreneurs away from developing their businesses or innovating. This is why we collect the Doing Business data, to encourage regulation that is designed to be smart, efficient, accessible, and simple."

Western Australian Nationals Unveil Payroll Tax Cut Plans

The Western Australian Nationals have announced plans for "sweeping changes" to the state's payroll tax framework, to be funded by a hike in the iron ore tax paid by Rio Tinto and BHP Billiton.

Party leader Brendon Grylls outlined the proposals in a speech to the Nationals' annual state conference. He explained: "Under our plan, the Nationals WA will increase the payroll tax exemption from AUD850,000 (USD645,873) to AUD5m for a period of two financial years. It will also see the diminishing threshold retained for businesses with a wage bill between AUD5m and AUD7.5m, offering further tax relief."

Grylls added that the party would introduce a Small Business Kick-start Grant, worth AUD5,000 per employee for non-payroll taxable small businesses that create new jobs and maintain the positions for one year.

When he was elected leader in August, Grylls announced that the Nationals will aim to increase the production rental in the State Agreements with Rio Tinto Iron Ore and BHPB Iron Ore from 25 cents to AUD5 per tonne. He argued at the time that the measure would return the budget to surplus, "and give us scope to discuss new policy settings like a reduction in payroll tax for small and medium businesses."

In his party conference speech, Grylls confirmed that the envisioned payroll tax reforms would be funded by the trailed production rental hike. "It is our aim to deliver payroll tax reform over the long term, however this cannot happen unless the state's finances are in order," he said.

The Nationals are the junior party in the state's Liberal-National ruling coalition. The state will hold elections in March 2017.

Kuwait To Introduce VAT From 2018

Kuwait will join Gulf Cooperation Council (GCC) countries in applying a value-added tax (VAT) from 2018, local reports covering a recent conference confirmed.

Kuwait Times reported that the Finance Ministry is working with Ernst & Young to develop the regime.

Financial services, education, and basic foodstuffs would be exempt, it reported, and a rate of no more than 5 percent would be levied.

In a meeting on June 16, 2016, the GCC Ministers of Finance approved in principle

VAT and excise tax treaties, providing a common framework for the development of national regimes.

The agreements pave the way for the introduction of harmonized excise duties from January 1, 2017, and a pan-GCC VAT framework from January 1, 2018.

The GCC is comprised of Saudi Arabia, the United Arab Emirates, Bahrain, Kuwait, Qatar, and Oman.

EU Relaunches Common Consolidated Corporate Tax Base Plan

On October 25, the European Commission released its proposals for the relaunch of its common consolidated corporate tax base (CCCTB) initiative and announced two other corporate tax reform measures – on hybrid mismatches and dispute resolution.

The CCCTB had earlier been proposed in 2011, but was rejected by member states. In the hopes of gaining approval this time, the CCCTB has been broken down to a two-step process. First, harmonized rules would be introduced on how to calculate a company's tax base in all member states. After that, tax revenues would be collected and distributed among member states under a formulary apportionment approach, whereby revenues would be allocated based on factors such as turnover, sales, and employment levels.

The Commission said the primary goal of the CCCTB proposal is to strengthen the EU Single Market by making it easier and cheaper for companies to operate cross-border in the EU. It argued that it would enable them to file a single tax return for all their activities in the EU through one tax authority, rather than having to file a tax return in every country where they operate. In addition, after the second phase, companies would be able to offset losses in one member state against profits in another.

The Commission said, under the CCCTB, the time spent by companies on annual compliance activities should decrease by 8 percent, while the time spent setting up a subsidiary would decrease by up to 67 percent, making it easier for companies, including SMEs, to set up abroad.

The CCCTB would eliminate mismatches between national systems and preferential corporate tax regimes, and the formulary apportionment approach would remove the need for transfer pricing rules for related-party dealings within the EU.

The CCCTB would be mandatory for the biggest multinational groups operating in the EU. The Commission said companies with global revenues exceeding EUR750m (USD820m) a year will be taxed "where they really make their profits."

Pierre Moscovici, Commissioner for Economic and Financial Affairs, Taxation and Customs, said: "With the rebooted CCCTB proposal, we're addressing the concerns of both businesses and citizens in one fell swoop. The many conversations I've had as Taxation Commissioner have made it crystal-clear to me that companies need simpler tax rules within the EU. At the same time, we need to drive forward our fight against tax avoidance, which is delivering real change. Finance ministers should look at this ambitious and timely package with a fresh pair of eyes because it will create a robust tax system fit for the 21st century."

Alongside the release of the CCCTB, the Commission has proposed an improved system to resolve double taxation disputes in the EU. It has proposed that current dispute resolution mechanisms should be adjusted to better meet the needs of businesses. In particular, a wider range of cases will be covered, and member states will have clear deadlines to agree on a binding solution to double taxation.

The final proposal is intended to prevent hybrid mismatches between the tax systems of member states and non-EU countries. Hybrid mismatches occur when countries have different rules for taxing certain income or entities, and this can be abused to achieve double non-taxation. The Anti-Tax Avoidance Directive, agreed in July, already addresses mismatches within the EU, but the new proposal would also tackle mismatches with non-EU countries.

Ireland Likely To Reject EU's 'Harmful' CCCTB Proposals

The proposed EU Common Consolidated Corporate Tax Base (CCCTB) would have a "significant" impact on the tax base of Ireland if implemented, advisory firm Grant Thornton says.

In response to the CCCTB proposals, which were released by the European Commission in updated form on October 25, Grant Thornton partner Peter Vale said the consolidation aspect of the common tax base would likely result in a "major reallocation" of taxable profit from Ireland, and an erosion of the effectiveness of Ireland's competitive 12.5 percent corporate tax rate.

"The CCCTB is essentially a two-part exercise," Vale observed. "The 'Common' piece seeks to ensure that all EU states calculate their taxable profits in a similar manner. The second part is 'Consolidation,' which means that the profits of the enterprise are then allocated across relevant EU member states using a prescribed formula."

"Of most concern to Ireland is the [Consolidation] piece of the proposals, as the formula places emphasis on employee numbers, sales, and assets," he continued. "This will likely see a relatively small amount of the enterprise's profits allocated to a small economy such as Ireland, thus significantly eroding the benefit of our low tax rate."

Last year, a report by Chartered Accountants Ireland (CAI) attempted to quantify the potential damage to Ireland's corporate tax base posed by the CCCTB proposals. It found that around one-sixth, or EUR700m (USD760m), of Ireland's annual corporation tax revenues come from the manufacture of pharmaceuticals. However, the report said that, as only 1 percent of the sales of pharmaceuticals in the EU takes place in Ireland, if the tax base for pharmaceuticals was based on the location of sales, Ireland could potentially see a 90 percent reduction in the tax base.

"Under a CCCTB-style apportionment based on capital, sales, and labor, Ireland's share of the tax base from pharmaceuticals could be around 80 percent lower than it is now. The potential loss of annual corporation tax revenue for Ireland under these scenarios is between EUR575m and EUR650m," CAI said.

Although the prospects of the CCCTB reaching implementation stage are "remote," given that it must be approved by every member state, Vale said it would be better if the EU were to put the proposals on hold until the OECD's base erosion and profit shifting project is at a more advanced stage.

"The general view in Ireland is that many of the issues that CCCTB seeks to address are being dealt with through the BEPS process and at a minimum CCCTB should be set aside until the outcome of BEPS is clearer," he said, although he conceded: "This is not a path favored by the Commission at present."

BRUNEI - KUWAIT

Signature

Brunei and Kuwait signed a DTA Protocol on October 11, 2016.

CANADA - SAN MARINO

Negotiations

The Canadian Government recently disclosed that it intends to conclude DTA negotiations with San Marino.

CHILE - ARGENTINA

Effective

The new DTA between Chile and Argentina will become effective from January 1, 2017, it was announced on October 17, 2016.

ECUADOR - QATAR

Forwarded

Ecuador's National Assembly on September 22, 2016, approved a DTA with Qatar.

EUROPEAN UNION - MONACO

Forwarded

The European Council on October 11, 2016 agreed a deal with Monaco to automatically exchange information on financial accounts.

FINLAND - SPAIN

Legislation

The introduction of a new DTA between Finland and Spain will be delayed by at least one year, it was announced on October 7, 2016.

GEORGIA - KYRGYZSTAN

Signature

Georgia on October 13, 2016, confirmed the signing of a DTA with Kyrgyzstan.

GUERNSEY - SEYCHELLES

Effective

Guernsey's DTA with the Seychelles became effective on October 6, 2016.

INDIA - KOREA, SOUTH

Effective

The DTA between India and South Korea will become effective from January 1, 2017.

JAPAN - INDIA

Into Force

The Protocol to the DTA between Japan and India entered into force on September 29, 2016.

JAPAN - SLOVENIA

Signature

Japan and Slovenia have signed a DTA, the Japanese Ministry of Foreign Affairs announced on September 30, 2016.

KAZAKHSTAN - SERBIA

Ratified

Kazakhstan's Senate on September 29, 2016, ratified the DTA with Serbia.

KOREA, SOUTH - HONG KONG

Effective

The comprehensive DTA between South Korea and Hong Kong, which was signed on July 8, 2014, came into effect on September 27, 2016.

KOREA, SOUTH - SINGAPORE

Signature

On October 14, 2016 South Korea signed an automatic tax information exchange deal with Singapore.

POLAND - TAIWAN

Signature

Poland and Taiwan signed a DTA on October 21, 2016.

PORTUGAL - ANDORRA

Forwarded

Portugal's Council of Ministers on September 22, 2016, approved the DTA with Andorra.

SAINT KITTS AND NEVIS - GERMANY

Ratified

Saint Kitts and Nevis on September 19, 2016, ratified the TIEA signed with Germany.

SAUDI ARABIA - JORDAN

Signature

Saudi Arabia and Jordan signed a DTA on October 19, 2016.

SINGAPORE - JAPAN

Signature

Singapore and Japan have agreed to automatically exchange financial account information under the OECD's Common Reporting Standard.

UNITED ARAB EMIRATES - EQUATORIAL GUINEA

Signature

The UAE and Equatorial Guinea signed a DTA on October 19, 2016.

UNITED STATES - ARGENTINA

Negotiations

Speaking on September 26, US Treasury Secretary Jack Lew disclosed that the US and Argentina are to negotiate a comprehensive DTA.

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 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

Introduction to US International Tax – Houston

11/14/2016 - 11/15/2016

Bloomberg BNA

Venue: Morgan Lewis, 1000 Louisiana Street #4000, Houston, TX 77002, USA

Key speakers: TBC

http://www.bna.com/introhouston2016/

Principles of International Taxation – New York

11/14/2016 - 11/15/2016

Bloomberg 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/prinintltax2016/

Intermediate US International Tax Update – Houston

11/16/2016 - 11/18/2016

Bloomberg BNA

Venue: Morgan Lewis, 1000 Louisiana Street #4000, Houston, TX 77002, USA

Key speakers: TBC

http://www.bna.com/interhouston2016/

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

11/30/2016 - 12/1/2016

Bloomberg 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

Taxation of Financial Products and Transactions 2017

1/17/2017 - 1/17/2017

PLI

Venue: PLI New York Center, 1177 Avenue of the Americas, (2nd floor), entrance on 45th Street, New York 10036, USA.

Chair: Matthew A. Stevens (EY)

http://www.pli.edu/Content/Seminar/Taxation_of_Financial_Products_and_Transactions/_/N-4kZ1z10p5p?ID=288675

International Tax and Estate Planning Forum: Around the Globe in 2017

5/4/2017 - 5/5/2017

STEP

Venue: Surf & Sand Resort, 1555 South Coast Highway, Laguna Beach, CA, USA

Key speakers: TBC

http://www.step.org/events/international-tax-and-estate-planning-forum-around-globe-2017

Transcontinental Trusts: International Forum 2017

5/4/2017 - 5/5/2017

Informa

Venue: The Fairmont Southampton, 101 South Shore Road, Southampton, SN02, Bermuda

Key speakers: TBC

http://www.iiribcfinance.com/event/transcontinental-trusts-bermuda

ASIA PACIFIC

Digital Economy Symposium: New Age Tax, Accounting and Valuation Issues

11/14/2016 - 11/14/2016

IBFD

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

Key speakers: Robert Thomson (Australian Taxation Office), Prof. Mary Barth (Stanford University), Prof. Dr Jeffrey Owens (Vienna University), Sunil Golecha (Thomson Reuters), among numerous others.

http://www.ibfd.org/IBFD-Tax-Portal/Events/Digital-Economy-Symposium-New-Age-Tax-Accounting-and-Valuation-Issues

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

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

AML, Financial Crime & Sanctions Forum - Cyprus

12/6/2016 - 12/6/2016

Infoline

Venue: TBC, Nicosia, Cyprus

Chair: Marios Skandalis (Bank of Cyprus)

https://finance.knect365.com/aml-financial-crime-and-sanctions-forum-cyprus/

MIDDLE EAST AND AFRICA

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

3rd IBFD Africa Tax Symposium

5/10/2017 - 5/12/2017

IBFD

Venue: Labadi Beach Hotel, No 1 La Bypass, Accra, Ghana

Key speakers: TBC

http://www.ibfd.org/IBFD-Tax-Portal/Events/3rd-IBFD-Africa-Tax-Symposium#tab_program

WESTERN EUROPE

ITPA Rome November 2016 Meeting

11/6/2016 - 11/8/2016

itpa

Venue: The St Regis Hotel, Via Vittorio Emanuele Orlando, 3, 00185 Roma, Italy

Chairs: Milton Grundy (Gray's Inn Tax Chambers), Paolo Panico (Private Trustees SA)

https://www.itpa.org/meeting/london-june-2016/

Update for the Accountant in Industry & Commerce

11/8/2016 - 11/9/2016

Wolters Kluwer

Venue: Grand Harbour Hotel, W Quay Rd, Southampton, SO15 1AG, 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

International Tax Aspects of Permanent Establishments

11/8/2016 - 11/11/2016

IBFD

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

Key speakers: Bart Kosters (IBFD), Jan Snel (Baker & McKenzie), Giulia Gallo (IBFD), Andreas Perdelwitz (IBFD), among numerous others

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

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/

Update for the Accountant in Industry & Commerce

11/15/2016 - 11/16/2016

Wolters Kluwer

Venue: Sofitel London Gatwick, Gatwick Airport, North Terminal, Northway, Horley, Crawley, RH6 0PH, 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

Coordinated European Planning & Taxation

11/16/2016 - 11/16/2016

Private Client Tax

Venue: TBC, London, UK

Key speakers: Beatrice Puoti (Burges Salmon), Richard Frimston (Russell Cooke), Daniel Bader (Bar & Karrer), Sonia Velasco (Cuatrecasas Gonçalves Pereira), Caroline Cohen (The French Law Practice), Dominic Lawrance (Charles Russell Speechlys), among numerous others.

https://finance.knect365.com/coordinated-european-planning-taxation

US/UK Tax & Estate Planning 2016 Conference

11/17/2016 - 11/17/2016

Private Client Tax

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

Chair: Iain Younger (Frank Hirth)

https://finance.knect365.com/usuk-tax-and-estate-planning/agenda/1

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

International Tax Audit Forum Munich

11/21/2016 - 11/22/2016

IBFD

Venue: BMW Welt, Am Olympiapark 1, 80809 München, Germany

Chair: Rudolf Mellinghoff (President of the Federal Supreme Court of Finance)

http://www.taxauditforum.eu/Program.html

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 Nobes (University of London, University of Sydney), among numerous others.

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

UK HNW Immigration: Post Brexit

11/23/2016 - 11/23/2016

Private Client Tax

Venue: TBC, London, UK

Key Speakers: Jonathan Burt (Harcus Sinclair), Dr Jean-Philippe Chetcuti (Chetcuti Cauchi Advocates), Neil Micklethwaite (Brown Rudnick), James Perrott (Macfarlanes), Elizabeth Henson (PwC), Julia Onslow-Cole (PwC Legal).

https://finance.knect365.com/family-tax-wealth-planning-for-uk-hnw-immigration/agenda/1

Offshore Taxation 2016

11/24/2016 - 11/24/2016

Private Client Tax

Venue: TBC, London, UK

Key speakers: Imran Afzal (Field Court Tax Chambers), Giles Clarke (Offshore Taxation), Patrick Soares (Field Court Tax Chambers), Philip Baker QC (Field Court Tax Chambers), Emma Chamberlain (Pump Court Tax Chambers).

https://finance.knect365.com/offshore-taxation/

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

Practical Implications of CRS

12/7/2016 - 12/7/2016

Informa

Venue: TBC, London, UK

Chair: Filippo Noseda (Withers)

https://finance.knect365.com/crs-implications/agenda/1

Taxation of Collective Investment Schemes

12/7/2016 - 12/7/2016

Informa

Venue: TBC, London, UK

Chair: Malcolm Richardson (M&G Investments)

https://finance.knect365.com/taxation-of-collective-investment-schemes-conference/agenda/1

Tax & Accounting for Oil & Gas Companies

12/7/2016 - 12/8/2016

Informa

Venue: TBC, London, UK

Key Speakers: Greg Stinson (KPMG), Preben Joker Thorsen (Maersk Oil), Zoe Leung-Hubbard (HMRC), Alan McCrae (PwC), among numerous others https://finance.knect365.com/tax-and-accounting-for-oil-gas-companies-conference/agenda/1

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

http://www.ibfd.org/Training/International-Taxation-Oil-and-Gas-and-Other-Mining-Activities-0

The New Tax Planning For Non-Domiciliaries – Legislation Changes & Updates

12/8/2016 - 12/8/2016

Private Client Tax

Venue: TBC, London, UK

Chair: Beatrice Puoti (Burges Salmon)

https://finance.knect365.com/tax-planning-for-non-domiciliaries/agenda/1

Court of Justice of the European Union: Recent VAT Case Law

1/11/2017 - 1/13/2017

The Institute for Austrian and International Tax Law

Venue: WU (Vienna University of Economics and Business), LC building on the New Campus, Welthandelsplatz1, 1020 Vienna, Austria

Chairs: Donato Raponi (European Commission), Antonio Victoria-Sanchez (European Commission), Michael Lang (WU)

https://www.wu.ac.at/en/taxlaw/conferences-seminars-lectures-events/recent-vat-case-law-conference/

6th Annual IBA Tax Conference

1/30/2017 - 1/31/2017

International Bar Association

Venue: TBC, London, UK

Key Speakers: TBC

http://www.ibanet.org/Conferences/conf779.aspx

Global Transfer Pricing Conference

2/22/2017 - 2/24/2017

WU Transfer Pricing Center at the Institute for Austrian and International Tax Law

Venue: WU (Vienna University of Economics and Business), Welthandelsplatz 1, 1020 Vienna, Austria

Key speakers: Krister Andersson (Lund University, Joe Andrus (OECD), Piero Bonarelli (UniCredit), Melinda Brown (OECD), among numerous others

https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/transfer_pricing_center/TP_Conf/Global_TP_Conference_2017_-_Brochure_19.8..pdf

22nd Annual International Wealth Transfer Practices Conference

3/6/2017 - 3/7/2017

International Bar Association

Venue: Claridge's, Brook Street, London, W1K 4HR, UK

Key speakers: TBC

http://www.ibanet.org/Conferences/conf771.aspx

CENTRAL AND EASTERN EUROPE


A listing of recent key international tax cases.

Albania

Albania's natural resources agency has decided to appeal against a recent arbitration ruling in favor of Canadian firm Bankers Petroleum ("Bankers") in its tax dispute with the Albanian Government.

The dispute centered on expenditure that the company offset against profit tax in 2011. The Albanian National Agency for Natural Resources (AKBN) was of the view that the expenditure was outside the scope of the company's Petroleum Agreement and License Agreement, and the country subsequently issued Bankers with a USD57m bill for back taxes. This was subsequently appealed by the firm.

Bankers obtained a commitment from the AKBN to engage a third-party international auditor to resolve the tax dispute in September 2015.

The third-party audit was conducted by a joint panel of individuals from PricewaterhouseCoopers and Navigant Consulting Company, and according to an August 29 statement by Bankers, this panel determined that the company correctly stated its 2011 expenses as cost recoverable according to the Petroleum Agreement and the License Agreement.

According to Bankers, all parties committed to using the results of this third party audit as the basis for determining recoverable petroleum costs in subsequent years.

However, in an announcement on October 24, the AKBN said it has decided to appeal the decision in the International Court of Arbitration, after consulting with the Ministry of Energy and the State Advocacy.

The AKBN argued that the issue remains "of public interest," adding that it is "convinced that the details found in the audit report, which were rejected by the experts, will be sufficient for [the International Court of Arbitration] to give the right to the Albanian state."

http://www.akbn.gov.al/national-agency-of-natural-resources-seeks-arbitration-on-audit-report-in-tax-dispute-with-bankers-petroleum/?lang=en

International Court of Arbitration: *Albanian National Agency for Natural Resources v. Bankers Petroleum*

MIDDLE EAST AND AFRICA

South Africa

On October 3, the Supreme Court of Appeal (SCA) dismissed an appeal by a local company against an order of the Tax Court applying value-added tax (VAT) on package tours supplied to foreign tour operators and individuals.

The taxpayer, XO, argued that the payments that it received from the non-resident operators for its package tour services should not attract VAT at the standard 14 percent rate, but should be zero-rated according to the terms of the VAT Act, on the basis that they were payments for services supplied to persons who were not resident in South Africa, and also that it was not present itself at the time the services were rendered to the non-resident customers.

The SCA rejected this argument, and held that XO had not provided only a booking service to foreign tour operators. In the various contracts XO had entered into, the SCA pointed out that it had undertaken to provide some local services itself, and had made sure that the services were "properly rendered" by local service providers.

In addition, XO had treated the payments it made to local service providers as expenses and had deducted input VAT from those payments, while treating the total invoiced amounts to foreign tour operators as sales, it explained. The SCA stated this also is not consistent with the firm's assertion that it had only provided a booking service to foreign tour operators.

The SCA additionally found that, while the foreign tour operators may have been the party contracting with XO, the services were ultimately for the benefit of the foreign tour operators' customers, and the services were rendered to those customers while they were present in South Africa.

http://www.justice.gov.za/sca/judgments/sca_2016/sca2016-160ms.pdf

South Africa's Supreme Court of Appeal: *XO Africa Safaris v. Commissioner of the South African Revenue Service*

WESTERN EUROPE

Luxembourg

Advocate General Kokott of the European Court of Justice (ECJ) has opined that the Court should return a ruling that Luxembourg has erred in EU law concerning the VAT system that it applies to independent groups of persons.

Under the VAT Directive, certain services supplied by a group to its members are exempt from VAT to avoid making operations downstream more expensive for these members, given that the VAT cannot be deducted. Strict conditions must be complied with in order to benefit from the exemption.

Under Luxembourg law, the services provided by an independent group to its members are free from VAT provided that the members' taxed activities do not exceed 30 percent (or 45 percent under certain conditions) of their annual turnover. Group members are also allowed to deduct the VAT charged to the group on its purchases of goods and services from third parties. Lastly, operations by a member in his or her own name but on behalf of the group are regarded as outside the scope of VAT.

Under EU law, in order to be exempt from VAT, the services provided by an independent group to its members must be directly required for their non-taxable or exempt activities. The Luxembourg rule providing for a ceiling for taxed operations does not fulfill this condition, the Commission had argued. Moreover, group members should not be allowed to deduct VAT charged to the group, it said.

Advocate General Kokott agreed with the Commission's contention that such arrangements are likely to distort competition within the Single Market and are thus contrary to EU law.

The opinion was released on October 6, 2016.

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5ff75bc3d05584674b2dce5b0613400a8.e34KaxiLc3qMb40Rch0SaxyKahj0?text=&docid=184341&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=916676 *(In French)*

European Court of Justice: *Commission v. Luxembourg (C-274/15)*

Switzerland

UBS has been granted "party status" by a Swiss court in the ongoing administrative assistance procedures initiated by the French tax authorities, allowing the bank to have a greater say in the handover of bank account data to France.

According to a statement from Switzerland's Federal Administrative Court (FAC), which ruled on the matter on October 25 (Judgment A-4974/2016), UBS was granted party status in light of the "special circumstances" of the case. As a result, the Federal Tax Administration (FTA) must allow UBS to inspect the files and serve it with all final decisions.

The FAC noted that the bank has been asked to hand over to France information on an unusually high number of banks accounts linked to French citizens – said to be in the five-digit region.

Normally, financial institutions in Switzerland involved in administrative assistance proceedings act only as a provider of requested information to the FTA and have no right to take part in the procedure as a "party." However, the FAC decided to make an exception in this case because the large amount of data requested "creates an incomparably high workload to UBS."

Significantly, the FAC also granted the bank party status to help protect its reputation, arguing that "the unusually high number of clients concerned by the request for administrative assistance could leave one with the impression that UBS systematically helped clients to evade taxes."

The FAC also raised the possibility that the data might be used in criminal proceedings already launched against UBS in France in its reasoning.

However, the FAC emphasized that UBS can only challenge the tax authority's final decisions, and not the order to hand over the data in the first place.

"The FAC has not dealt with the question whether the request for administrative assistance itself is admissible," the court confirmed.

It is believed that the French administrative request, which was sent to the FTA on May 11, 2016, is based on information passed on by German authorities, and involves around 45,000 bank accounts.

http://www.bvger.ch/index.html?lang=en&download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1ad1IZn4Z2qZpnO2Yuq2Z6gpJCDdYB_fGym162epYbg2c_JjKbNoKSn6A--

Swiss Federal Administrative Court: *UBS v. Direction Générale des Finances Publiques (Judgment A-4974/2016)*

Dateline November 3, 2016

Global competitive rankings, like the latest Doing Business Index from the World Bank, often throw up some surprising results. **New Zealand** usually performs well in such surveys, but who would have thought that it is literally the best place in the world to set up and run a company from a regulatory, administrative, and tax point of view – better even than low-tax Singapore, according to Doing Business 2017?

Or, perhaps even more startling, that **Denmark** – yes, high-tax, high-spend Denmark, the object of derision from the right and praise from the left during the US presidential election campaign – is the third best place to operate a firm, exceeding *laissez-faire* Hong Kong as a business location? Similarly, **Sweden's** brand of social democracy is often criticized as overbearing and fiscally unsustainable. Yet, Sweden is just behind the **United States** in ninth place.

If these results seem scarcely credible, it is probably because we are looking at them through a tax-focused lens. And Doing Business shows there are a whole host of other considerations that go into the mix when investors decide where to set up a business.

New Zealand's top score is attributable to several non-tax factors, including simple company formation and property registration procedures, hassle-free construction permit processes, strong minority investor protections, and the ease with which credit can be obtained. Sweden also scores quite highly in most of these categories, excelling particularly in the "getting electricity" segment of the index. It doesn't fare as well when it comes to getting credit or paying taxes though.

The opposite also holds true; there are countries that you'd think would be occupying the top spots in the league table but are only fair-to-middling, like **Switzerland**. Doing Business tells us that Switzerland's taxes are not overly difficult to comply with, but that it's not a great place to start a business in a hurry, or to get credit. Dealing with construction permits is also difficult, and protecting minority shareholders virtually impossible.

On the other hand, some of the findings are not so surprising for those who follow international tax developments. For instance, it doesn't come as a huge shock to find **France** down in 29th place. But, given that the index includes 190 jurisdictions, this still isn't a disastrous score. And I'm sure the fact that France finished ahead of Switzerland in the table – two countries with something of tense relationship around tax and banking secrecy rules, as illustrated by the French tax authority's recent request for an unusually large amount of data from UBS – wasn't entirely lost on the French Government.

Indeed, we are living in an era where the normal order of things is being shaken up on a regular basis. Think Brexit, Trump versus Clinton, and, perhaps the most unexpected event of all, India adopting legislation for a goods and services tax (GST). We can now add to that list **Wallonia's** entrance onto the world diplomatic stage.

When you think about it, perhaps the most surprising thing about Wallonia's part in delaying the eagerly anticipated free trade agreement between the **European Union and Canada** (CETA) is that something similar hasn't happened before.

The EU has negotiated several complex trade agreements in its history, so it makes you wonder why the Walloons and their French-speaking regional allies chose this moment to make their voices heard. Whatever the reason, it doesn't bode well for future trade negotiations involving the EU, as European Council President Donald Tusk has already warned. As if getting a consensus among 28 countries wasn't difficult enough, the EU will cease to function at all if the EU's sub-national governments insist on having a say as well.

If I was a member of the UK's **Brexit** negotiating team (assuming there is one), I'd be very worried indeed by this development. But how realistic is it that Brexit negotiations will be completed in the two years permitted by Article 50 anyway? FTAs are rarely completed so briskly. The CETA negotiations took five years to complete, the EU's FTA with Vietnam clocked in at well over three years, and its FTA with Singapore took four and a half.

It's almost impossible to predict what the outcome of Brexit will be, or how long things will take to resolve. But whatever happens, there are bound to be more surprises along the way.

Still, with the UK seemingly intent on leaving the EU, at least it won't have to get its head around the **common consolidated corporate tax base** (CCCTB), proposals for which were released in repackaged form by the European Commission last week. The main difference between the "new" CCCTB plan and the old one is that it will be rolled out in two stages: the common tax base for companies first, and the consolidation bit later.

However, this is a tacit acknowledgement by the Commission that the CCCTB will be difficult, if not impossible, to deliver. This is because the legislation will need to be agreed by all member states, and, because of the way revenues are apportioned under the proposal, some of those member states, particularly the small ones, stand to lose out heavily. One such is Ireland, which, according to a 2015 Chartered Accountants Ireland study, could see a 90 percent reduction in its corporate tax share under the CCCTB.

And if tiny Wallonia can stymie an international trade agreement, Ireland and other like-minded smaller EU member states may well feel more emboldened to throw the spanner in the CCCTB works.

The Jester