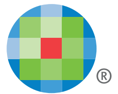

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GLOBAL TAX WEEKLY
a closer look

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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

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Global Tax Weekly – A Closer Look

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GLOBAL TAX WEEKLY
a closer look

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The unacceptable face of tax journalism

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US Tax Compliance And Planning For US Executives, Entrepreneurs And Investors Living Outside The US: Part 11

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This is the eleventh article in a series of articles on key US tax compliance and planning issues that should be considered by US executives, entrepreneurs and investors living outside the United States. This article will discuss the compliance issues associated with Foreign Pass-Through Entities and Partnerships.

Dealing With Foreign Pass-Through Entities And Partnerships: Forms 8858 And 8865

US Persons [1] are subject to citizenship-based taxation. A US Person is taxed on his or her worldwide income without regard to their country of residence. Many US Persons are unaware of the US's citizenship-based taxation as the vast majority of other countries apply residence-based tax systems. Because of the US's citizenship-based taxation, US Persons living abroad and running a business must not only file Form 1040, but also report their interests in foreign corporations, disregarded entities, partnerships and trusts as if they *resided in the US*.

This article examines the reporting requirements for Forms 8858 and 8865. These forms are required for US Persons with ownership percentage of interest in foreign pass-through entities ("FPEs") [2] and foreign partnerships.[3] These reporting obligations are similar to those of US Persons with ownership interests in foreign corporations, for which Form 5471 may be required.[4]

The US requires US Persons with interests in FPEs [5] or foreign partnerships to file Forms 8858 and 8865 to provide the Internal Revenue Service ("IRS") with enough information to ensure that the US Person is properly reporting their income from the foreign entity on their Form 1040. If a US person was not required to file Form 8858 or 8865, it would be much more difficult for the IRS to determine if the income reported by the US Person was accurate.

An FPE is a single-owner entity organized outside the US which by default is treated as a foreign disregarded entity for US tax purposes or the entity elected to be treated as disregarded from its owner for US tax purposes.[6] The election is commonly referred to as a "check-the-box election" and is made on Form 8832.

A foreign partnership is multi-member entity organized outside the US which by default is treated as pass-through for US tax purposes or has elected to be treated as pass-through from its owner for US tax purposes.[7] As with the FPE, a foreign partnership may make the "check-the-box election" on Form 8832.

A foreign partnership is "controlled" by US Persons if either:

(1) A US Person directly, indirectly or constructively owns more than 50 percent of the total capital by value or owns more than 50 percent interest in the profits, deductions or losses of the foreign partnership;[8] or
(2) US Persons, who each own 10 percent or more interest in the foreign partnership, collectively own more than 50 percent of the total capital by value or own more than 50 percent interest in the profits, deductions or losses of the foreign partnership.[9]

To determine US Persons' ownership interests in foreign entities, constructive ownership rules apply.[10] A US Person may own an interest in a foreign entity through another domestic or foreign entity. Interests owned directly or indirectly by such other entity (including corporations, partnerships, estates or trusts) are treated as owned proportionately by the US Person (*i.e.*, the entity's owner, partner or beneficiary).[11] For example, if a US Person owns 80 percent of a US corporation that owns 80 percent of a foreign partnership, the US Person is considered to own 64 percent of the foreign partnership (80 percent x 80 percent).

In addition, there are attribution rules through which US Persons are considered to own interests owned by their spouses, siblings, ancestors (whether whole or half-blood) and lineal descendants.[12] For example, consider an entity in which a US Person has a 25 percent interest, his spouse has a 25 percent interest and his parents have a 25 percent interest; this US Person is attributed a 75 percent interest in that entity, as are their spouse and their parents.

Interests owned by nonresident alien individuals are treated differently. Interests owned by nonresident alien family members are only attributed to a US Person under the attribution rules if the US Person already owns a direct or indirect interest in the foreign partnership or corporation under Internal Revenue Code ("IRC") § 267(c)(1) or (5).[13]

Form 8865 – Who Must File And What Must Be Reported

Form 8865 must be filed by any of following six categories of US Persons:

A. Those who own, directly or indirectly, more than a 50 percent interest in the partnership;[14]
B. Those who own 10 percent or more interest in a foreign partnership and control the partnership with other US Persons with 10 percent or more interest;[15]
C. Those who transfer property to a foreign partnership in exchange for at least 10 percent partnership interest;[16]
D. Those who transfer property to a foreign partnership whose value exceeds USD100,000;[17]
E. Those who acquire or dispose of a certain percentage of interest in a foreign partnership;[18] or
F. Those who experience a substantial change in the interest ownership in a foreign partnership.[19]

These six categories of filers are lumped into four filing categories in the instructions to Form 8865:

- *Category 1 filers* include Category A filers.[20] Category 1 filers are required to report the most detailed information on the foreign partnership including reporting the income statement, balance sheet, distributive share and capital accounts of partners, and transactions between the partnership and other entities or partners.
- *Category 2 filers* include Category B filers.[21] Category 2 filers have limited reporting requirements and do not need to provide any financial details of the partnership. Instead, their reporting obligations are limited to reporting their interests in the partnership, any related party transactions, and their share of the profits and losses.
- *Category 3 filers* include Category C, D and E filers.[22] Category 3 filers report their ownership interests on Form 8865 as well as details of the transfer of property to the partnership. Like Category 2 filers, Category 3 filers are not obligated to report the detailed financials of the partnership.
- *Category 4 filers* are any Category F filers. A substantial change in ownership occurs when there is a "reportable event" during the tax year. There are three categories of reportable event: (1) acquisitions of interests, (2) dispositions of interests, or (3) changes in proportional interests of 10 percent or more.[23] An acquisition of interest occurs when a US Person with less than 10 percent interest in a partnership results in owning 10 percent or more after the acquisition,[24] or when a US Person acquires a total of 10 percent or more interest.[25] A disposition of interest occurs when a US Person with greater than 10 percent interest disposes of interest and consequently owns less than 10 percent,[26] or a US Person disposes of a total of

10 percent or more of an interest in the foreign partnership.[27] Finally, changes in proportional interests are reportable when a US Person's interest in a foreign partnership increases or decreases by 10 percent or more, compared to the interest owned at the last reportable event.[28] Proportional changes are caused by the withdrawal or addition of a partner or by operation of the partnership agreement. An indirect acquisition of a foreign partnership interest is not considered a reportable event.

There are several exceptions to the Form 8865 filing requirements listed above. First, the "multiple Category 1 filers exception" applies when there are more than one Category 1 filers. In these cases, the filing requirement is satisfied when one of the Category 1 US Persons files Form 8865.[29] However, the US Person filing Form 8865 cannot be the US Person with a controlling interest in the losses or deductions of the partnership, but must be the partner with a controlling interest in capital or profits.[30] When filing Form 8865, the Category 1 filer must list the other Category 1 filers and complete the form as if each Category 1 filer were required to file the form.[31] Specifically, items B, C and D on page one and Schedules A, N and K-1 must be completed and attached for each Category 1 filer. The other Category 1 US Persons not filing Form 8865 must attach a statement to their tax returns. The statement must be entitled "Controlled Foreign Partnership Reporting" and provide the IRS with the details of the US Person who filed the Form 8865 and identifying information of the foreign partnership.[32]

A second exception to filing Form 8865 is referred to as "constructive owners exception," which occurs when a Category 1 or 2 filer is only a constructive owner of a controlled foreign partnership ("CFP") with no direct ownership in the foreign partnership.[33] For example, if a US Person is required to file Form 8865 only because of an indirect, constructive ownership attributed from their spouse, then they are not required to file Form 8865. However, the US Person must still attach a statement similar to the one above entitled "Controlled Foreign Partnership Reporting." [34] The statement must include all the same information, except that it must state that the US Person is submitting Form 8865 under the constructive owners exception. If a US Person qualifies for both the multiple Category 1 filers exception and the constructive owners exception, they may only use the multiple Category 1 filers exception.[35]

A third exception is for Category 2 filers. If a foreign partnership in any given tax year has a Category 1 filer, then none of the Category 2 filers are considered Category 2 filers and hence have no Form 8865 filing obligations.

The fourth exception is for US Persons qualifying as both Category 3 and 4 filers because they contributed property to a foreign partnership in exchange for a 10 percent or more interest. Under this exception, the US Person is required to report the transaction under either Category 3 or 4, but does not need to report under both categories.

Finally, while not a complete exemption, it does reduce the amount of paperwork. If a foreign partnership files Form 1065 or Form 1065-B (relating to US Partnership Income Tax Return), the Category 1 and 2 filers may file a copy of the completed Form 1065 or Form 1065-B schedules in lieu of the Form 8865 schedules which report the same information.[36]

Form 8858 – Who Must File And What Must Be Reported

Generally, Form 8858 must be filed by US Persons that are tax owners of FPEs. Additionally, US Persons with controlling interests in a controlled foreign corporation ("CFC") or a foreign partnership, which is in turn a tax owner of an FPE, must file Form 8858. For a CFC this includes Category 4 and 5 filers of Form 5471 (US Shareholders owning 50 percent and 10 percent stock by value or vote) and for a foreign partnership this includes Category 1 and 2 filers of Form 8865, above.

The meaning of "tax owner" is distinct from "direct owner." The "tax owner" of an FPE is the person treated as owning the assets and liabilities of the FPE for US income tax purposes, whereas the "direct owner" of an FPE is the person that is the legal owner of the FPE under local law. Assume FPE1 is owned 100 percent by FPE2, which is 100 percent owned by FP1 and US Person is a 60 percent owner of CFP1. In this case, FPE2 is the direct owner of FPE1, but FP1 is the tax owner of FPE1 (and FPE2). Then, the US Person with a 60 percent interest in CFP1 has an obligation to file Form 8865 with respect to the CFP as well as Forms 8858 relating to FPE1 and FPE2.

Unlike Form 8865, there are no categories of filers for Form 8858. The rule for filing Form 8858 is simple: any US Person that is the tax owner of an FPE is obligated to file Form 8858.

An exception to the Form 8858 filing requirement is the multiple filers exception which is similar to the "multiple Category 1 filers exception" for Form 8865. If one or more US Persons are required to file Form 8858 for the same FPE for the same tax year, only one US Person is required to file Form 8858.[37] The same requirements of Form 8865 under the multiple category 1 filers exception apply: the sole US Person filing Form 8858 must complete the form as if each filer would be required to do so, and the other US Persons must attach a statement to their tax return detailing the same information on the FPE and the US Person who files Form 8858.[38]

The multiple filers exception also applies to Category 4 and 5 filers of Form 5471 (US Shareholders owning 50 percent and 10 percent stock by value or vote, respectively) and Category 1 filers of Form 8865 (50 percent controlling partners). For example, if a US Person owns 60 percent of a CFC and is thus a Category 4 filer of Form 5471, and the CFC is the tax owner of an FPE, only that 60 percent owner US Person needs to file Form 8858 (and Form 5471). However, the US Person filing Form 8858 must report all the information relating to the other non-filing US Persons and file a separate Schedule M (Form 8858) with respect to transactions between the FPE and the CFC or CFP.

A special rule applies to dormant FPEs, which are permitted to use "summary filing procedures" to satisfy the reporting requirements.[39] An FPE may become "dormant" if, in a given tax year, (1) the FPE conducts no business and owns no stock in another entity, (2) no assets of the FPE are sold, exchanged or transferred, (3) the FPE receives income or pays expenses of USD5,000 or less, (4) the value of the FPE's assets is USD100,000 or less, and (5) no distributions are made by the FPE which has either no current or accumulated earnings and profits or only *de minimis* changes in the earnings and profits.[40] If a US Person elects the summary filing procedure, they only need to complete the identifying information on page 1 of Form 8858 for each dormant FPE and write "Filed Pursuant to Announcement 2004-4 for Dormant FPE" on the top of Form 8858.

Forms 8858 and 8865 – Filing Considerations And Penalties

Based on the foregoing facts, depending on the US Persons' ownership interest in foreign entities, they may be required to file either Form 8858 or 8865 and provide the entity's detailed financial information. US Persons may find it difficult to comply with the requirements of Forms 8858 and 8865 because the informational reporting requires extensive financial information.[41] Foreign entities may not otherwise be required to provide this information to those US Persons with ownership interests, so the information may not be easily obtained. These foreign entities are also likely unwilling to disclose such information to the IRS for fear of being pulled into the unfavorable US tax scheme.[42]

Ensuring that the US Person will be provided with the necessary information is imperative because failure to file these forms may incur a USD10,000 penalty for each tax year and each tax form that was not filed.[43] The IRS will send to the US Person a failure-to-file notice, and if the informational form is not filed within 90 days of receiving the notice, an additional USD10,000 penalty per year, per entity is imposed for each 30-day period after the 90-day period expires, not to exceed USD50,000.[44]

Note that ownership in FPEs, CFCs or foreign partners may also implicate other US tax filing obligations not addressed in this article, including but not limited to Forms 114, 8938, 3520, 3520-A, 5472 and 926. For example, ownership in a foreign entity is also considered ownership in a specified foreign financial asset that is reportable on Form 8938, under the Foreign Account Tax Compliance Act ("FATCA").[45] Additionally, ownership of more than 50 percent of a foreign entity may require the US Person to report the entity's foreign bank information on Form 114, commonly referred to as the Foreign Bank Account Report or "FBAR." [46]

The varying reporting requirements of Forms 8858 and 8865 create significant compliance and practical considerations for US Persons investing in foreign entities. Therefore, it is crucial that US Persons consult with qualified US tax counsel before becoming a partner or shareholder of a foreign entity to both understand their filing obligations and tax implications as well as to ensure they will have access to the information they will need to complete their US tax filings, ensuring they are able to comply with their US tax filing obligations and avoiding any penalties.

Endnotes

1 "US Persons" include: (1) US citizens, (2) resident aliens of the US, (3) a nonresident alien who makes an election to be treated as a resident alien for purposes of filing a joint income tax return, and (4) US corporations, partnerships, estates and trusts. IRC § 7701(a)(30).

2 As used in this article, the term "foreign pass-through entity" includes a partnership not created or organized in the US, a simple or grantor trust not within the US jurisdiction and without any US Persons controlling the decisions of the trust, and an entity that makes some types of its income (*e.g.*, interest, dividends, royalties) fiscally transparent. IRS, *Flow-Through Entities – see* https://www.irs.gov/individuals/international-taxpayers/flow-through-entities

3 As used in this article, the term "foreign partnership" means any syndicate, group, joint venture or organization of two or more Persons and not created or organized in the US or under the law of the US or of any State. IRC § 7701(a)(2), (4)–(5).

4 As used in this article, the term "foreign corporation" means any corporation not created or organized in the US or under the law of the US or of any State. IRC § 7701(a)(3)–(5). *See Global Tax Weekly*, No. 170, February 11, 2016 for Article 7 in this series, for a discussion of controlled foreign corporations and Form 5471 compliance.

5 As used in this article, the term "foreign disregarded entity" means an entity not created or organized in the US and that is disregarded separate from its owner for US income tax purposes. Treas. Reg. §§ 301.7701-2, -3.

[6] Treas. Reg. § 301.7701-3(a).

[7] *Id*.

[8] IRC § 6038(e)(3); Treas. Reg. § 1.6038-3(a)(1), (b)(1)-(2).

[9] Treas. Reg. § 1.6038-3(a)(2), (b)(3).

[10] IRC § 267(c); IRC § 318.

[11] IRC § 267(c)(1).

[12] IRC § 267(c)(4); IRC § 318(a)(1).

[13] Treas. Reg. § 1.6038-3(b)(4).

[14] Treas. Reg. § 1.6038-3(a)(1).

[15] Treas. Reg. § 1.6038-3(a)(2).

[16] IRC § 6038B(b)(1)(A).

[17] IRC § 6038B(b)(1)(B).

[18] IRC § 6046A(a)(1)-(2).

[19] IRC § 6046A(a)(3).

[20] Treas. Reg. § 1.6038-3(a)(1), (b)(1)-(2).

[21] Treas. Reg. § 1.6038-3(a)(2), (b)(3).

[22] IRC § 6038B(b)(1)(A).

[23] IRC § 6046A(a).

[24] Treas. Reg. § 1.6046A-1(b)(1)(i)(A). This includes an interest increasing from 9 percent to 10 percent.

[25] Treas. Reg. § 1.6046A-1(b)(1)(i)(B). This includes an interest increasing from 12 percent to 22 percent.

[26] Treas. Reg. § 1.6046A-1(b)(1)(ii)(A). This includes an interest decreasing from 22 percent to 12 percent.

[27] Treas. Reg. § 1.6046A-1(b)(1)(ii)(B). This includes an interest decreasing from 10 percent to 9 percent.

[28] Treas. Reg. § 1.6046A-1(b)(1)(iii).

[29] Treas. Reg. § 1.6038-3(c)(1)(i).

[30] *Id*.

[31] Treas. Reg. § 1.6038-3(c)(1)(ii)(A).

[32] Treas. Reg. § 1.6038-3(c)(1)(ii)(B).

[33] Treas. Reg. § 1.6038-3(c)(2)(i).

[34] Treas. Reg. § 1.6038-3(c)(2)(ii)(B).

[35] Treas. Reg. § 1.6038-3(c)(2)(iv).

[36] Treas. Reg. § 1.6038-3(j).

[37] IRC § 6038(d).

[38] Form 8865 – Who must file, *supra*, Treas. Reg. § 1.6038-3(c)(1)(ii)(B).

[39] Announcement 2004-4, 2004-4 IRB 357.

[40] Rev. Proc. 92-70.

[41] William L. Burke, "Tax Information Reporting and Compliance in the Cross-Border Context," 27 *Va. Tax Rev.* 399, 417 (2007).

[42] *Id*, at 418–19.

[43] IRC § 6038(b)(1).

[44] IRC § 6038(b)(2).

[45] Hiring Incentives to Restore Employment Act, Pub. L. No. 111–147, 124 Stat. 71 (2010).

[46] Financial Crimes Enforcement Network, *BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts* (FinCEN Report 114) 57 (2015); IRS, *Comparison of Form 8938 and FBAR Requirements – see* https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements

Tax Aspects Of Investing In Brazil

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In addition to the current obstacles imposed upon foreign investments in Brazil such as the country's recession and the uncertain political scenario, the Brazilian tax environment, including particularities in the Brazilian tax rules, and the creative approach of local tax authorities, may be considered as other challenges that foreign investors face on a day-to-day basis.

Learning how taxation works in Brazil and how domestic and international tax rules are interpreted may represent an important tool for foreign companies engaged in cross-border transactions with Brazilian resident companies (in either inbound or outbound investments).

Unlike other countries, one single transaction such as an import of services may be subject to six different taxes in Brazil, which result in an effective taxation that may exceed 50 percent depending on how the parties agree to pay the taxes (with or without gross-up). Taxable bases are determined through the application of mathematical formulas that impose the levy of one tax over another.

Among the taxes levied, only one (the withholding tax – WHT) is eligible to benefit from tax reductions eventually granted in tax treaties to avoid double taxation (DTT). Nevertheless, even in the case of an existing DTT, taxpayers may not enjoy practical effects in terms of tax saving in view of the extremely broad definition of "technical services" under Brazilian tax legislation and the Brazilian tax authorities (RFB's) unique stance on the articles of the treaty to be applied to service remittances.

According to the RFB's current understanding, service remittances made to countries with which Brazil has signed a DTT fall under:

(i) Article 12 ("royalties"), if the protocol of the DTT expressly states that technical services and technical assistance are included in the concept of royalties. Article 12 of the DTTs entered into by Brazil allows both countries to tax royalty remittances, usually limiting the right to tax of the country in which the payer is domiciled to 15 percent, which is already the tax rate charged under domestic rules (certain DTTs provide for a 10 percent or 12.5 percent maximum tax rate);
(ii) Article 14 ("independent personal services"), if the rendering of the services relies on the technical qualification of a person or group of people. Certain DTTs also include legal entities under the scope of this Article, and the outcome is the taxation in Brazil with no tax rate limitation; and
(iii) Article 7 ("business profits"), as long as Articles 12 and 14 do not apply. In this case, no WHT is levied in Brazil on service remittances. The DTTs with Austria, Finland, France, Japan and Sweden are the only ones entered into by Brazil which protocol does not classify technical services and technical assistance under Article 12.

As regards to application of treaty articles, taxpayers must be aware that unlike many other countries, Brazil differentiates "technical services" from "technological services." In practice, any rendering of service involving any kind of knowledge and irrespective of any transfer of technology may be included in the definition given by the RFB for "technical services" and, therefore, shall fall under Article 12 and be taxed by the WHT. As the RFB's position is contrary to international practice (as in many countries such services would fall under Article 7), foreign legal entities tend to end up with a double taxation as they often face practical difficulties in their country of residence to offset the WHT withheld in Brazil.

Tax legislation also brings difficulties to Brazilians investing overseas or foreign companies investing abroad through Brazil. Within a short period, Brazil left behind the territorial principle and went towards the opposite side to introduce very atypical Controlled Foreign Corporation (CFC) legislation.

Pursuant to the current CFC rules (in force as of 2015), taxation is imposed at the level of the Brazilian controlling company on the profits accrued by each direct or indirect foreign subsidiary, on an accrual basis and regardless of any distribution. Disregarding the group's international

corporate structure, the profits of all indirect foreign controlled companies are directly included in the taxable basis of the Brazilian investor as such companies are deemed to be "first tier subsidiaries" for Brazilian CFC purposes.

CFC rules apply to the profits of all foreign controlled and affiliate companies, irrespective of the nature of the income derived by them (active or passive), and regardless their country of residence (tax havens or not). Tax havens and the nature of the income are only relevant to allow the Brazilian company to enjoy certain tax benefits under the CFC rules (*e.g.*, tax consolidation, among others).

Brazilian transfer pricing legislation is another subject that causes surprise. Although inspired by OECD guidelines, the Brazilian rules do not take into consideration any analysis of the risks, functions and role performed by the companies, but rather determine the calculation of the benchmarks through the application of mathematical formulas (*e.g.*, predetermined profits margins) and objective methods. There is no adoption of the arm's length principle.

Among other particularities, the Brazilian legislation determines:

(i) Different methods for import and export transactions; and
(ii) A very broad concept of related parties (also including in the definition any association made through a consortium, certain exclusivity relationships, among others).

Neither domestic rules nor the DTTs signed by Brazil provide for any correlative adjustment to avoid double taxation that may be caused by mismatched transfer pricing adjustments (*i.e.*, tax adjustments in both countries).

Differences resulting from the Brazilian tax legislation or the RFB's interpretation of law will have to be discussed more from now on due to the globalization phenomenon that is occurring in terms of tax transparency, tax compliance and global exchange of information. Brazil has very sophisticated legislation that allows the country to control prices, inhibit profit shifting and, more importantly, have full access to all tax information of Brazilian taxpayers and foreign parties trading with Brazilian residents.

At the forefront of tax technology, having introduced the electronic individual income tax return more than 15 years ago, the RFB has required more and more that Brazilian legal entities file, regularly, a large amount of information electronically.

In view of the Public System for Digital Filings (SPED) project, initially introduced in 2007 and implemented in stages throughout the years, Brazilian tax authorities have digital access (sometimes instant) to Brazilian companies' accounting records, returns for several taxes including Corporate Income Tax, digital invoices, and administrative proceedings, among other data.

The demand for information by the tax authorities will very likely increase from here on in light of the implementation of the OECD/G20's Base Erosion and Profit Shifting (BEPS) project (*e.g.*, Action 13 – *Transfer Pricing Documentation and Country-by-Country Reporting* is expected to be implemented in 2017 relating to the 2016 calendar year) and the expected exchange of information with other countries provided for under the OECD Convention on Mutual Administrative Assistance in Tax Matters (in force as of October 2016 for Brazil).

Keeping up with such endless tax compliance and with the innumerous tax rules in force in Brazil (at federal, state and municipal levels) takes a big toll on companies' resources and time. Tax compliance may increase with BEPS, but the Brazilian tax environment's continuous evolution may also come for the good with, *e.g.*, the implementation of the mutual agreement procedure recommended by Action 14 (*Making Dispute Resolution Mechanisms More Effective*) and a possible interest of Brazil to better adapt its legislation or, at least, its law's interpretation to the international standards. In the meanwhile, knowing Brazil in anticipation will continue to be an important recommendation when engaging in business in Brazil.

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Automatic Exchange Of Information (AEOI) – CRS And FATCA – More And More (But Still Not Enough) From HMRC

by Richard Cassell, Withers

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Most readers should by now be familiar with the regular litany of updates about CRS and FATCA from enthusiastic government revenue officials accompanied by the regular chorus of wailing from those who see this as the end of civilization. Regardless of the merits or otherwise of information exchange, the OECD member states have reacted to the tax evasion strategies promulgated by Swiss and other banks in the decades leading up to the 2000s by harnessing the information exchange capabilities already present in many international tax agreements to destroy bank secrecy. Most observers expected some governmental reaction to the aggressive marketing of tax evasion by some banks, and the OECD has been pointing the way for many years.

As always with government initiatives, it is dangerous to ignore them but the devil is in the detail. Having accepted that no bank to which you would wish to entrust your money is going to keep it secret from your government revenue authority, you need to focus on exactly what is going to be disclosed. The AEOI implementation is complicated, particularly since there are two similar but not entirely compatible components: the OECD common reporting standard or CRS, and the US Foreign Account Tax Compliance Act or FATCA as applied in Europe and internationally through the inter-governmental agreement network. AEOI operates unfairly in some ways, but does offer opportunities to plan the information flow.

The biggest challenge is likely to come from EU governments sharing tax information about sensitive individuals with corrupt governments. There are virtually no safeguards on the information once it enters the AEOI network. For example, a payment from a charitable foundation to support a human rights campaigner in a repressive regime may get reported to that country's tax

authority where it may not remain secret. Filippo Noseda at Withers has assembled a credible basis for a challenge if the right candidate presents him or herself.

In the meantime, clients need to use the opportunity to plan disclosure through the financial institution registration facilities. Clients can use this for their own trust and corporate structures to control the information flow in order to ensure it is accurate. Some of the most intrusive and unpleasant audits by the IRS that the US team at Withers has seen have arisen from information that was disclosed either by Swiss banks pursuant to the US Department of Justice prosecution program, or through well publicized leaks such as the Falciani disclosure. Banks, when faced with the possibility of prosecution, do not hesitate to dump all possible customer information on the IRS or other revenue authority. Much of that information is inaccurate, or partially accurate, and unsurprisingly when attempts are made to link it to individual taxpayers, the returns usually do not match the information. Completely compliant taxpayers then face months or years of responding to quite aggressive audit enquiry. At the end of the day success can seem like a rather hollow victory, since the result only proves that the taxpayer had indeed reported information correctly.

Avoiding this ordeal is an extremely worthwhile goal. The key is ensuring that the information reported by your fund or your trust matches the information on your return, whether it is a US or a European tax return. Here the key difference is between reporting by passive entities and reporting entities. Passive entities do not file AEOI reports directly but rely on the banks to report the component income streams. These are very unlikely to match the income reported on a tax return.

For example, if a trust has a brokerage account with USD3,000 of dividend income, USD6,000 of capital gains and USD1,800 of interest income and it has three beneficiaries, then the banks will all generate reports showing that each beneficiary received USD1,000 dividends, USD2,000 gains and USD600 interest income. In practice the trustee may have decided to accumulate the gains and reinvest them, and distributed only the dividend income, using the interest income to pay trustee expenses and expenses of a house used by the beneficiaries. The relevant revenue authority (whether it is the US or an EU country) will not be able to match the income shown on the returns with the FATCA and CRS reports it receives.

If the trust investments are professionally managed, even if the trust has individual trustees, then it is certainly appropriate for the trustees to report directly to their home jurisdiction (either onshore or offshore) as a "financial institution" (FI) which will then be shared with each beneficiary tax jurisdiction. Crucially this means that the banks and brokerage houses involved will not file

reports but will just note that the trust is a reporting FI. The trust's report will then report the net amount distributed and confirm this to the beneficiaries so that their tax returns will match the report filed by the trustee.

There are a number of areas where the FATCA and CRS rules differ for no particularly good reason. One important area is the reporting required for protectors. If your trust has a protector, then under the FATCA rules (applicable if the protector is US) the FATCA report from an FI trustee only needs to identify distributions made if the protector is a beneficiary. Under the CRS rules, however, the protector must be reported even if the protector is not a beneficiary and he or she is treated as controlling and therefore owning all of the trust income and accounts. This onerous requirement will undoubtedly lead to misleading reports. We think that this requirement is not authorized under the text of the CRS or the commentary, and has only been added as an afterthought by OECD staff, but adopted by EU implementation. At a recent town hall meeting with the UK's HM Revenue & Customs (HMRC), we raised this issue and although there was some sympathy, the UK Government attitude is that they are following the OECD lead on this. However, they acknowledged that future implementation guidance might relax this requirement. Hence our view that we do actually need more guidance in this area.

Tax Measures In The UK Autumn Statement

by Stuart Gray, Senior Editor,
Global Tax Weekly

This article details the tax changes announced by UK Chancellor of the Exchequer Philip Hammond in the Autumn Statement – a sort of end-of-year mini budget which has been increasingly used to foreshadow measures to be introduced in the main Spring Budget – on November 23, 2016.

Introduction

From a tax point of view, the 2016 Autumn Statement was probably one of the least eventful fiscal announcements of recent times. Still, Hammond, in his first set-piece speech as Chancellor, couldn't resist the temptation to tinker with the tax system at least a little bit. And while there were no stand-out tax measures, collectively they were an indication of the direction in which he wishes to take UK tax policy – which is effectively sideways.

For businesses, this means a commitment to a low and competitive rate of corporate tax. But it also means fewer opportunities for tax avoidance as the UK advances its BEPS agenda. Therefore, Hammond confirmed the Government's intention to restrict loss carryforwards to 50 percent of profits, and place limits on interest deductibility, both measures announced under his predecessor George Osborne in the 2016 Budget and expected to raise GBP5bn (USD6.2bn) in additional revenue after they take effect in April 2017.

For small firms and the self-employed, there was little to cheer in the Autumn Statement. With no additional tax concessions announced for small and micro businesses, Hammond has renewed the Government's campaign against tax-motivated incorporations, which he said have increased as the corporation tax rate has fallen, depressing the level of tax receipts. The biggest impact is likely to be felt by contractors working in the public sector (so-called "off-payroll" workers (see below)) – a move which has been heavily criticized by small businesses and the self-employed as a blow for UK labor market flexibility.

Hammond also ignored pleas from the insurance industry to resist the temptation to raise insurance premium tax by increasing the levy by 2 percent to 12 percent from June 2017, with the Chancellor arguing that insurance firms already enjoy a considerable tax advantage by virtue of their exemption from value-added tax (VAT).

Indeed, there was an emphasis on discouraging tax avoidance throughout the Autumn Statement as Hammond announced changes to the VAT Flat Rate Scheme, eliminated the tax advantages linked to Employee Shareholder Status, reduced the tax advantages of salary sacrifice schemes, abolished the permanency of non-domiciled tax status, and announced a new penalty for those who enable the use of a tax avoidance scheme that the tax authority later challenges and defeats, among other changes.

These and other tax measures are detailed below.

Corporate Tax – Sticking To The Roadmap

Hammond put to bed speculation that the UK would extend pre-announced cuts to corporate tax, and confirmed that the rate will fall to no lower than 17 percent by 2020 as planned. "I know how much business values certainty and stability, and so I confirm today that we will stick to the business tax roadmap we set out in March," he stated.

Corporate Interest Expensing And Loss Relief

However, the Government will introduce rules that limit the tax deductions that large groups can claim for their UK interest expenses from April 2017. These rules will limit deductions where a group has net interest expenses of more than GBP2m, net interest expenses exceed 30 percent of UK taxable earnings, and the group's net interest-to-earnings ratio in the UK exceeds that of the worldwide group.

The Government also intends to legislate for reforms announced in Budget 2016 that will restrict the amount of profit that can be offset by carried-forward losses to 50 percent from April 2017, while allowing greater flexibility over the types of profit that can be relieved by losses incurred after that date. The restriction will be subject to a GBP5m allowance for each standalone company or group. In implementing the reforms, the Government intends to simplify the administration of the new rules.

The amount of profit that banks can offset with losses incurred prior to April 2015 will continue to be restricted to 25 percent in recognition of the exceptional nature and scale of losses in the sector.

Consultation papers will be released on both of these measures in due course, it was announced.

Non-Resident Companies

The Government is considering bringing all non-resident companies receiving taxable income from the UK into the corporation tax regime, and will consult on these proposals at the 2017 Budget. The aim is to ensure that all companies are subject to the rules that apply generally for the purposes of corporation tax, including the limitation of corporate interest expense deductibility and loss relief rules.

Bank Levy Reform

As announced in the 2015 Summer Budget, the bank levy charge will be restricted to UK balance sheet liabilities from January 1, 2021. Following consultation, the Government confirmed in the Autumn Statement that there will be an exemption for certain UK liabilities relating to the funding of non-UK companies, and an exemption for UK liabilities relating to the funding of non-UK branches. Details will be set out in the Government's response to the consultation, with the intention of legislating in this area in Finance Bill 2017/18.

With regard to the taxation of banks, the Government also said it "will continue to consider the balance between revenue and competitiveness," taking into account the implications of the UK leaving the EU.

Authorized Investment Funds Dividend Distributions

The Government intends to modernize the rules on the taxation of dividend distributions to corporate investors in a way which allows exempt investors, such as pension funds, to obtain credit for tax paid by authorized investment funds, and will publish proposals in draft secondary legislation in early 2017.

Museums And Galleries Tax Relief

The Government will broaden the scope of the museums and galleries tax relief announced in Budget 2016 to include permanent exhibitions so that it is accessible to a wider range of institutions across the country. The rates of relief will be set at 25 percent for touring exhibitions, and 20 percent for non-touring exhibitions. The relief will be capped at GBP500,000 of qualifying expenditure per exhibition. The relief will take effect from April 1, 2017, with a sunset clause which means the relief will expire in April 2022 if not renewed. In 2020, the Government will review the tax relief and set out plans beyond 2022.

Indirect Tax – Insurance Premium Tax And The Sugar Tax

The standard rate of Insurance Premium Tax (IPT) will rise to 12 percent from June 1, 2017. This represents a doubling of IPT in the space of three years.

Hammond also confirmed in the Autumn Statement that draft legislation will be published in relation to the Soft Drinks Industry Levy (the "'sugar tax") on December 5, 2016.

First announced as part of the Government's legislative program in the 2016 Queen's Speech in May, it was initially proposed that the sugar tax would be introduced in 2018 in two tax bands: a lower band for total sugar content above five grams per 100 milliliters; and a higher band for drinks with more than eight grams per 100 milliliters.

Personal Tax And National Insurance

There were no changes to personal tax rates in the Autumn Statement. However, the Government intends to stick to its commitment to raise the income tax personal allowance to GBP12,500 (GBP11,000 in 2016/17) and the higher rate threshold to GBP50,000 (GBP43,000 in 2016/17), by the end of the current Parliament, which ends in the spring of 2020. In 2017, the personal allowance will rise to GBP11,500 and the higher rate threshold to GBP45,000.

Once the personal allowance reaches GBP12,500, it will then rise in line with inflation, as measured by the consumer price index (as the higher rate threshold currently does).

In the area of payroll tax, the National Insurance secondary (employer) and primary (employee) thresholds will be aligned from April 2017, meaning that both employers and employees will start paying National Insurance on weekly earnings above GBP157. This measure has been recommended by the Office of Tax Simplification, and is designed to simplify the payment of National Insurance for employers.

Class 2 National Insurance contributions (NICs) will be abolished from April 2018, simplifying National Insurance for the self-employed. Class 2 NICs are flat-rate weekly contributions (currently GBP2.80 per week) that enable the self-employed to access to a range of state benefits such as the basic state pension.

The Autumn Statement confirms that, following the abolition of Class 2 NICs, self-employed contributory benefit entitlement will be accessed through Class 3 and Class 4 NICs.

Class 3 contributions are those which can be made voluntarily to fill gaps in an individual's payment record (currently GBP14.10 per week), while Class 4 contributions are paid by the self-employed on net profits that are subject to income tax at a rate of 9 percent on profits between the lower profits limit (GBP8,060 in 2016/17) and upper profits limit (UPL) (GBP43,000 in 2016/17) and 2 percent on profits above the UPL.

As announced at Budget 2016, from April 2018 termination payments over GBP30,000, which are subject to income tax, will also be subject to employer NICs. The first GBP30,000 of a termination payment will remain exempt from income tax and National Insurance.

Off-Payroll Workers

In a move designed to counter the rising trend of incorporations by contractors and the self-employed, largely to take advantage of lower rates of corporation tax, the Government will reform the "off-payroll" working rules for contractors working in the public sector from April 2017. This will entail moving the responsibility for operating the rules, and paying the correct tax, to the body paying the worker's company.

The Government said this will help to tackle the high levels of non-compliance with the current rules and will mean that taxpayers engaged through a corporate structure, but working in a similar way to employees in the public sector, will pay the same taxes as employees.

Employee Remuneration – Salary Sacrifice And Benefits In Kind

The tax and employer National Insurance advantages of salary sacrifice schemes will be removed from April 2017, except for arrangements relating to pensions (including advice), childcare, the cycle-to-work scheme, and ultra-low emission cars. This will mean that employees swapping salary for benefits will pay the same tax as the vast majority of individuals who buy them out of their post-tax income. Arrangements in place before April 2017 will be protected until April 2018, and arrangements for cars, accommodation and school fees will be protected until April 2021.

The Government will also consider how benefits in kind are valued for tax purposes, publishing a consultation on employer-provided living accommodation and a call for evidence on the valuation of all other benefits in kind at Budget 2017.

In addition, a call for evidence will be published at Budget 2017 on the use of the income tax relief for employees' business expenses, including those that are not reimbursed by their employer.

Property And Trading Income

The Government intends to create two new income tax allowances of GBP1,000 each, for trading and property income. This follows up on a proposal first announced in the 2016 Budget. As a result, individuals with trading income or property income below the level of the allowance will no longer need to declare or pay tax on that income. The trading income allowance will also apply to certain miscellaneous income from providing assets or services.

Non-Domiciled Individuals

As previously announced, from April 2017, non-domiciled individuals will be deemed UK-domiciled for tax purposes if they have been UK resident for 15 of the past 20 years, or if they were born in the UK with a UK domicile of origin. Non-domiciled individuals who have a non-UK resident trust set up before they become deemed-domiciled in the UK will not be taxed on income and gains arising outside the UK and retained in the trust.

Under the current rules, "non-doms" pay tax on income and gains outside the UK only when they are remitted to the UK using the remittance basis of taxation. Non-doms must pay an extra levy, the Remittance Based Charge, or pay the full amount of UK tax that would be charged to a resident.

Under other changes to the non-dom tax rules, inheritance tax will be charged on UK residential property when it is held indirectly by a non-domiciled individual through an offshore structure, such as a company or a trust. This is designed to prevent situations where non-doms avoid paying inheritance tax on their UK residential property.

However, the Government intends to change the rules for the Business Investment Relief scheme from April 2017 to make it easier for non-domiciled individuals who are taxed on the remittance basis to bring offshore money into the UK for the purpose of investing in UK businesses.

Pensions

The tax treatment of foreign pensions will be more closely aligned with the UK's domestic pension tax regime by bringing foreign pensions and lump sums fully into tax for UK residents, to the same extent as domestic ones. The Government will also close specialist pension schemes for those employed abroad ("section 615" schemes) to new saving, extend from five to ten years the taxing rights over recently emigrated non-UK residents' foreign lump sum payments from funds that have had UK tax relief, align the tax treatment of funds transferred between registered pension schemes, and update the eligibility criteria for foreign schemes to qualify as overseas pensions schemes for tax purposes.

Employee Shareholder Status (ESS)

An employee shareholder is someone who works under an employee shareholder employment contract. Employees must receive shares in the employer's parent company of a minimum value of GBP2,000 on receipt (there is no set upper limit).

Typically, these schemes are used by employers to attract highly skilled or high-caliber employees. However, the Government has seen evidence that the status is being used primarily for the purposes of tax planning instead of promoting labor market flexibility. Therefore, ESS will be abolished for arrangements entered into on, or after, December 1, 2016. The status itself will be closed to new arrangements "at the next legislative opportunity."

Anti-Avoidance Measures

The Government said it has collected an additional GBP130bn since 2010 through its anti-avoidance and anti-evasion initiatives, resulting in a "tax gap" that is one of the lowest in the world. However, further anti-avoidance measures were announced in the Autumn Statement.

Penalty For Tax Avoidance "Enablers"

As signaled at Budget 2016, the Government will introduce a new penalty for any person who has enabled another person or business to use a tax avoidance arrangement that is later defeated by HM Revenue & Customs (HMRC). Details will be published in draft legislation shortly.

The Government will also remove the defense of having relied on non-independent advice as taking "reasonable care" when considering penalties for any person or business that uses such arrangements.

Disguised Remuneration

The Government intends to extend the scope of changes announced in the 2016 Budget to tackle the use of disguised remuneration avoidance schemes by the self-employed. This is designed to ensure that self-employed users of these schemes pay the correct amount of tax and National Insurance. Additionally, the Government wants to discourage employers from using disguised remuneration avoidance schemes by denying tax relief for an employer's contributions to such schemes unless tax and National Insurance are paid within a specified period.

Offshore Tax Evasion – Requirement To Correct

The Government will introduce a new legal requirement to correct a past failure to pay UK tax on offshore interests within a defined period of time, with new sanctions for those who fail to do

so. It also will consult on a new legal requirement for intermediaries arranging complex structures for clients holding money offshore to notify HMRC of the structures and the related client lists.

VAT Flat Rate Scheme

The VAT Flat Rate Scheme is designed to simplify the recording of sales and purchases for labor-intensive businesses with low VAT inputs. It requires taxpayers to apply a fixed flat-rate percentage, which varies depending on the type of business, on gross turnover to arrive at the VAT due.

According to the Government, some taxpayers are using the scheme as a means of avoiding tax rather than simplifying their tax affairs. Therefore, it has decided in the Autumn Statement to introduce a new 16.5 percent rate from April 1, 2017, for businesses opting into the scheme. It has stated that this will "level the playing field," while maintaining accounting simplification for the small businesses that use the scheme as intended.

Hammond's First Autumn Statement Is Also His Last

In his speech to the House of Commons, Hammond probably saved his best until last, announcing that this Autumn Statement would be his last. Not that Hammond is stepping down after so brief a time so far in his position as Chancellor; rather that, from next year, the Autumn Statement will become the annual Budget, and the year after that, the traditional Spring Budget will be relegated to an announcement of the latest fiscal forecasts from the Office of Budget Responsibility. In other words, the UK will have a Spring Statement and an Autumn Budget instead of the other way around.

Importantly, the difference is that Hammond does not intend for the spring fiscal statement to be used as a platform for new tax measures. Quite the contrary. "No other major economy makes hundreds of tax changes twice a year, and neither should we," Hammond told Members of Parliament. "So the spring Budget in a few months will be the final spring Budget. Starting in autumn 2017, Britain will have an autumn Budget, announcing tax changes well in advance of the start of the tax year." [1]

Nevertheless, Hammond did leave the door open for himself and future Chancellors to use the Spring Statement to effect tax changes.

"If unexpected changes in the economy require it, then I will, of course, announce actions at the Spring Statement, but I won't make significant changes twice a year just for the sake of it," he explained.

Evaluating The Autumn Statement: From Osbornomics To Hammondism?

For an Autumn Statement purported by the Government to have prioritized the so-called "JAMs" – the "just about managing," meaning the economically squeezed low- and middle-income earners facing rising living costs and stagnating wages – there was precious little in the way of actual tax relief.

However, Hammond's first foray into the world of fiscal policy could be interpreted as a sign that – appropriately enough for a Conservative Chancellor – he intends to run the Treasury in a much more conservative fashion than his predecessor, George Osborne, who could be accused of being rather too fond of pulling rabbits out of hats. If so, this would be much to the relief of business taxpayers, many of whom have likely struggled to keep pace with the frenetic rate of change under Osborne.

However, this was a fiscal statement in which the Government was more preoccupied with wider fiscal and economic concerns. And rather than fixating on the intricacies of the tax system, Hammond concentrated more on preparing the groundwork to help the UK navigate potentially choppy waters ahead following the UK's historic vote to leave the European Union. Or, as he put it, to ensure that the UK is "match fit" for the challenges ahead.

The good news for Britain is that its economy remains robust despite all the political uncertainty surrounding the Brexit process. It is predicted to be the fastest growing major economy this year, and unemployment is at historically low levels.

The bad news is that Brexit is expected to weigh on economic growth in the years ahead, which is why Hammond has announced billions of pounds for infrastructure investment and for boosting UK productivity, measures intended to prop up growth.

Fortunately for Hammond, he is able to take advantage of record low interest rates and fund his infrastructure splurge through borrowing. But this means that the Government's fiscal targets – which have been something of a movable feast in recent years – have effectively been thrown out the window altogether.

Consequently, tax and spending policy will no longer be tilted towards closing the budget deficit, at least not to the extent it was under the Cameron administration. Indeed, Hammond admitted that the Government will have to borrow GBP122bn more than planned to help insulate the UK economy from the buffeting expected as a result of Brexit. And this could apply upward pressure on the budget deficit and national debt.

So, when considering this apparent u-turn on fiscal policy, the Autumn Statement's focus on the JAMS seems quite appropriate. For "jam tomorrow" could be a suitable idiom to describe the Government's promises on fiscal responsibility.

For now, the Chancellor seems to have left himself enough wiggle room if the much-predicted economic downturn appears, and he has earned praise for what many believe is a calm and measured response to ongoing uncertainties. For those who watch UK tax developments, the years ahead under Hammond could as a result be quite dull. But a dull Chancellor is probably what most taxpayers have been waiting for.

Endnote

1 https://www.gov.uk/government/speeches/autumn-statement-2016-philip-hammonds-speech

A Primer On The New Principle Residence Rules

by Cameron Mancell, CFP, Research Analyst, Wolters Kluwer

Introduction

On October 3, 2016, Canada's Department of Finance announced new financial measures, including tax measures, which target the housing and mortgage lending sectors. The tax measures are intended to "improve tax fairness and the integrity of the tax system" and specifically propose to amend the capital gains rules pertaining to the disposition of a principal residence. At this time, these amendments are merely proposed and have yet to be introduced in a bill. This primer will discuss the nature of these proposed tax changes and their implications.

Goodbye To The "One Plus" Rule For Non-Resident Purchasers

Currently, paragraph 40(2)(*b*) of the *Income Tax Act* (ITA) computes the gain on the sale of property which was an individual's principal residence at any time since the acquisition date of the property. The gain otherwise determined is reduced by the proportion of the gain that is:

(i) One plus the number of taxation years ending after the acquisition date for which the property was designated as the taxpayer's principal residence and during which the individual was resident in Canada; of

(ii) The number of taxation years ending after the acquisition date during which the taxpayer owned the property whether jointly or otherwise.

The general intent of the "one plus" rule is to allow taxpayers to claim the principal residence exemption ("PRE") for both their old and new residences for years in which they move from one to the other. If not for this rule, taxpayers would only be allowed to designate one principal residence for the year in which they moved and could potentially realize a taxable capital gain upon the disposition of one of them.

As stated in paragraph 2.75 of Income Tax Folio S1-F3-C1, *Principal Residence*: "[i]t may be possible for a property in Canada that is owned in a particular tax year by a non-resident of Canada to qualify as the non-resident's principal residence (that is, satisfy all the requirements of the section 54 definition of principal residence for the non-resident) for that year." For example, say a non-resident purchases a property for his daughter to live in while attending university in Canada for four years. Since the daughter ordinarily inhabited the property during those four years, the property could be considered a principal residence of the non-resident person. Since the non-resident person never resided in Canada, he would not be able to claim the PRE with respect to any of those years. However, the current wording of the formula in paragraph 40(2)(*b*) allows him to claim the PRE for a single year due to the "one plus," regardless of him having never resided in Canada.

Effective for dispositions occurring on or after October 3, 2016, the "one plus" element of the computation under paragraph 40(2)(*b*) is exclusive to taxpayers who were resident in Canada during the year in which they purchased the principal residence. Thus, if a taxpayer was not resident in Canada during the year that he or she acquired the property, the computation will not include a "one plus" year. According to the Department of Finance, the general intent of this measure is to ensure that taxpayers are not eligible for the PRE with respect to a year in which they were not resident in Canada. And this amendment will achieve just that. Taxpayers who were not resident in Canada in the year that they acquired their property will only be allowed to designate the property as their principal residence for the years in which they were resident in Canada and meet all of the other necessary criteria.

Taxpayers who acquired a principal residence prior to the announcement can be affected by this change. For example, say a taxpayer purchased her residence for CAD500,000 in 2013, immigrated to Canada in 2014, and sold the residence in 2017 for CAD600,000. The residence is excluded from the deemed acquisition upon immigration rules under paragraph 128.1(1)(*c*) ITA since it is considered taxable Canadian property. Therefore, the taxpayer's adjusted cost base would presumably be the historical cost of CAD500,000. Under the previous rules, assuming she was resident in Canada throughout 2014 to 2017 and the property was her principal residence (meeting all necessary conditions), the entire CAD100,000 gain would be eliminated by the PRE.

However, under the new rules, the taxpayer will not have access to a "one plus" in computing her gain. Therefore, amount (i) above would equal four years, and amount (ii) would remain at five years, so four-fifths of the CAD100,000 gain would be sheltered by the PRE. The taxpayer will

have incurred a CAD20,000 gain in 2017 which is a CAD10,000 taxable capital gain resulting from the sale of her principal residence.

No grandfathering provision is provided to taxpayers who acquired their principal residences while not resident in Canada prior to the announcement. That said, with every passing year that taxpayers own the principal residence while resident in Canada, the potential taxable capital gains become proportionately lower. Taxpayers who recently immigrated to Canada and are upgrading their house may be exposed to a more onerous tax burden, particularly when selling a home in the greater Toronto or Vancouver areas which have seen consistent price gains in recent years.

Stricter Principal Residence Criteria For Trusts

Only individuals and personal trusts are eligible to utilize the PRE. In the case of a personal trust, the conditions under paragraph (*c.1*) of the definition of "principal residence" in section 54 ITA must be met in order for that property to qualify as the trust's principal residence. Sparing you the details of the existing criteria, the draft legislation proposes to expand paragraph (*c.1*) by including further criteria for personal trusts. Applicable to tax years beginning after 2016, in order for property to be considered a principal residence of a personal trust, the trust must be:

(A) An alter ego trust, spousal or common-law partner trust, joint spousal or common-law partner trust, or "protective trust," the beneficiary of which is the individual whose death determines the day of disposition for the trust under subsection 104(4) ITA;
(B) A qualified disability trust (as defined under subsection 122(3) ITA) the electing beneficiary of which is resident in Canada and a spouse or common-law partner, former spouse or common-law partner, or child of the settlor; or
(C) Settled by a deceased parent of an orphan under the age of 18 who is resident in Canada.

Moreover, if the trust acquires a property after October 2, 2016, the terms of the trust must provide the beneficiary referred to above with the right to the use and enjoyment of the housing unit as a residence in order for the property to be considered a principal residence of the trust. This additional condition applies to taxation years of the trust beginning after 2016.

Personal trusts meeting the above conditions may continue to claim the PRE (provided the general conditions are met) with respect to a property held in 2017 and later years. These new conditions also do not apply in determining whether a trust can designate a property as its principal residence with respect to tax years beginning before 2017, and thus is not relevant to trusts that dispose of principal residences in 2016.

Transitional Rule For Trusts

If a trust does not meet the post-2016 conditions, a proposed transitional rule deems the trust to have notionally disposed of the principal residence (with no immediate tax consequences). Where a trust owns a property at the end of 2016, does not meet the new conditions in its first taxation year beginning after 2016, and disposes of the property after 2016, the trust's gain from disposing of the property is computed as the sum of two parts:

(1) The gain computed under paragraph 40(2)(*b*) under the assumption that the trust disposed of the property on December 31, 2016, for proceeds of disposition equal to its fair market value ("FMV") at that time.
(2) The gain in respect of the actual disposition calculated under paragraph 40(2)(*b*) ITA without the "one plus" year addition and under the assumption that the trust acquired the property on January 1, 2017, at a cost equal to the proceeds of disposition as determined for the first computation.

Also, the sum of these two gains is reduced by the amount (if any) by which the FMV referred to above exceeded the actual proceeds of disposition. So where the proceeds of disposition are less than the amount of the notional disposition on December 31, 2016, the reduction generally accounts for any selling costs or a subsequent decrease in the property's value after the notional disposition. This transitional rule allows a trust to claim the PRE with respect to years before 2017 in which it owned a principal residence where it is no longer eligible to claim the exemption for years beginning after 2016 due to the stricter criteria. Affected trusts will likely need to obtain a valuation of the property as of December 31, 2016, in order to claim the PRE with respect to prior years.

New Tax Compliance Rules

The proposed legislation also proposes to expand the CRA's ability to assess taxpayers outside the normal reassessment period, which for individuals and trusts is three years after the earliest of the date that the original notice of assessment was sent and the date that a notification that no tax payable was sent. Proposed paragraph 152(4)(*b.3*) ITA will allow the CRA to assess a taxpayer for a further year outside of the normal reassessment period where he or she failed to report the disposition of real or immovable property on his or her return for that year. However, if the taxpayer subsequently amends the return to report the disposition, the CRA may only reassess the taxpayer within the three years following the date that the amendment was filed.

Paragraph (*c*) of the definition of a principal residence in section 54 ITA has always required that individuals (other than personal trusts) designate their property as their principal residence in a prescribed form. However, it has long been the Canada Revenue Agency's (CRA's) administrative position that where an individual taxpayer (other than a trust) disposes of his or her principal residence and no gain is taxable since the property was his or her principal residence during every year of ownership, the taxpayer is not required to report any information on his or her tax return. Otherwise, individuals are required to complete CRA Form T2091 (or T1255 in the case of deceased individuals).

On the same day that the Department of Finance announced the new tax changes, the CRA announced new filing requirements with respect to claiming the PRE. Effective for dispositions occurring on or after January 1, 2016, the CRA now requires that individual taxpayers report the sale of a principal residence on Schedule 3 for the tax year in which the property was sold if the property was designated as the taxpayer's principal residence for every year of ownership. Schedule 3 will require taxpayers to provide the year of acquisition, the proceeds of disposition, and a description of the property. This new rule applies to actual and deemed dispositions.

Taxpayers cannot utilize the PRE if they fail to report the disposition on Schedule 3. If a taxpayer does not report the disposition, he or she can request that the CRA amend the tax return for the year of disposition so that he or she can claim the exemption. Unfortunately, the CRA may enforce the penalty for late filed, amended, or revoked elections under subsection 220(3.5) ITA since a designation of a principal residence is deemed to be an election. This penalty is the lesser of CAD8,000 and CAD100 for each complete month between the original due date and the date the request is made. The CRA has stated that they will only assess any late filing penalties in the most excessive cases.

Given the prospect of being denied the PRE or facing a significant penalty, it is paramount that taxpayers include all pertinent information on Schedule 3 of their T1 tax return for the year that they disposed of their property and wish to designate it as their principal residence for every year of ownership. Fortunately, the CRA aims to ensure that taxpayers and tax professionals are informed of the new reporting requirement.

If the disposed property was not the taxpayer's principal residence for every year of ownership (*e.g.*, where a cottage will be designated for one or more of those years), the taxpayer must continue to report the disposition on Form T2091 and any gain computed on the form must be included on Schedule 3.

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Topical News Briefing: Legislate In Haste, Repent At Leisure

by the Global Tax Weekly Editorial Team

The Conservative Party-led coalition government in the UK came in for heavy criticism from businesses and tax practitioners last year when it rushed through complex diverted profits tax (DPT) legislation just in time for the 2015 general election. Are we about to see the same process repeated in other countries?

The UK Government justified the need for the DPT on the grounds that it would prevent companies, particularly those operating largely on the internet, from "artificially" shifting their profits out of the UK to low-tax jurisdictions. As such, the Government argued it was fulfilling its commitments under the BEPS agenda.

However, businesses and tax experts, while broadly supportive of the OECD's BEPS work, accused the Government of legislating in haste to score some political points with the 2015 general election looming. As Stephen Herring, Head of Taxation at the Institute of Directors, put it at the time: "The [DPT] is being rushed into law for short-term political reasons and against the Government's own rules on setting business taxes." Those rules being that taxpayers should be fully consulted on new tax measures to reduce tax uncertainty.

Herring added: "We fear that the perceived political imperative of being seen to do something about the treatment of global corporations will mean that this tax is enacted too hastily and without adequate consultation."

What's more, it has been argued that the UK DPT, introduced in April 2015, has gone well beyond the minimum standards set out by the OECD in its final BEPS recommendations, and was in fact finalized in advance of those recommendations being published in October 2015 in any case.

Indeed, even the OECD was taken aback by the speed and potential scope of the UK DPT, with Pascal Saint-Amans, OECD Director of the Center for Tax Policy and Administration, suggesting that unilateral measures of this type could undermine the BEPS movement as a whole, which will depend on multilateralism to succeed. "What we wish, of course – and that's the other philosophy of the BEPS action plan – is that this be addressed through multilateral action," he said.

So far, the UK is unique in having legislated for this type of tax under the BEPS umbrella. However, as reported in this week's issue of *Global Tax Weekly*, the idea might be about to catch on.

Australia has been considering the introduction of a UK-style DPT ever since the UK began to advance the idea. Australia has at last published draft DPT legislation. A DPT is also being examined in France following the introduction into parliament of a legislative amendment by a Socialist Senator. And it also appears that a DPT is interesting for the New Zealand Government, as it pushes forward with its own BEPS agenda.

Are governments and politicians putting populism before practicality?

Commenting on the matter ahead of the Australian general election earlier this year, Michael Croker, Head of Tax at Chartered Accountants Australia and New Zealand, was one commentator who suggested the "get tough on multinationals" message will be popular with the electorate, but could be risky for an open economy like Australia.

Croker observed that: "Businesses need certainty and despite what politicians say, the law doesn't levy tax based on the concept of paying a 'fair share.' In the eyes of the international business community, Australia can ill-afford to be seen as a place where the ascertainment of tax payable only becomes clear following discussions with the Australian Taxation Office about the inbound structure and related-party transactions."

The timing of the introduction into parliament of the French DPT proposals is therefore interesting given that France is moving onto an election campaign footing, and that the ruling Socialists are trailing in the opinion polls.

However, it remains to be seen whether Australia, New Zealand and France will learn anything from the UK DPT, which, by all accounts, is taxing the resources of not only multinational companies but also the tax authority itself – an outcome which was surely not intended by the UK Government or by Parliament.

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FATCA: Trial, Denial and Delay

by Mike DeBlis Esq., DeBlis Law

FATCA Under Fire

Earlier this year, Kentucky Senator and then 2016 Republican Presidential hopeful Rand Paul announced that, in partnership with Republicans Overseas and five others, he would head to court to stop the Foreign Account Tax Compliance Act crackdown.

The lawsuit, which was filed in an Ohio federal court, actually contained some pretty good arguments. In any other environment, this lawsuit might have gone somewhere. But they say that timing is everything, and the timing was just all wrong.

The lawsuit was a first-of-its kind affair, in that no other recent Presidential hopeful had sued the IRS in the midst of a campaign. If you have in mind to sue the government that you want to lead, there's definitely something going on.

First, Senator Paul argued that so-called "inter-governmental agreements" (IGAs) circumvented his Constitutional rights. The Obama Administration labeled FATCA accords with foreign powers as IGAs – a clever term that the Democrat-controlled Congress of the time basically invented *ex nihlio* in 2010. To date, the Obama Administration has negotiated and finalized 113 FATCA treaties,[1] without a sliver of participation from the Senate.

Republicans hate these things because they require foreign banks to gather and share financial information about Americans who live and/or work abroad; the data would be private if these individuals worked and lived on American soil. As a result, a significant number of expats have somewhat reluctantly renounced their citizenship.

Furthermore, the lawsuit maintained that the high penalties, as well as the rather arbitrary nature of these penalties, along with mandatory withholding and a few other provisions violated the excessive fines clause of the Eighth Amendment.

More importantly for our purposes, the other plaintiffs claimed that FATCA has effectively denied them access to banking and financial services in foreign countries, because these institutions do not want to mess with expats and their political baggage. Expats have been complaining about this issue for years.

Predictably, the suit was also somewhat politically motivated. "Republicans Overseas," which is the brainchild of longtime conservative activist Solomon Yue, is basically a vehicle for the Republican National Committee to identify GOP voters and convince them to register in swing states, like Ohio and Michigan. Republicans Overseas was funding the entire effort.

Yue denied that the suit was all about votes in November (although it is worth noting that had it been so, it would seem to have secured the desired end result). "The best way to defend 8.7 million overseas Americans' right to privacy and constitutional protections is to cripple the IRS, FATCA and enforcement tools through legal action on constitutional grounds all the way to the US Supreme Court," he boldly proclaimed at the time.

"Justice Delayed Is Justice Denied"?

English jurist William Gladstone, the author of this famous quote, was obviously not a criminal defense lawyer. In many, if not most, cases, delay is a fundamental element of a successful defense, or even the lynchpin of the entire enterprise. Over time, memories fade, evidence is lost (or at least becomes more difficult to find and use in court), witnesses relocate, and prosecutors lose interest in the case. All of these developments weigh in favor of criminal defendants.

To paraphrase Gordon Gekko: Delay is good. Delay is right; delay works. So, there were champagne corks popping all along Wall Street when the IRS announced that it would delay certain FATCA bank withholding requirements until 2019. However, it remains to be seen whether the delay is a legitimate reprieve or just a temporary stay.

The Announcement

The IRS said it delayed certain portions of FATCA to "facilitate an orderly transition for withholding agents and FFIs regarding FATCA compliance and respond to comments regarding how the phase-out of transitional rules may affect information reporting and withholding systems." In other words, no one really knew what to do, and the Service didn't want to look heavy-handed, or at least more heavy-handed than it does currently.

At its core, FATCA consists of two components: withholding requirements on certain foreign bank account assets, and stool-pigeon "inter-governmental agreements" that require foreign governments to report any possibly non-compliant activity. The recently announced delay addresses both these areas.

As previously mentioned, at the time of writing, 113 jurisdictions have signed FATCA agreements which obligate them to turn over financial information about US accountholders in exchange for preferred status of the foreign financial institutions (FFIs) operating within its borders. While that is a lot of countries, some notable heavy-hitters like Russia, as well as a few local "tax havens" like Cuba, are conspicuously absent. So, the delay is calculated to get more countries on board.

In terms of the dreaded withholding requirements, the Service will delay the withholding on foreign pass-through payments, which was slated to begin in 2017, to at least January 1, 2019, or the date the rule is codified in the Federal Register. In a similar vein, the hammer will not fall on non-compliant FFIs until December 31, 2016. During the next calendar year, FFIs that are not covered by an IGA will be labeled "registration incomplete" until they toe the line.

The IRS will also exempt additional accounts by redefining the grandfather clause in Section 1.1471-2(b)(2)(i)(A) of the Income Tax Code, and confirms that the next two calendar years are a transitional period for FATCA compliance purposes.

What It Means

As mentioned earlier, it is too soon to tell whether the Service is merely circling the wagons in preparation for a fight or is willing to reach some kind of deal with expats. Much probably depends on the outcome of the 2018 mid-term elections; President-Elect Donald Trump not yet having made clear his intentions regarding FATCA, beyond a commitment to general tax reform.

That being said, the introduction in September 2016, by Congressman Mark Meadows (R – North Carolina) of H.R. 5935, which would repeal FATCA could signal a brightening on the horizon for US expats overseas, when taken alongside similar legislation introduced by Rand Paul in the Senate.

Commenting on the introduction of the bill, Congressman Meadows observed that:

"Ultimately, it is clear that FATCA goes well beyond what is appropriate and requires a level of disclosing information to the IRS that violates Americans' Fourth Amendment rights and places

unnecessary burdens on taxpayers. I encourage my colleagues to support a repeal of FATCA and demonstrate a commitment to upholding our Constitution as the law of the land."

Additionally, there are some indications that the countries who signed FATCA agreements, or at least a portion of them, are starting to have second thoughts. If FATCA does start to unravel, the IRS will have a few options:

- Call it quits and declare victory based on the amount of money already collected and the buzz already created;
- Modify the FATCA agreements in a way that gives signatories a bit more authority over the funds inside their own borders; or
- Damn the torpedoes and full speed ahead.

That first scenario is rather unlikely. As anyone who has ever been audited or investigated will attest, the IRS does not quit. However, there is the real possibility that the Service will back off at least somewhat. The Notice makes several references to the slew of negative comments that the IRS has received.

For now, it's wait and see. While the future is somewhat uncertain, one thing isn't: the international banking world will never be the same, especially for American expats and their families.

Endnote

1 https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx

Topical News Briefing: Putting France On The Right Track?

by the Global Tax Weekly Editorial Team

If the predictions of political experts and pollsters come to pass, and the incumbent Socialist Government is routed in next year's presidential elections, 2017 could be a decisive turning point in French economic policy, with possibly far-reaching implications for taxation.

With President Hollande's popularity ratings already on the floor, all the indications are that the elections will boil down to a straight fight between the center-right candidate François Fillon, and the nationalist leader Marine Le Pen. And given Fillon's resounding victory in the final round of the Republican primaries (reported in this week's issue of *Global Tax Weekly*), and the political toxicity of the Le Pen "brand," some say that the former Prime Minister is a shoo-in for the Elysée.

If these assumptions turn out to be correct, then France is primed for a shift towards the right. For as a self-confessed admirer of the late Margaret Thatcher, Fillon has proposed shrinking the size of the French Government and slashing taxes.

Recent statistics show that Fillon will have plenty of scope to achieve these aims. According to the EU's statistical agency Eurostat, France has the highest tax burden as a percentage of gross domestic product in the EU at 47.9 percent. Additionally, France was recently given the dubious distinction of possessing the world's least competitive tax regime by the Washington-based Tax Foundation on account of its high 33.33 percent corporate tax rate, "high and poorly structured" property taxes, and "high, progressive individual tax rates."

But when Fillon's policies are examined in slightly more detail, perhaps he is attempting to move France away from its traditionally statist economic model too far and too fast. His platform consists of EUR100bn (EUR106bn) in government spending cuts over five years, the loss of half-a-million public sector jobs, EUR50bn in tax cuts for companies, and the scrapping of the sacrosanct 35-hour working week. These are the sorts of policies that might appeal to many economists, who would argue that this is just the tough medicine France needs to unshackle its moribund economy, but not necessarily to ordinary French voters.

Indeed, given recent political developments, it is perhaps too dangerous to make any sort of assumptions about the French presidency. Political polling has suddenly become a fraught business, and like their counterparts in the UK and the US, taxpayers in France should perhaps prepare for the unexpected.

Countries Agree Multilateral Deal To Amend All Tax Treaties

Over 100 nations have concluded negotiations on a multilateral instrument that will swiftly implement a series of tax treaty measures in the area of base erosion and profit shifting (BEPS).

The instrument – developed under Action 15 of the BEPS project – will transpose BEPS recommendations into over 2,000 tax treaties worldwide. It will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies. It will also allow governments to strengthen their tax treaties with other tax treaty measures developed in the BEPS project, the OECD said.

The OECD will be the depositary of the multilateral instrument and will support governments in the process of its signature, ratification, and implementation. A first high-level signing ceremony will take place in the week beginning June 5, 2017, with the expected participation of a significant group of countries during the annual OECD Ministerial Council meeting, which brings together ministers from OECD and partner countries to discuss issues of global relevance.

OECD Secretary-General Angel Gurría commented: "The adoption of this multilateral instrument marks a turning point in tax treaty history. It will save countries from multiple bilateral negotiations and renegotiations to implement the tax treaty changes in the BEPS project. More importantly, having more than 100 jurisdictions on board will help ensure consistency in the implementation of the BEPS project, which will result in more certainty and predictability for businesses, and a better functioning international tax system for the benefit of our citizens."

Australia To Legislate For Diverted Profits Tax

The Australian Government has released draft legislation for the implementation of the proposed Diverted Profits Tax (DPT).

The policy was originally announced at the 2016/17 Budget. If passed, the legislation would impose a 40 percent penalty tax on profits that have been "artificially diverted" from Australia by multinationals.

The DPT is intended to target entities with annual global income of AUD1bn (USD748.5m) or more that shift profits to offshore associates where:

- The resulting increase in the foreign tax liability is less than 80 percent of the corresponding decrease in the Australian tax liability;

- There is insufficient economic substance; and
- One of the "principal purposes" is to obtain a tax benefit.

If the DPT applies to a scheme, the Commissioner of Taxation may issue a DPT assessment to the taxpayer in question. Once an assessment is issued, the taxpayer will have 21 days to pay the amount stipulated.

The taxpayer will be able to provide the Commissioner with further information disclosing reasons why the DPT assessment should be reduced during the period of review (generally 12 months after notice is given of the DPT assessment). If at the end of the review period the taxpayer is dissatisfied with the DPT assessment, or the amended DPT assessment, they will have 30 days to appeal to the Federal Court of Australia.

The DPT will not apply if it is reasonable to conclude that one of the following tests applies to the relevant taxpayer:

- The AUD25m turnover test – this will apply if, broadly, the sum of the Australian turnover of the relevant taxpayer and the Australian turnover of any other Australian entities that are part of the same global group does not exceed AUD25m;
- The sufficient foreign tax test – this will apply if, broadly, the increase in the foreign entities resulting from the scheme is 80 percent or more of the reduction in the Australian tax liability of the relevant taxpayer; or
- The sufficient substance test – this will apply if, broadly, the income derived, received, or made as a result of the scheme by each entity that entered into or carried out the scheme, or is otherwise connected to it, reasonably reflects the economic substance of the entity's activities in connection with the scheme.

The DPT will commence on July 1, 2017. The Government expects it to raise AUD200m over the next four years.

Switzerland May Start CbC Exchanges From 2020

Multinationals operating in Switzerland could be required to draw up country-by-country (CbC) reports from the 2018 tax year if the Swiss Parliament approves new proposals put forward by the Federal Council.

On November 23, the Swiss Federal Council adopted a dispatch on the automatic exchange of CbC reports and the federal legislation required for its implementation. CbC reports will provide information on how the turnover generated and the taxes paid by a multinational group of companies are distributed globally.

Only multinationals with an annual consolidated turnover of more than EUR750m (USD792.9m) (or the equivalent in the national currency as of January 1, 2015) will be

required to provide CbC reports. The Federal Council expects that around 200 groups resident in Switzerland will be affected.

To implement the new rules, three legal bases must exist. In the first instance, the OECD/Council of Europe Convention on Mutual Assistance in Tax Matters must enter into force. This is scheduled for January 1, 2017, and will be applicable for Switzerland from January 1, 2018. Second, the Multilateral Competent Authority Agreement (MCAA) on the Exchange of Country-by-Country Reports must be implemented. Switzerland signed this agreement on January 27, 2016, and it will now be submitted to Parliament for approval. Finally, the Federal Act on the International Automatic Exchange of Country-by-Country Reports of Multinationals must be passed by Parliament. The Federal Council is submitting this legislation to Parliament.

If Parliament approves the proposals and a referendum is not held, the MCAA and the Federal Act should enter into force at the end of 2017. Multinationals in Switzerland would therefore be obliged to draw up CbC reports from the 2018 tax year. Provided that the relevant legislation enters into force by the end of 2017, multinationals would be able to voluntarily submit country-by-country reports for tax periods before 2018.

The Federal Council expects the exchange of CbC reports with partner states to begin in 2020. The Federal Council will determine the countries with which it wishes to exchange data.

Once the relevant bilateral agreements have been reached, CbC reports will be transmitted automatically on an annual basis to the tax authorities of the countries where affected companies have business units.

Tax Inspectors Without Borders Boosting Revenues For Developing States

More than USD260m in tax revenues has been generated through the Tax Inspectors Without Borders (TIWB) initiative since its launch last year, the OECD announced on November 22.

The TIWB project was launched in July 2015 to support developing nations address base erosion and profit shifting. It provides support and training from highly qualified tax experts, in particular to support audits of multinationals' affairs.

According to the OECD, eight pilot projects – in countries spanning the globe from Africa to Asia and Latin America – have resulted in more than USD260m in additional tax revenues to date. This includes more than USD100m in new tax revenues generated through TIWB audits in Zimbabwe, which the OECD said demonstrates the tremendous potential for future projects.

Thirteen projects are underway worldwide, in Botswana, Costa Rica, Ethiopia, Georgia, Ghana, Jamaica, Lesotho, Liberia, Malawi, Nigeria, Uganda, Zambia, and Zimbabwe. A range of new programs will launch in the coming year, including new deployments of auditors to Republic of Congo, Egypt, Uganda, Cameroon, and Vietnam. This will also include the first South–South cooperation project under the TIWB initiative, which will see Kenyan auditors deployed to Botswana in 2017, the OECD said.

James Karanja, head of the TIWB Secretariat, commented: "Developing countries face serious challenges in raising domestic resources to fund basic government services, and tax avoidance by multinational enterprises is a complicating factor. The TIWB program is demonstrating how effective capacity building can make a difference toward the goal of ensuring that all companies pay their fair share of tax."

France Mulls Diverted Profits Tax

The French National Assembly is considering a proposal to introduce a new diverted profits tax (DPT).

Put forward by Socialist French Senator Yann Galut, the proposal is based on the same levy introduced in the UK to ensure that profits are not shifted out of France through artificial arrangements.

The provisions would reportedly ensure that arrangements to avoid establishing a tax presence or liability in France would be subject to a prohibitively high tax rate, above the present corporate tax rate of 33.33 percent. The DPT is proposed to be in place by 2018.

Whether the levy is adopted may depend on the outcome of the ongoing presidential election race, with the French Socialist Party currently behind in the running.

Dijsselbloem Talks Up Dutch Corporate Tax Cut

Dutch Finance Minister Jeroen Dijsselbloem has said that the Netherlands should consider reducing its corporate tax rate in response to proposed tax cuts in other countries.

In his weekly interview with Dutch broadcaster RTLZ, Dijsselbloem suggested that the Netherlands will find it harder in future to compete with other countries on tax unless it cuts its 25 percent corporate tax rate, especially as the Government aligns the country with the OECD BEPS recommendations by repealing deductions and special tax schemes for multinational companies.

While it has been estimated that each 1 percent reduction in the main corporate tax rate would reduce revenues by almost EUR600m (USD638m), Dijsselbloem argued that the removal of corporate tax deductions would offset the cost of a tax rate cut.

Dijsselbloem was speaking amid speculation that the UK would seek to extend ongoing corporate tax cuts by lowering its rate to as low as 15 percent – an opportunity that the UK Government avoided in its annual autumn fiscal statement. However, corporate tax rates around the world continue to fall, and corporate tax in the Netherlands is above the global average of 23 percent.

The center-right Dutch People's Party, the largest party in the governing coalition, has said that it would seek to cut corporate tax for all companies if it retains power in parliamentary elections scheduled for 2017. The party's manifesto also calls for a reduction in taxes on labor, a cut in capital gains tax, and simplification of the tax regime.

However, the Dutch Labor Party, to which Dijsselbloem belongs, is firmly against the idea of a corporate tax cut, having warned about a corporate tax "race to the bottom."

French Presidential Hopeful Fillon Pledges Tax Cuts

Former Prime Minister François Fillon, who on November 27 won in primaries to lead France's main center-right party in the 2017 presidential elections, has proposed major tax cuts for businesses and individuals if he becomes French President.

In something of an unexpected result, Fillon, who was Prime Minister from 2007 to 2012, won convincingly in the first round of the primary to elect the center-right's presidential candidate, a vote which saw former President Nicolas Sarkozy eliminated from the contest. He then went to win against remaining candidate, Alain Juppé, also a former French Prime Minister, and previously

the favorite to secure the candidacy, in the second round of the primary.

Fillon has announced a series of controversial pro-business reforms which he argues will restore growth to the French economy. Among them are some EUR40bn (USD42.5bn) worth of tax cuts for businesses, including a reduction in corporate tax to 25 percent.

Currently 33.33 percent, France's corporate tax will be reduced to 28 percent by 2020 under the plans of the current Socialist Government.

Fillon has also proposed EUR10bn worth of tax cuts for individual taxpayers, and wants to scrap France's wealth tax, the ISF.

He would offset these tax reductions with substantial cuts in public spending, intended to reduce the size of the French state. However, some of the lost revenues would be clawed back by a proposed 2 percent increase to value-added tax, which is currently 20 percent.

Report: Canada Must Improve Tax Competitiveness

The tendency of Canada's federal and provincial governments to hike taxes on businesses means that the country is beginning to lose its competitive edge, according to a new report by the School of Public Policy at the University of Calgary.

The School's 2015 Tax-Competitiveness Report, authored by Philip Bazel and Jack Mintz, explained that Canada's effective corporate tax rate on new investment has risen from 17.5 percent in 2012 to 20 percent in 2015. The report attributed this increase primarily to higher provincial corporate income tax rates, the British Columbian Government's reversal of previous goods and services tax reforms, and reductions in tax preferences at federal and provincial levels. Reforms introduced in the federal 2016 Budget will see the effective rate increase to 20.1 percent.

The School found that Canada now has the sixth-highest marginal effective tax rate (METR) in the G7, and the 13th-highest in both the G20- and the OECD-country groupings.

Among Canada's provinces, the report noted that Newfoundland and Labrador increased its corporate income tax rates to deal with their deficits, while New Brunswick increased its corporate tax from 10 percent to 14 percent in 2014–16. An increase in Alberta's corporate tax in 2015 pushed up its effective tax rate by 2.3 percent to 19.3 percent, above that of Ontario and Quebec.

"With the US election of Donald Trump and a Republican Congress promising to reduce corporate income tax rates, as well as the recent

affirmation by the Prime Minister [Theresa] May to lower the UK corporate income tax rate to 17 percent, the pressure will be to reduce, not to increase corporate income taxes in the next several years," the School said.

The Government should use the revenues that will be generated from its review of tax expenditures to cut the corporate income tax rate, the report recommended.

"For example, the federal rate could be reduced from 15 to 13 percent by scaling back accelerated depreciation and other tax preferences at the federal level on a revenue-neutral basis. Provinces could adopt a single corporate income tax rate on all businesses that would also be fiscally neutral. This would simplify the business tax structure as well as make it more efficient and neutral," the report suggested.

Australian Business Council Urges Corporate Tax Cut

Jennifer Westacott, the Chief Executive of the Business Council of Australia, has warned that Australia risks being left behind in the global race for investment if it retains its high company tax rate.

In an opinion piece for the *Australian Financial Review*, Westacott cautioned that "uncompetitive company tax rates deprive the community of more tax revenue, higher wages, and new growths."

She pointed to US President-elect Donald Trump's campaign pledge to cut the federal company tax rate from 35 percent to 15 percent as an example of the external pressures on Australia's competitiveness. She argued that if Trump delivers on his plan, Australia "will be floundering in terms of our competitiveness."

Westacott also noted that the UK's corporate tax rate is 20 percent, while the average across Asia is 22 percent and the OECD average is 25 percent. The Australian rate is 30 percent, although the federal Government has outlined plans to reduce the rate to 25 percent over the next ten years.

"Some economists say reducing company taxes is a leap of faith. The real leap of faith is blithely assuming people will continue doing business here, no matter the cost or difficulty. Our trading partners can buy products from other countries, and they will," Westacott wrote.

OECD Backs Trump's Tax Cuts

The latest economic survey of the US from the OECD has come out in support of President-elect Donald Trump's tax-cutting policies, anticipating an immediate boost to US economic growth.

In its report, the OECD said it welcomes the prospect of the US economy being boosted in 2017, and particularly in 2018, by the fiscal stimulus it assumes will be provided as the new Administration begins to implement expansionary policies, including tax cuts.

Projected fiscal support is expected to increase US economic growth by between "just under 0.5 percent and 1 percent" in the next two years. After growth of only 1.5 percent this year, US gross domestic product is forecast to grow by 2.3 percent in 2017, and then by 3 percent in 2018. Household spending would be supported by the personal income tax cuts in Trump's expected reforms, while business investment should "surge" with reduced corporate tax rates, the OECD said.

However, the OECD also comments that US economic growth could be threatened by Trump's protectionist trade measures, with renegotiated trade treaties and possible import tariff hikes. The organization said his policies would require counterbalancing "fiscal adjustment of some sort … to ensure public finances are sustainable in the medium term."

The US report was released by the OECD alongside its main annual report for all countries, in which it warned governments that current low interest rates could "create financial market risks" globally. It called on all countries to adopt "more supportive" fiscal policies to "ease the burden on monetary policy."

China To Challenge Trump Tariffs At WTO

During a press conference on November 23, China's deputy international trade representative Zhang Xiangchen said that China would use World Trade Organization (WTO) rules to counter the tariffs threatened by US President-elect Donald Trump.

Before his election, Trump pointed out that he would impose a 45 percent tariff on imports from China to counteract allegations that China is not "living by the rules," particularly with regard to its alleged currency devaluation policy. "I would tax China on products coming in," he said, although he also commented that just the threat of sharply higher tariffs could itself alter China's policies.

However, in the press briefing after the US–China Joint Commission on Commerce and

Trade, Zhang confirmed that China denies any use of currency devaluation to help its exporters, and would rely on the US honoring its WTO obligations to protect against any unjustified imposition of tariffs.

He did not mention any possible retaliatory action against US exports to China.

Advisory Panel Seeks IRS Reassurances On CbC Reporting

The Large Business and International (LB&I) subgroup advisory panel to the Internal Revenue Service (IRS) is calling for actions to ensure the confidentiality of tax-related information reported under the OECD's country-by-country (CbC) reporting framework.

Under the framework, the US will exchange information on the tax affairs of multinationals headquartered in the US with other territories, to support international efforts to ensure fair taxation of profits.

CbC reporting is a tool intended to allow tax administrations to perform high-level transfer pricing risk assessments, or to evaluate other BEPS-related risks. The CbC reporting template will require multinational enterprises (MNEs) to provide annually and for each jurisdiction in which they do business, aggregate information relating to the global allocation of the MNE's income and taxes paid together with certain indicators of the location of economic activity within the MNE group, as well as information about which entities do business in a particular jurisdiction and the business activities each entity engages in.

As part of its efforts to implement BEPS in respect of US taxpayers, in June 2016 the IRS issued final regulations requiring CbC reporting by US persons that are the ultimate parent entity of an MNE group with revenue of USD850m or more in the preceding accounting year.

The final regulations, provided under Treas. Reg. Section 1.6038-4, require these US persons to file annual reports containing information on a country-by-country basis of an MNE group's income, taxes paid, and certain indicators of the location of economic activity. The new reporting requirements apply to all parent entities with taxable years beginning on or after June 30, 2016. The final regulations will require reporting on new Form 8975, the "Country-by-Country Report." The IRS has estimated that CbC reports will be filed by approximately 1,800 US-parented MNEs.

Assuming the US has an exchange-of-information treaty or similar agreement with a foreign jurisdiction in which the US multinational group operates, the CbC reports filed with the IRS will be exchanged automatically with tax authorities in that foreign jurisdiction.

However, there are concerns in the US about the misuse and security of that information.

The LB&I subgroup has set out recommendations that the IRS take additional steps to promote its commitment to maintaining taxpayer confidentiality, for example by:

- Expanding its website notice to include links to relevant materials, including its International Data Safeguards & Infrastructure Workbook and the OECD's Keeping It Safe guide;
- Elaborating (on its website notice and elsewhere) on what is meant by the term "misuse" and explaining what the consequences will be to a receiving country that either discloses or inappropriately uses exchanged information. Specifically, it has recommended that the IRS should confirm that where it is determined that information has been misused, the automatic exchange of information with that country will be suspended; and
- Considering whether to include specific reference to its commitment to ensure taxpayer confidentiality, along with its Exchange of Information Disclosure mailbox, in the instructions to Form 8975 and other documents sent to taxpayers.

The LB&I subgroup noted that the IRS's policy and practices to ensure taxpayer confidentiality in respect of treaty-exchanged information accord fully with the OECD guidelines. Specifically, no information will be exchanged pursuant to a tax convention until the IRS has conducted a "safeguards review" and satisfied itself that the receiving tax authority can and will maintain the confidentiality of the exchanged information. However, it called for greater clarity concerning the response for non-compliance. In this respect, it welcomed the publication by the IRS of a notice on the IRS's website captioned "Reporting Unauthorized Disclosure or Misuse of Tax Information Exchanged Under an International Agreement."

It noted that, until now, where a concern is raised (either directly by the affected taxpayer or by the taxpayer's representative), the IRS's response is to put further exchanges with the affected jurisdiction on hold, consult with the taxpayer or representative, and – if the concern is deemed to have credence – engage in a dialogue with the other country. Under applicable tax treaties, there is no sanction for violating the confidentiality provisions; that is to say, an aggrieved taxpayer cannot sue for damages, force the return of the information, or prevent the other authority's use of the information.

In this area, the LB&I subgroup has recommended that the IRS publish each year a list of countries with respect to which automatic exchanges of CbC reports will occur. As for the particular instances of alleged or actual

disclosure or misuse, options could include securing the consent required by section 6105(b)(3) on a case-by-case basis or, perhaps even better, a process or procedure for keeping affected taxpayers apprised in the model competent authority or automatic exchange of information agreement. "Steps such as these would not only underscore the IRS's commitment to ensuring taxpayer confidentiality and the appropriate use of their data, but would also communicate that transparency is not a one-way street, thereby buttressing taxpayers' faith in the integrity of the tax system," the LB&I subgroup concluded.

Trump Confirms US Withdrawal From Trans-Pacific Partnership

President-elect Donald Trump has confirmed that, during his first day in office, he will keep his promise to withdraw the US from the Trans-Pacific Partnership (TPP) trade treaty.

In a short video on YouTube, he said he would immediately "issue a notification of intent to withdraw from the TPP – a potential disaster for our country. Instead, we will negotiate fair, bilateral trade deals that bring jobs and industry back onto American shores." The decision was expected, but perhaps not as one of the first executive actions "he would take on day one."

Covering some 40 percent of the global economy, the TPP was signed in February this year by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam. Had the TPP entered into force under current agreement between the parties, approximately 86 percent of tariffs on industrial goods would have been eliminated.

With TPP in doubt, China has been pushing for a completion of negotiations for the Regional Comprehensive Economic Partnership (RCEP), as part of its longer term objective to oversee the formation of a wider Free Trade Area of the Asia Pacific.

While it is unlikely to have the same level of market access benefits as TPP, RCEP aims to bring together the existing free trade agreements of China, Japan, South Korea, India, Australia, and New Zealand with the Association of Southeast Asian Nations (ASEAN) into a single enhanced comprehensive agreement. ASEAN comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

ESRI: How Post-Brexit WTO Rules Could Hit UK–EU Trade

If the UK's trading relationship with the EU reverts to World Trade Organization (WTO) rules post-Brexit, the impact on trade with individual EU member states will depend on the volume and nature of the merchandise traded, Ireland's Economic and Social Research Institute (ESRI) has said.

ESRI analyzed bilateral trade flows between the UK and each of the 27 other EU member states. It obtained information on the value and unit/weight of over 5,200 product lines and matched each line to the external tariff applied by the EU to third country trade as registered with the WTO where there is no separately agreed trade agreement.

"In the event of a 'hard' Brexit and no immediately agreed trade treaty, we assume these third country tariffs would be the fall-back or default position between the EU and UK. We further assume that these tariffs would be applied by both the EU and the UK," ESRI stated.

The report explained: "The WTO tariffs vary widely across products with many subject to a zero tariff while some products are subject to a tariff as high as 75 percent (for water pipe tobacco). Many basic products and commodities are subject to both an ad valorem tariff and a weight based tariff which often results in high overall levels of tariff."

"This implies that the aggregate impact of Brexit under a WTO scenario is a function of the detailed trade patterns and the impact will thus vary considerably across EU member states."

The report noted that the UK's most important trading partners are Germany (10.2 percent of total merchandise exports) and France (5.9 percent), while Croatia and Latvia account for only 0.05 percent and 0.07 percent of UK exports, respectively. It said that the UK is a particularly important destination for merchandise exports for certain countries, accounting for 13.7 percent of Irish exports and 10.1 percent of Cypriot exports. By contrast, Croatia and Slovenia export only 1.7 percent and 2.2 percent of their merchandise to the UK, respectively.

ESRI calculated that, overall, the application of WTO tariff rates on exports from the EU to the UK would result in an average (minimum) tariff of 4.1 percent. At 2 percent, the lowest tariff would be imposed by Luxembourg, whereas the tariff on UK exports to Ireland would be 6 percent (with a potential maximum value of 11.7 percent).

ESRI also found that "the implied tariff that would be imposed by the UK on goods coming from the EU would be higher than that applied by the EU." It estimated that the average minimum tariff would be 5.7 percent, but that tariffs imposed on imports from Denmark and Ireland would be over 10 percent.

On a sector-by-sector basis, a number of sectors – including paper products, pharmaceuticals, and iron and steel – would face either no tariff or a rate set very close to zero. On the other hand, ESRI calculated that food, clothing, and tobacco products would face the highest tariffs. Meat products exported from the UK to the EU could be hit by tariffs of 49.4 percent, while cereals could face tariffs of 45.7 percent, and tobacco 38.1 percent.

Overall, ESRI estimated that, under this scenario, the EU's exports to the UK would fall by 30 percent, representing a 2 percent reduction in its total world trade. Ireland and Belgium would be worst affected, losing 4 percent and 3.1 percent of their total exports, respectively.

It added that the UK's exports to the EU would fall by 22 percent. However, "as these reductions apply to 27 trading partners, the aggregate effect is larger than that of the EU with the UK facing a fall in its total trade of 9.8 percent," it explained.

Finance Minister: Canada–UK FTA Not A Priority For Canada

Canadian Finance Minister Bill Morneau has said that negotiating a post-Brexit trade agreement with the UK is not a high priority, with trading relationships with the US, the EU and China topping his agenda instead.

Morneau told the *Financial Times*: "We're not talking as much about Brexit as you are in the UK."

The paper reported Morneau as stating that Canada would like to conclude a trade agreement with the UK on account of a high degree of "affinity" between the two countries. However, he stressed that the North American Free Trade Agreement (NAFTA) with the US and Mexico "is of huge importance" as Canada's "biggest [trading] relationship by a very big margin."

"Our view is that NAFTA has had enormous advantages for the US, for Canada, and for Mexico," Morneau explained.

Although he emphasized that "nine million Americans are reliant on trade with Canada," with "more than USD2bn a day back and forth trade," Morneau did nevertheless state that Canada "recognize[s] that the anxieties that fueled the decision in the US [election] are real." Morneau said the Canadian Government had not yet had discussions with US President-elect Trump on NAFTA.

He also highlighted Canada's other trading priorities, with the EU and China. He described the Comprehensive Economic Trade and Investment Agreement (CETA) with the EU as "open[ing] up a very significant market," and said the opening of exploratory talks with China was likewise important.

"As the UK figures [out] its next steps, it will be important too," he told the paper.

US Firms Seek Duties On Canadian Lumber

On November 25, the US lumber industry petitioned the US Department of Commerce (Commerce) and International Trade Commission (ITC) "to restore the conditions of fair trade in softwood lumber between the United States and Canada" by the imposition of trade dispute import duties.

The petition alleges that Canadian provincial governments, which own the vast bulk of Canada's timberlands, provide standing trees to Canadian softwood lumber producers for an administered fee that is far below the market value of the timber, as well as a number of other subsidies and tax incentives.

The legal action seeks for the US to impose anti-dumping duties (ADs) and countervailing duties (CVDs) to offset the "harm suffered by the US industry and its employees" from those subsidies and by the dumping of the subsidized merchandise at less than fair value in the US market.

The petition details the industry's allegations of injury. It points out that, after the expiry of the 2006–2015 US–Canada Softwood Lumber Agreement (SLA), Canadian imports surged from 29.5 percent of US total consumption in the third quarter of 2015 to 34.1 percent so far in 2016. The volume of imports from Canada in the first eight months of 2016 was more than 33 percent higher than in the same period of 2015.

Under the SLA, Canada agreed to impose certain export measures on softwood lumber products when the price of lumber fell below a certain level, and not to circumvent those measures by, for example, providing grants or other benefits to softwood lumber producers.

Negotiation of a replacement trade agreement proved impossible during the one-year "standstill period" that was added on to the SLA after its expiry, and, since October 12, the US lumber industry has been free to seek enforcement from Commerce and the ITC. It is seen likely that, after the imposition of ADs and CVDs on Canadian lumber imports, the dispute will be filed at the World Trade Organization.

"As negotiations to address the underlying market distorting policies continue," Senate

Finance Committee Ranking Member Ron Wyden (D – Oregon) stated, "it is incumbent on the Administration to enforce the law fully and fairly to the cases filed today. American workers and forestry communities need relief from unfair trade and they need it now."

ATO To Send 'Certainty Letters' To Taxpayers

The Australian Taxation Office (ATO) has said it will send "certainty letters" to some taxpayers to confirm that it has completed its routine information checks and they have satisfied their tax obligations for the year.

In a bulletin for tax advisors, the ATO said the letters will confirm that the ATO will not conduct a further review or audit of the relevant client's tax return. However, clients will still be required to keep their tax records.

The ATO told advisors that if a client does not receive a letter, it does not mean something is wrong with their tax return. The ATO explained: "We have only selected a group of taxpayers to receive letters based on specific criteria. We began issuing certainty letters in 2015 as part of a trial and are continuing to trial this for 2016."

The initial letters will be issued to taxpayers who have linked the ATO to their myGov online accounts. The ATO is consulting on how to send certainty letters to taxpayers who do not use myGov.

Airbnb Hopes For 700 Tax Deals

Accommodation rental platform Airbnb has said it soon hopes to have tax agreements in place with 700 cities, removing a major source of regulatory risk to its global operations.

Airbnb Chief Executive Brian Chesky revealed in a recent interview with the *Financial Times* that the company has already agreed to collect and remit local tourism and hotel occupancy taxes in 200 locations, and is looking to add another 500 such agreements.

Chesky explained that the agreements are necessary to reduce the risk that the company, or those using its online market place to rent out their homes to tourists, could break local tax laws.

"When you have a tax agreement, you have an explicit agreement, therefore there is not an existential risk," he told the FT.

In one prominent example, Airbnb agreed last year to collect the tax on bookings for stays in Paris, its largest market, to ensure hosts' compliance with Parisian tax rules.

Airbnb operates in around 50,000 locations around the world, according to the FT.

Studies in the US, which has thousands of tax jurisdictions at state and local level, show that there continues to be confusion about the tax obligations of individuals receiving money in the sharing economy via platforms such as

Uber, Etsy, Lift, and Airbnb. One small business survey focusing on participants in the US sharing economy, published earlier this year, found that 69 percent of respondents have not received any tax guidance from the shared economy platform they use.

In addition, approximately one-third of survey respondents did not know whether they were required to pay quarterly estimated tax payments, and almost half were unaware of any available deductions, expenses, or tax credits they could claim to offset their tax liability.

It was said that the data from the survey, which was conducted by the National Association for the Self-Employed in partnership with American University's Kogod Tax Policy Center, "underscores the importance of educating shared-economy entrepreneurs about the fact that they, too, are operating a self-employed, small business."

Hong Kong Explains New Tax Appeal Process

Hong Kong's Inland Revenue Department (IRD) has updated Interpretation and Practice Note No. 6 to reflect legislative changes to the rights of appeal against tax assessments, which began to be applied from April 1 this year.

Since that date, a taxpayer who disputes an assessment may apply directly to a court of first instance for leave to appeal against the IRD's decision on a matter of law. If the court grants leave to appeal, it will hear and determine the substantive issue of the appeal. If the court refuses to grant leave to appeal, the appellant may make a further application to the Court of Appeal.

Those cases delivered before April 1 will continue to be processed under the previous practice, which required an appellant or the Commissioner to make an application requiring the Board of Review to present the case to the lower court.

Relaunch Of Italian Tax Amnesty Approved

Final parliamentary approval was obtained on November 24 for a relaunch of Italy's voluntary disclosure program (VDP), as part of the Government's fiscal simplification and administrative decree linked to its 2017 Budget proposals.

The reopened VDP, which was announced at the same time as the 2017 Budget, is expected to yield a further EUR2.6bn (USD2.75bn) in additional tax revenue. The original program that closed on November 30 last year yielded EUR4bn.

Under the VDP, which will remain open until July 31, 2017, participants have to agree to pay

all outstanding taxes when providing details of their undeclared assets or income. They then get the benefit of much-reduced administrative and criminal penalties.

Within its new provisions, it will be possible for declarations to be made not only of undeclared overseas assets, but also of previously unreported cash and bearer bond holdings in Italy. An individual who has already taken part in the 2015 program may not participate in the revised VDP to declare further holdings abroad, unless also declaring unreported assets in Italy.

ARGENTINA - UNITED ARAB EMIRATES

Signature

Argentina and the United Arab Emirates signed a DTA on November 3, 2016.

CYPRUS - INDIA

Signature

Cyprus and India signed a DTA Protocol on November 18, 2016.

EGYPT - BAHRAIN

Forwarded

The Egyptian Parliament approved a DTA with Bahrain on November 16, 2016.

FINLAND - PORTUGAL

Signature

Finland and Portugal signed a DTA on November 7, 2016.

GERMANY - COSTA RICA

Effective

Germany's Finance Ministry on October 24, 2016 confirmed that the DTA between Germany and Costa Rica will apply from January 1, 2017.

HONG KONG - AUSTRALIA

Negotiations

Hong Kong called for the start of DTA negotiations with Australia at a meeting on November 9, 2016.

INDIA - CYPRUS

Signature

India and Cyprus signed a DTA Protocol on November 18, 2016.

INDIA - KOREA, SOUTH

Effective

The DTA between India and South Korea will apply from April 1, 2017.

INDIA - SINGAPORE

Into Force

The Indian Government has announced that a new DTA Protocol with Singapore entered into force on October 29, 2016.

LATVIA - SWITZERLAND

Signature

Latvia and Switzerland signed a DTA Protocol on November 2, 2016.

NEW ZEALAND - VARIOUS

Negotiations

New Zealand aims to conclude new or updated DTAs with Norway, China, Korea, Slovak Republic, Portugal, and Fiji, the Inland Revenue Department announced in its updated work plan for next year.

NIGERIA - SINGAPORE

Forwarded

Nigeria's Cabinet approved a new DTA with Singapore at its meeting on November 16, 2016.

OMAN - HUNGARY

Signature

Oman and Hungary signed a DTA on November 1, 2016.

PAKISTAN - IRELAND

Effective

The DTA between Pakistan and Ireland will be effective from January 1, 2017, according to an update from the Irish Revenue.

SAINT KITTS AND NEVIS - UNITED ARAB EMIRATES

Signature

Saint Kitts and Nevis and the United Arab Emirates signed a DTA on November 24, 2016.

SINGAPORE - LAOS

Into Force

The DTA between Singapore and Laos entered into force on November 11, 2016.

SWITZERLAND - LIECHTENSTEIN

Into Force

The DTA between Switzerland and Liechtenstein will enter into force on December 22, 2016.

SWITZERLAND - OMAN

Effective

The new DTA between Switzerland and Oman will become effective from January 1, 2017, after it entered into force on October 13, 2016.

UNITED KINGDOM - COLOMBIA

Signature

The United Kingdom and Colombia signed a DTA on November 2, 2016.

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

THE AMERICAS

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

2016 Filing Season Business Tax Update

1/4/2017 - 1/4/2017

Wolters Kluwer

Venue: Webinar

Key Speakers: Bradley Burnett, J.D., LL.M.

https://www.cchwebinars.com/products/january-4-2017-2016-filing-season-business-tax-update-full-day-course#tab-product_tab_overview

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

6th Annual Institute on Tax, Estate Planning and the Economy

1/23/2017 - 1/26/2017

STEP

Venue: Fairmont Hotel, 4500 MacArthur Blvd, Newport Beach, California, 92660, USA

Key speakers: Erin S. Fukuto (Albrecht & Barney), Kristin Yokomoto (Albrecht & Barney), Matthew T. McClintock (WealthCounsel LLC), Louis W. Pierro (Pierro, Connor & Associates, LLC), among numerous others

http://www.step.org/sites/default/files/STEP_OC_Brochure_2017_USsize_WEB_081116.pdf

International Tax Issues 2017

2/7/2017 - 2/7/2017

PLI

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

Chair: Michael A. DiFronzo (PwC)

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2017/_/N-4kZ1z10p5l?ID=288687

The Leading Forum For Transfer Pricing Professionals in the US and Beyond

2/21/2017 - 2/22/2017

TP Minds Americas

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

Key speakers: Matthew Frank (General Electric), Brandon de la Houssaye (Walmart), Brian Trauman (KPMG), Katherine Amos (Johnson & Johnson), Michael Cartusciello (JP Morgan), among numerous others

https://finance.knect365.com/tp-minds-americas-conference/

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

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

The 5th Offshore Investment Conference

2/8/2017 - 2/9/2017

Offshore Investment

Venue: Fairmont, 80 Bras Basah Rd, 189560, Singapore

Key Speakers: TBC

http://www.offshoreinvestment.com/pages/index.asp?title=The_5th_Offshore_Investment_Conference_Singapore_2017&catID=13805

CENTRAL AND EASTERN EUROPE

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

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

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

Update for the Accountant in Industry & Commerce

12/7/2016 - 12/8/2016

Wolters Kluwer

Venue: Sofitel London St James, 6 Waterloo Pl, St. James's, London, SW1Y 4AN, 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 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

Update for the Accountant in Industry & Commerce

12/29/2016 - 12/30/2016

Wolters Kluwer

Venue: Hilton Glasgow Hotel, 1 William St, Glasgow, G3 8HT, 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

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, Welthandelsplatz 1, 1020 Vienna, Austria

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

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

Private Client Property Tax 2017

1/26/2017 - 1/26/2017

Private Client Tax

Venue: TBC, London, UK

Chair: Robert Smeath (New Quadrant Partners)

https://finance.knect365.com/private-client-property-tax/agenda/1

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

Tax Planning for Entertainers and Sports Stars 2017

2/23/2017 - 2/23/2017

Private Client Tax

Venue: TBC, London, UK

Chair: Patrick Way (Field Court Tax Chambers)

https://finance.knect365.com/tax-planning-for-entertainers-sports-stars/

Principles of International Taxation

2/27/2017 - 3/3/2017

IBFD

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

Key speakers: TBC

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

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

Global Tax Treaty Commentaries Conference

5/5/2017 - 5/5/2017

IBFD

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

Key speakers: Prof. John Avery Jones, Dr Philip Baker (QC Field Court Tax Chambers), Prof. Dr Michael Beusch (Federal Administrative Court), Prof. Mike Dolan (IRS Policies and Dispute Resolution and KPMG), among numerous others

http://www.ibfd.org/IBFD-Tax-Portal/Events/Global-Tax-Treaty-Commentaries-Conference#tab_program

THE AMERICAS

United States

Attorneys General from 11 US states are supporting efforts to require the US Supreme Court to rethink the 1992 *Quill* decision restricting sales taxes on internet sales.

Quill, a Supreme Court ruling delivered before the internet sales boom, established the "physical presence" test, whereby retailers are only required to collect sales tax in states where they also have bricks-and-mortar stores. It was also decided that only Congress has the authority to regulate interstate commerce under the Commerce Clause of the US Constitution.

A listing of recent key international tax cases.

On November 7, the Attorneys General from Alabama, Hawaii, Illinois, Kansas, Maryland, Michigan, Mississippi, Oregon, Pennsylvania, Tennessee, and Vermont filed a brief asking the Court whether the decision should be overturned.

They are seeking a review of the Court of Appeals for the Tenth Circuit's decision last year in the case brought by the Direct Marketing Association (DMA) against Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue.

Colorado had enacted a law in 2010 that imposed three obligations on online retailers that do not collect sales taxes – "non-collecting retailers." Under the law, such retailers have to send a "transactional notice" to Colorado purchasers informing them that they may be subject to Colorado's sales tax.

Additionally, online retailers must send an "annual purchase summary" to those who buy goods from the retailer totaling more than USD500, listing dates, categories, and amounts of purchases, to remind them of their obligation to pay sales taxes on those purchases, while they are also required to send the state government an annual "customer information report" listing their customers' names, addresses, and total amounts spent.

The DMA filed a challenge to the Colorado law and convinced a district court that it violates the Commerce Clause because it discriminates against, and unduly burdens, interstate commerce. The Appeals Court decided, to the contrary, that the Colorado law does not contravene *Quill*, as "the notice and reporting requirements of the Colorado law do not constitute a form of tax collection."

However, the Appeals Court did not look at a repeal of *Quill*, even though Justice Anthony Kennedy noted that "there is a powerful case to be made that a retailer doing extensive business within a state has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the internet," and suggested that "it is unwise to delay any longer a reconsideration of the [Supreme] Court's holding in *Quill*."

The brief from the Attorneys General on *Quill* points out that "courts and commentators agree that the rule lacks doctrinal justification, given that states may impose other regulations on businesses that lack a physical presence within the regulating state's borders. And, with the explosion of e-commerce to a multi-trillion dollar industry, the physical presence rule has caused a startling revenue shortfall in many states."

They added that *Quill* should finally receive "the complete burial it justly deserves. … Internet retailers' ability to conduct trillions of dollars of business without collecting a sales and use tax also discriminates against local businesses and their customers. *Quill* thus undermines the foremost purpose of the dormant Commerce Clause – to prevent discrimination and unfair tax treatment."

"More and more, the marketplace is moving from Main Street to the Information Superhighway, and our local merchants are at an unfortunate disadvantage," Mississippi's Attorney General Jim Hood observed, continuing: "If local stores are unable to compete with out-of-state online retailers, we lose jobs, an important tax base, and a critical investment in our communities. We're asking the Supreme Court to even the playing field for merchants and to allow the states to gain the revenue that should be due to them."

"At least 13 states now have laws to levy sales taxes on purchases through third-party affiliates like Amazon, for example. Courts in New York have upheld this type of tax," he added. "I remain hopeful that the brief we filed today will move the Supreme Court toward opening the door for states to collect sales tax on all internet sales."

http://www.ago.state.ms.us/wp-content/uploads/2016/11/Brohl-v.-Direct-Marketing-Association-Brief.pdf

US Supreme Court: *Barbara J. Brohl v. The Direct Marketing Association*

United States

On November 17, the Ohio Supreme Court ruled that Colorado's commercial activity tax (CAT) does not contravene the US Supreme Court *Quill* decision which has restricted the imposition of state and local sales taxes on online sellers since 1992.

The *Quill* case decided that only the US Congress has the authority to regulate interstate commerce under the constitutional Commerce Clause, and that retailers are only required to collect sales tax in states where they also have a physical presence, such as their headquarters, stores, offices, or warehouses – a "physical nexus."

The CAT has been imposed since 2005 on every business with "taxable gross receipts" in Ohio, determined as orders of goods initiated online by Ohio consumers and transported into Ohio by an out-of-state seller. However, the tax applies only if a business has USD500,000 or more in annual gross sales in the state.

The Ohio Supreme Court, by a 5-2 majority decision, determined that, while a physical presence in a state may be required to impose an obligation to collect sales taxes on an out-of-state seller, that requirement does not apply to "business-privilege taxes," such as the CAT.

It also found that Ohio's USD500,000 in annual sales threshold for the CAT to apply meets the Commerce Clause requirement that a seller should have a "substantial nexus" with a state.

The Ohio tax commissioner had additionally argued that online sellers do have a physical presence in the state because their computerized connections with Ohio consumers involve the presence of tangible personal property owned either by the sellers or by contractors acting specifically on their behalf. However, because the Court found a physical presence was not required for the CAT, it declined to address the question of whether the company had a physical presence, or not, through equipment use.

The Ohio ruling is the latest element in the ongoing battle by states to impose sales tax on online sellers. While there have been delays in proposals, such as the Marketplace Fairness Act, for bipartisan federal legislation in the US Congress to resolve the issue, states and their courts appear to be taking a larger role.

Recently, for example, the US Court of Appeals decided that a Colorado law imposing notice and reporting requirements for internet purchases does not contravene *Quill*, as they do not

constitute a form of sales tax collection. In addition, a number of states have introduced "Amazon taxes," using the affiliates of an internet retailer, which redirect customers to that company's retailing website, as a means of imposing sales tax.

While Amazon itself has been increasing the number of states in which it does agree to collect sales tax, particularly where it is building new warehouses, it has also been fighting the imposition of the tax on its online sales in many states, particularly those where it does not have such a physical presence. Nevertheless, Amazon is currently informing its customers on its website that items shipped to 28 states are subject to tax.

http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-7760.pdf

Ohio Supreme Court: *Crutchfield Corp v. Testa (No. 2016-Ohio-7760)*

ASIA PACIFIC

Australia

The High Court of Australia on November 16 unanimously dismissed appeals by four companies regarding place of residence for income tax purposes.

In August 2010, the Commissioner of Taxation issued assessments to the appellants in respect of profits derived from the purchase and sale of shares listed on the Australian Securities Exchange. The appellants objected to the assessments on the basis, *inter alia*, that they were not Australian residents under Section 6(1) of the Income Tax Assessment Act 1936.

Their objections were substantially disallowed by the Commissioner, and the appellants appealed to the Federal Court of Australia.

The primary judge found that, notwithstanding the overseas location of the formal organs of each company, the real business of the appellants was conducted by an Australian resident, from Sydney, without the involvement of the directors of the appellants.

The primary judge held that the "central management and control" of each appellant therefore was situated in Australia in the terms of Section 6(1) of the Act, rendering each appellant liable to tax as an Australian resident.

On appeal, the Full Court of the Federal Court rejected the appellants' argument that their central management and control was situated abroad because the meetings of their boards of directors were held abroad. The Full Court found no reason to doubt the primary judge's findings of fact, and no error in the conclusion that each appellant was a resident of Australia for income tax purposes.

The High Court statement continued:

> "By grant of special leave, the appellants appealed to the High Court. The Court held that, as a matter of long-established principle, the residence of a company is a question of fact and degree to be answered according to where the central management and control of the company actually abides, and that is to be determined by reference to the course of the company's business and trading, rather than by reference to the documents establishing its formal structure."

Three of the appellants (Bywater Investments, Chemical Trustee, and Derrin Brothers Properties) claimed that all directors but one were resident in Switzerland, while the fourth appellant was incorporated in Samoa and most of its directors were employees of Samoan international trustee and corporate service provider. The "sole" Australian-resident director was located in Sydney.

The Court held that the fact the boards of directors were located abroad was insufficient to locate the residence of the appellants abroad in circumstances where, on the findings of the primary judge, the boards of directors had abrogated their decision-making in favor of the Sydney-based resident and only met to mechanically implement or rubber-stamp decisions made by him in Australia.

The Court further held that the appellants could not escape liability for income tax in Australia on the basis that they were resident abroad. Nor could Bywater Investments, Chemical Trustee, or Derrin Brothers Properties rely on applicable double taxation agreements on the basis that their "place of effective management" was other than in Australia.

Welcoming the ruling, Tax Commissioner Chris Jordan said the decision means that any parties who set up complex structures offshore with the clear intent to avoid paying tax in Australia should take a hard look at what they are doing and whether they want to run the risk of being caught and seriously penalized. He added:

> "The decision is not a one-off decision. We've fought this case already in the Federal Court. Today's High Court decision affirms that we will maintain our resolve to pursue cases of blatant tax evasion – we can and will catch this type of contrived behavior.
>
> We will use all our available powers and resources to deal with such schemes and ensure all Australian residents pay the right amount of tax.
>
> This case has had a substantial litigation history – including 19 challenges to the evidence and procedure at the Federal Court, followed by an appeal to the Full Federal Court. This was not an easy process.
>
> I have made it clear that the ATO will not shy away from difficult and complex cases, no matter how long they take to run, and no matter how many obstacles are put in our way."

http://www.hcourt.gov.au/assets/publications/judgment-summaries/2016/hca-45-2016-11-16.pdf

High Court of Australia: *Bywater Investment Limited et al. v. Commissioner of Taxation*

WESTERN EUROPE

Belgium

An Advocate General of the European Court of Justice (ECJ) has concluded that Belgium's fairness tax is incompatible with the EU Parent-Subsidiary Directive.

Belgium's fairness tax applies where companies distribute profits but have paid little tax on those profits, typically through the use of loss carry-forwards and deductions for risk capital. The tax is based on the amount by which a company's distributed profits exceed its taxable profits. This amount is multiplied by a "proportionality factor," which reflects the extent by which profits were reduced through the use of deductions.

The case has been referred to the ECJ by a Belgian court after a Belgian taxpayer challenged the fairness tax on the grounds that it is incompatible with both the principle of freedom of establishment and the Parent-Subsidiary Directive.

In a preliminary ruling delivered on November 17, ECJ Advocate General Julianne Kokott disagreed that the fairness tax conflicts with the freedom of establishment. Kokott observed that

in the case in question, there is a presupposition that a non-resident company that exercises its activities in Belgium through a permanent establishment must be treated adversely compared with a resident company (which in turn may be the subsidiary of a non-resident company) with regard to the levying of the Belgian fairness tax. In Kokott's opinion, no such adverse treatment is apparent.

However, the Advocate General determined that the fairness tax is in breach of the Parent-Subsidiary Directive because it could permit Belgium to place a higher tax burden on dividends than permitted under Article 4(3) of the Directive.

The Belgian court also asked the ECJ to ascertain whether the fairness tax is a withholding tax and therefore in conflict with Article 5 of the Directive. On this point Kokott found that the fairness tax cannot be considered a withholding tax within the meaning of the Directive because the taxable person owing the fairness tax is not the recipient of the distribution but rather the company distributing the profits.

The ECJ has yet to rule on this case.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=185446&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=279776

European Court Of Justice: *X NV v. Belgium (Case C-68/15)*

European Union (EU)

The European Parliament has rejected a request by 89 MEPs to refer the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to the European Court of Justice (ECJ) for an opinion.

The referral request was rejected by 419 votes to 258, with 22 abstentions. The decision paves the way for a vote on the agreement itself.

Eighty-nine MEPs had questioned whether CETA's investor protection provisions are in line with the right of governments to regulate to achieve legitimate public policy aims.

Under Parliament's Rules of Procedure, the committee responsible, a political group, or at least one-tenth of MEPs may propose that Parliament seek an opinion from the ECJ on the

compatibility of an international agreement with the EU's treaties before a full parliamentary vote is taken on that agreement. In June, the European Parliament's Legal Service found no contradiction between CETA's investment chapter and the EU's treaties.

Rapporteur Daniel Caspary said: "Our legal experts said that CETA had no effect on our legal framework, on the competencies of the EU, or on our constitutional rights. This agreement provides an answer to our concerns regarding globalization without causing problems for democracy."

CETA was signed on October 30, after a deadlock with Belgium's French-speaking regions was broken. The Canadian Government introduced implementing legislation to its parliament the next day.

Upon entry into force, 98 percent of EU tariff lines will be duty-free for goods that originate in Canada. Within seven years, 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.

http://www.europarl.europa.eu/news/en/news-room/20161117IPR51553/
ceta-meps-pave-the-way-for-vote-on-eu-canada-trade-agreement

European Court of Justice: *European Parliament v. CETA*

Gibraltar

The Gibraltar Government on November 14 confirmed that it has brought an action seeking the annulment of a decision taken by the European Commission on Gibraltar's tax ruling regime.

In its decision, the Commission raised doubts on the compatibility of Gibraltar's tax rulings with EU state aid rules. Although the decision does not contain any final finding, and merely opens a formal investigation, Gibraltar's Government is challenging the decision on procedural grounds.

The Gibraltar Income Tax Act (ITA) 2010 introduced, among other changes, a tax rulings practice which allows companies to ask for advance confirmation of whether certain income, generated by companies incorporated in Gibraltar or that carried out an activity which generates income, are subject to taxation in Gibraltar.

In October 2014, in a publicly released statement, the Commission announced that it had assessed 165 tax rulings, and observed that, based on the information submitted by the UK authorities, it appears that the Gibraltar tax authorities grant formal tax rulings without performing an adequate evaluation of whether the companies' income has been accrued in or derived from outside Gibraltar and is therefore exempted from taxation in Gibraltar. It stated that, even if the Gibraltar tax authorities are given considerable margin of maneuver under the ITA 2010, a misapplication of its provisions could not be excluded at that stage.

The Commission explained in its October 2014 letter, which was recently released, that:

> "The Commission has concerns that potentially all assessed rulings may contain state aid, because none of them are based on sufficient information so as to ensure that the level of taxation of the activities concerned is in line with the tax paid by other companies, which generate income that is to be considered accrued in or derived from Gibraltar."

In launching its legal challenge, the Gibraltar Government argued that the decision was adopted under the wrong procedure, lacks adequate reasoning, and contains a number of serious errors of fact and of law. It further suggested that this supports the Government's belief that the decision was adopted unexpectedly and in haste, only several weeks before Commissioner Almunia stepped down as the Commissioner responsible for state aid law.

Commenting on the court action, Gibraltar's Chief Minister, Fabian Picardo revealed that:

> "The Government will leave no stone unturned in its commitment to protect the financial services industry in Gibraltar. Although the decision does not contain any final finding, it was important that we challenge the considerable deficiencies that it contains. Furthermore, the Government remains convinced that the practice of tax rulings in Gibraltar does not constitute state aid."

He continued:

> "This case has a long history, spanning over the last two years. This has included correspondence between myself and the UK Government with the current Commissioner, Margrethe Vestager, who inherited this decision from the outgoing previous Spanish Commissioner. We have all sought to persuade the Commission to adopt a sensible

approach, but to no avail. This is the reason why the court action has been brought. At the same time we continue to engage with the Commission in the administrative procedure in our commitment to deliver certainty to the industry as soon as possible on this matter."

https://www.gibraltar.gov.gi/new/sites/default/files/press/2016/Press%20Releases/636-2016.pdf

European Court of Justice: *Gibraltar v. the Commission*

Dateline December 1, 2016

Judging by the **UK Government's Autumn Statement**, which has come to serve as a secondary Budget (for the last time), you would be forgiven for thinking that there must have been a general election at some point in the recent past that everyone missed. Had there been, I'm fairly sure we would have been looking at a very different Autumn Statement than the one just delivered by Chancellor of the Exchequer Philip Hammond.

The approach to fiscal policy under the Tory Government of David Cameron and George Osborne (who both ran the Tory-led coalition that preceded it) and the Tory Government of Theresa May and Philip Hammond is quite stark. Almost like two different political parties, in fact.

Osborne was all about righting the Labour Party's wrongs with his focus on deficit reduction, spending cuts, and showy corporate tax cuts – although he wasn't shy about pinching a Labour policy or two to shore up the Government's support! Hammond on the other hand has just abandoned deficit reduction, instead increasing spending (and, crucially, borrowing), and is all about prudent tax policy – pretty much usurping the center ground once occupied by Labour in the process.

Hammond claimed that this was a (mini-)budget for the people. For the so-called "JAMs", or those "just about managing" to make ends meet. However, unless I'm missing something, I fail to see a single new tax measure in there that would help anyone that much.

Indeed, it's amazing how many plaudits Hammond seems to have received for doing hardly anything of note. Osborne, a serial puller of rabbits from hats, must be perplexed, perhaps even envious of his Right Honorable Friend – he was never shown the love in quite the same way. But perhaps the current Chancellor has given taxpayers what they want for once, which in this case is nothing. And the sigh of relief from business taxpayers in the UK is almost palpable; the post-budget response from business has been more a collective "phew" rather than the usual "oh no, what have they gone and done now…?" This gives businesses more time to think about how they will cope with Brexit. And, best of all, Hammond has restrained himself and future Chancellors by scrapping the Autumn Statement altogether.

Brexit is not only a major preoccupation of the UK, however. **Ireland** is also spooked by the prospect of the UK's withdrawal from the EU, which is understandable given the strong trading

links between these two neighbors. This had led to calls for the Government to urgently review the tax system and make any necessary changes to ensure that it is "match fit" for a potentially turbulent future. For example, Ireland's Small Firms Association said the Irish Government needs "to become obsessive" about the country's **tax competitiveness** in relation to the UK.

But perhaps there is a case for some Hammond-esque caution to be exercised in Ireland too. Otherwise, it might fall into the trap of thinking it needs to constantly update its tax system or fall behind. Such a course of action might actually be counterproductive, and there's a risk that Ireland could fall behind *because* it is constantly updating its tax system.

When it comes to the taxation of businesses, the latest Paying Taxes Index from PwC shows that, actually, Ireland is already ahead of most of the competition anyway. Therefore, change in this area could well do more harm than good. As President Reagan used to say, if you find yourself in a crisis, "don't just do something. Stand there!"

It could be said that most things tried by successive Greek governments and the international community to save the **Greek economy** have either not worked, or made things worse. Take for example attempts to reduce tax evasion and avoidance, a crucial plank of Greece's recovery plan. According to a recent analysis by business advisory firm EY, it could be still as high as 9 percent of gross domestic product, or roughly EUR16bn per year. For those of us living in the world's large economies and used to much bigger macroeconomic numbers, if the amount of tax evaded in the US was the equivalent of 9 percent of GDP annually, that figure would be a staggering USD1.6 trillion, give or take a few billion. However, the Internal Revenue Service recently put the US "tax gap" at USD385bn, which, although a huge sum on its own, puts the scale of the Greek problem with tax evasion into context.

So what's going wrong? According to EY, an **inefficient, complex tax system** is one contributory factor behind the high levels of tax evasion; this, theoretically, can be fixed. However, the political will seems to be lacking. Another reason is the **rising tax burden**. However, this policy won't be reversed unless Greece's bailout creditors allow it.

Such a course would take a radical, almost unthinkable, reversal in the approach taken to the Greek crisis by the "troika," and by the international community. But we are living in a period of radical political change, so the possibility that a fresh approach to the Greek crisis may materialize is not out of the question.

President-elect Trump is expected to question the IMF's role in bailing out Greece as the soon-to-be leader of by far the largest contributor to the Fund. What's more, we are likely to see a **change of leadership in France** next year, and possibly **Germany** too. Doing nothing is clearly not an option when it comes to Greece. But perhaps it's time for a change of plan, and that might be closer than we think. After all, isn't the definition of insanity repeating the same action time after time and expecting a different result?

To the other side of the world now, and in **Australia** we see the Government determined to push through its unpopular "**backpacker tax**." This is despite warnings about the negative impact that it may have on the country's important tourism industry, not to mention agriculture, with farmers warning that they will struggle to fill vacancies caused by a fall in transient foreign workers.

You do have to wonder why, after all these years of Australia being a major stop-off on the backpacker trail, the Government is doing this now, and is digging its heels in, too. The answer to that probably has something to do with the Government's plan to **close the budget deficit**, currently 3 percent of GDP, almost completely by 2020. However, as has been demonstrated by the UK, the best-laid plans of treasury ministers can easily go awry, especially if the economic assumptions upon which fiscal plans are laid turn out to be overly optimistic. According to a recent report by Deloitte, Australia risks undershooting its tax targets for this very reason.

To be fair to the current administration, the fiscal problems it is attempting to fix aren't of its own making. However, it would be well advised not to dig a deeper hole for itself!

The Jester