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a closer look

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a closer look

Global Tax Weekly – A Closer Look

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

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Advance Pricing Agreements: A New Era

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Introduction

There has been a significant amount of negative press recently concerning tax rulings and advance pricing agreements (APAs); negativity that has been fueled by the European Commission's state aid investigations, Lux leaks, and reports by various public interest groups. In light of this there have been numerous articles in the tax media indicating that appeal of APAs is in decline, for example:

> "Appeal of APAs Fades in Light of EU State Aid Rulings," *BNA*, August 30, 2016.

Such articles, however, do not always draw the important distinction between unilateral and bilateral APAs.

Why Is This Distinction Important?

Unilateral APAs involve a multinational enterprise group (MNE group) reaching (advance) agreement on their transfer pricing policy with the tax administration in a single tax jurisdiction. In contrast, bilateral APAs involve the MNE group seeking agreement from the governments of two tax jurisdictions as to the transfer pricing policy applicable to transactions between the MNE group taxpayers located in those countries. The legal basis for governments to negotiate and reach agreement in such cases is the Mutual Agreement Procedure (MAP) Article of an applicable tax treaty.

Bilateral APAs On The Rise

Recently, bilateral APAs have become the preferred route for businesses seeking certainty as to their transfer pricing policies. There are various reasons for this and we look at some of these here.

In contrast to unilateral APAs, to date there have been no bilateral APAs that have been the subject of state aid investigations, nor have any bilateral APAs faced any criticism in the press. This is not expected to change, particularly when taking into account the recent recommendations of the OECD/G20 concerning bilateral APAs, draft positions put forward by the European Commission, and updates to the United States Revenue Procedure on APAs:

- Best practice 4 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Item 14 Final Report ("Making Dispute Resolution More Effective") recommends that "*Countries should implement bilateral APA programmes.*"[1]
- The European Commission's working paper on tax rulings[2] notes that when a two-sided approach to an APA is adopted, which is inherently the approach taken in a bilateral APA, there is less room to deviate from a market outcome as under this approach both companies that are party to the intragroup transaction are analyzed.
- United States Revenue Procedure 2015-41 also states in Section 2.02(4)(d) that the IRS will have a strong preference for bilateral APAs when a treaty makes it possible (and practical) to do so.[3]

The Appeal Of Bilateral APAs Today

It's not just governments and international organizations calling for greater use of bilateral APAs; in many countries, taxpayer applications have increased due to the formalization of APA programs and increased risk in the current environment.

According to Séverine Grüber, a member of the Swiss Competent Authority, in the last few years there has been an increase in both bilateral APA applications overall as well as APAs with an increasing number of treaty partners. In addition, Monica Todose, head of the transfer pricing unit within the Romanian tax administration, confirms that bilateral APA applications have now surpassed unilateral applications in Romania.

Increased interactions between Competent Authorities (who ultimately negotiate bilateral APAs on behalf of their governments) as a result of BEPS meetings and conferences have helped foster new and enhanced relationships between them, and have provided an additional opportunity for government representatives to meet and resolve bilateral APA cases.

On top of this, increasing use of technology (such as videoconferencing and encrypted email) has helped remove some of the administrative hurdles historically encountered in the bilateral APA process, and with a proactive presence from the taxpayer side, can vastly improve processing times.

Given these developments, bilateral APAs are an increasingly attractive option. That being said, the analysis of when and where a bilateral APA is the appropriate course of action requires a country-by-country, taxpayer-by-taxpayer, and transaction-by-transaction analysis. For example, certain countries are currently known to be subjecting applicants to quasi-audits upon application, while others are actively promoting their bilateral APA programs as a way of proactively managing cases and building experience. In addition, the cost/benefit of seeking bilateral APAs on certain transactions simply may not warrant an investment in the process. On the other hand, in many cases the absence of certainty can mean prolonged and contentious fact-based audits from tax authorities who may not be experts in transfer pricing.

In addition to protection from penalties and potential double taxation, there are a number of additional benefits to having a bilateral APA. For instance, APAs alleviate the need to discuss or ultimately book provisions in financial statements. APAs also allow companies to better resource plan their tax departments, effectively help manage their overall tax rate, as well as realize compliance cost savings in the long run.

There can be considerable reputational benefits as well. Aside from the future transfer pricing related benefits, being part of a governments' bilateral APA program can help provide for smoother access to MAP if challenges to previous years arise, and also has the advantage of familiarizing the Competent Authority with the business operations should other tax treaty issues arise. In addition, the potential role of bilateral APAs in managing the interface of customs valuation and transfer pricing can further add to the appeal for businesses involved in the trade of physical goods.[4]

What Next?

As a result of BEPS and related developments, transfer pricing and related issues such as permanent establishments are in the crosshairs of most tax authorities (and the media). MNE groups are facing increasing levels of transparency (*e.g.*, European Union tax ruling sharing) and disclosure (*e.g.*, country-by-country reporting and the new OECD master file/local file transfer pricing documentation requirements).

While disclosure of such information has historically been a reason to avoid seeking an APA, the new requirements have neutralized one of the key reasons a company may want to avoid the APA process. In such an environment, it therefore makes sense for MNE groups to assess on a global level where it might be appropriate to seek certainty on transfer pricing arrangements in a proactive and cooperative manner through a bilateral APA. Given this, in the authors' view, the appeal of bilateral APAs will continue to fuel interest in APAs for some time to come.

Endnotes

1 http://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm

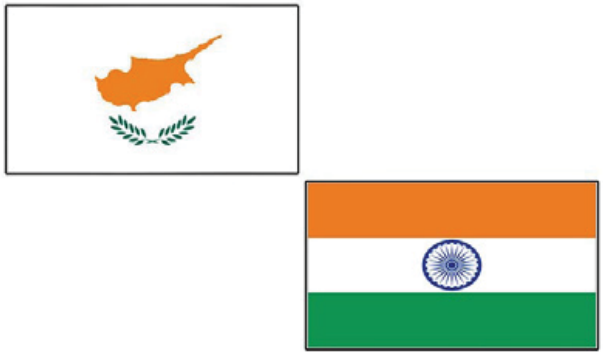
2 http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf

3 https://www.irs.gov/pub/irs-drop/rp-15-41.pdf

4 https://www.dlapiper.com/en/uk/insights/publications/2016/05/transfer-pricing-and-customs-valuation-case-study

Signature Of The Revised Double Taxation Agreement Between Cyprus And India

by Philippos Aristotelous, Andreas Neocleous & Co. LLC



The revised double taxation agreement (DTA) between Cyprus and India was signed on November 18 in Nicosia. The signature of the agreement marks a significant milestone in the restoration of normal tax relations between the two countries, which were severely disrupted when the Indian authorities in 2013 designated Cyprus as a notified jurisdictional area under Section 94A of the Indian Income-tax Act, 1961, imposing additional bureaucratic burdens on Cyprus companies investing in India.

As was widely expected following similar changes to India's double tax agreements with Mauritius and Singapore, the new agreement provides for source-based taxation of gains from the alienation of shares. However, investments undertaken before April 1, 2017, are grandfathered, with taxation rights over gains on the disposal of such shares at any future date remaining solely with the state of residence of the seller.

The new agreement closely follows the 2010 OECD Model Convention, with only minor modifications, and a protocol appended to the agreement clarifies certain of the provisions. The key provisions of the DTA and protocol are analyzed in the following paragraphs.

Taxes Covered

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

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

Residence

Article 4 of the DTA reproduces the provisions of the OECD Model regarding residence verbatim, with the "tie-break" criteria for determining residence for individuals who are resident in both countries being permanent home and center of vital interests, country of habitual residence, and nationality, in descending order. If none of these is decisive, residence is to be settled by mutual agreement between the two countries' tax authorities.

For legal persons the place of residence is the place in which the effective management of the enterprise is situated. If this cannot be determined, the issue will be settled by mutual agreement.

Permanent Establishment

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

A building site, a construction, assembly or installation project or a supervisory or consultancy activity connected with it will be deemed to be a permanent establishment if it lasts for more than six months. A permanent establishment will also arise when an enterprise provides services, including consultancy services, through employees or other personnel which continue for more than 90 days within any 12-month period. An insurance enterprise of one country will, except in regard to re-insurance, be deemed to have a permanent establishment in the other country if it collects premiums or insures risks there through a person other than an agent of independent status.

If an enterprise has a representative in the territory of a country who has, and habitually exercises, authority to conclude contracts in the name of the enterprise, or who habitually maintains a stock from which he regularly delivers goods or merchandise on behalf of the enterprise, or habitually secures orders for the enterprise, the enterprise concerned is deemed to have a permanent establishment in respect of any activities which the person undertakes for it.

As in the OECD Model, the DTA provides that an independent broker or agent who represents the enterprise in the ordinary course of business will not be caught by this provision. Particular care needs to be taken regarding the issuing of general powers of attorney so as not to risk unintentionally creating a permanent establishment, with potential adverse consequences.

Income From Immovable Property

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

Business Profits

Article 7 of the DTA follows the principles contained in the corresponding article of the OECD Model, but includes a number of amplifications and clarifications.

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

Intra-group management charges, interest, royalties and the like are disregarded for the purpose of determining the profits of a permanent establishment.

International Shipping And Transport

Profits of an enterprise from the operation of ships or aircraft in international traffic (including interest directly related to such operations and income from containers, trailers and related equipment) are taxable only by the country in whose territory the enterprise is resident. Income from the use of containers, trailers and related equipment entirely within a country may be taxed in that country.

Dividends

Dividends paid by a resident of one country to a resident of the other country may be taxed in the country in which the company paying the dividends is resident. However, if the beneficial owner of the dividends is a resident of the other country, the tax may not exceed 10 percent of the gross dividend. There is no minimum shareholding threshold.

Article 1 of the protocol makes clear that dividends paid by Indian companies are currently exempt from tax by virtue of Section 10 (34) of the Income-tax Act, 1961 and that, so long as this continues to be the case, there will be no withholding tax from dividends paid by an Indian company to its shareholders.

Similarly, there are no withholding taxes on dividends in Cyprus.

Interest

Interest arising in one country and paid to a resident of the other may be taxed in the country of origin. If the beneficial owner of the interest is a resident of the other country, the tax may not exceed 10 percent of the gross interest. There are the usual anti-avoidance provisions restricting relief to arm's length interest in transactions between related parties.

Interest paid to local and national government bodies and national banks is exempt from these provisions.

Royalties

Royalties and fees for technical services arising in one country and paid to a resident of the other may be taxed in the country of origin. If the beneficial owner of the income is a resident of the other country, the tax may not exceed 10 percent of the gross amount. As with interest, relief is restricted to arm's length amounts where transactions involve related parties.

Capital Gains

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

Similarly, gains from the disposal of shares in a company which derive their value (whether directly or indirectly) principally from immovable property situated in one country may be taxed in that country. Gains from the disposal of other shares may be taxed in the country in which the company issuing the shares is resident. However, Article 2 of the protocol makes an exception from these provisions for shares acquired prior to April 1, 2017. Gains from the disposal of shares acquired at any time prior to that date are taxable only in the country in which the disponor is resident.

Gains derived from the disposal of all other property (including ships or aircraft operated in international traffic) are taxable only by the country of residence of the disponor.

Offshore Activities

Unlike most of Cyprus's recent DTAs, the Cyprus–India agreement has no article dealing specifically with offshore activities. However, the provision giving rise to a permanent establishment when an enterprise provides services, including consultancy services, which continue for more than 90 days within any 12-month period will have a similar effect.

Elimination Of Double Taxation

Elimination of double taxation is achieved by the credit method. The credit is limited to the amount of tax that would be payable on the income concerned in the country of residence.

Non-Discrimination

The DTA reproduces the corresponding article of the OECD Model verbatim.

Mutual Agreement Procedure

The DTA follows the corresponding provisions of the OECD Model, but does not include any reference to arbitration to settle issues that cannot otherwise be resolved. Instead, it provides for the setting-up of a joint commission to determine such issues.

Exchange Of Information

The exchange of information article reproduces Article 26 of the OECD Model Convention almost verbatim. It adds a provision enabling a recipient of information to use it for other purposes than those specified on condition that the laws of both countries permit such use and the competent authority of the country providing the information agrees.

Article 4 of the protocol makes clear that neither country is obliged to carry out measures at variance with its laws, administrative practices, or public policy with respect to the collection of its own taxes. In this regard, it is important to note that Cyprus's Assessment and Collection of Taxes Law provides robust safeguards against abuse of any information exchange provisions by requiring the country that requests information to fulfill rigorous specified procedures to demonstrate the foreseeable relevance of the information to the request.

A request must be much more than a brief email containing the name and identifying information of the individual concerned. Rather, a detailed case must be made, with the criteria set out in a formal, reasoned document. In effect, this means that the authorities requesting the information must already have a strong case even before they request the information.

Requests for exchange of information are dealt with by a specialist unit, and informal exchange of information between tax officers bypassing the competent authority is prohibited. As a final safeguard, the written consent of the Attorney General must be obtained before any information is released to an overseas tax authority.

Assistance In The Collection Of Taxes

The DTA reproduces the corresponding article of the OECD Model Convention almost verbatim. It adds a provision making clear that the agreement does not give either country access to the courts of the other.

Entry Into Force And Termination

The agreement will enter into force when the two governments inform one another that the requisite constitutional procedures have been completed. Its provisions will have effect from the beginning of the following tax year. In Cyprus, the tax year is the calendar year, and in India, it is the year beginning April 1.

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

Conclusion

India is among the world's largest and fastest-growing economies, and the signature of the agreement and the restoration of normal tax relations provide great opportunities for both trade and investment. While the revised agreement no longer provides exemption from capital gains tax on investments made after April 1, 2017, it places Cyprus on no less advantageous a footing than Mauritius and Singapore in this regard, Furthermore, by bringing to an end the notified jurisdictional area designation, it will eliminate the bureaucratic burdens that this imposed.

From TPP To RCEP: Focus On Trade Liberalization In Asia-Pacific

by Stuart Gray, Senior Editor, Global Tax Weekly

With the Trans-Pacific Partnership – arguably the most significant regional free trade agreement (FTA) negotiated to date – facing an uncertain future, this article looks at progress towards trade liberalization in the Asia-Pacific region, focusing on the Association of South East Asian Nations (ASEAN) and the formation of the Regional Comprehensive Economic Partnership (RCEP).

Introduction

Confirmation by US President-elect Donald Trump that one of his first acts as President will be to withdraw the US from the Trans-Pacific Partnership (TPP) free trade agreement talks is likely to catalyze free trade developments in Asia in the coming years, with China expected to be the driving force.

China envisages that eventually there will be a free trade area of the Asia-Pacific (FTAAP), a high quality mega-regional FTA that would allow goods and services to be traded freely around a region expected to see the world's strongest trade and economic growth in the coming years. However, before that goal can be accomplished, the tangle of existing bilateral and multilateral free trade agreements will have to coalesce into a single agreement. A key step will be the fusing together of ASEAN with its six FTA partners, all of which are key economies in the region. This process is explored below.

The Association Of South East Asian Nations (ASEAN)

Probably the most deep-rooted regional FTA in Asia-Pacific is ASEAN. Established on August 8, 1967, in Bangkok, Thailand, with the signing of the ASEAN Declaration (also known as the Bangkok Declaration), ASEAN was formed by Indonesia, Malaysia, Philippines, Singapore, and

Thailand. Brunei joined in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999, completing the current ten-country membership.

The overarching aims of ASEAN as set out in the Bangkok Declaration are the joint promotion of economic, social, and cultural development and the advancement of regional peace and stability. However, a commitment to the freedom of trade, investment, and eventually the movement of peoples around the bloc are ASEAN's economic objectives.

Under the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, signed in Singapore on January 28, 1992, tariffs on intra-ASEAN trade have fallen considerably.

Under Article 4 of the CEPT, member states agreed to the following schedule of effective preferential tariff reductions:

- The reduction from existing tariff rates to 20 percent within a time frame of between five and eight years, from January 1, 1993;
- The subsequent reduction of tariff rates from 20 percent or below to take place within a time frame of seven years. The rate of reduction was at a minimum of 5 percent per reduction; and
- For products with existing tariff rates of 20 percent or below as at January 1, 1993, member states could decide upon a program of tariff reductions, and announce at the start, the schedule of tariff reductions. Two or more member states could enter into arrangements for tariff reduction in the range of 0 to 5 percent on specific products at an accelerated pace to be announced at the start of the program.

The three newest member states were given until 2015 to achieve similar levels of tariff reductions, although the deadline for tariff cuts on certain sensitive items has been put back to 2018.

Article 5 of the CEPT deals with non-tariff barriers (NTBs), and commits member states to eliminating all quantitative restrictions in respect of products under the CEPT Scheme. Member states also agreed to eliminate other non-tariff barriers on a gradual basis within a period of five years.

Since its inception, ASEAN member states have intensified work towards the establishment of an economic community with a harmonized set of trading and investment rules. A notable development occurred in February 2009 when ASEAN Economic Ministers met on the sidelines of the 14th ASEAN Summit to sign the ASEAN Trade in Goods Agreement (ATIGA), the ASEAN

Comprehensive Investment Agreement (ACIA), and the Protocol to Implement the 7th Package of Commitments under the ASEAN Framework Agreement on Services (AFAS).

Other accords signed that day included the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, and Protocols on the Accession of Thailand to the ASEAN–Korea Agreement on Trade in Goods and the Agreement on Trade in Services.

The ATIGA integrates all existing ASEAN initiatives related to trade in goods into one comprehensive framework. The ACIA incorporates elements of investment liberalization, promotion, awareness, facilitation, and protection, and puts ASEAN on a pathway towards a more free and open investment environment.

Surin Pitsuwan, the Secretary-General of ASEAN, observed of the ACIA, which entered into force in April 2012:[1]

> "This will definitely provide for investor confidence and support the notion for ASEAN to be not only an attractive investment hub but also becomes elected as an investment destination of choice."

A key milestone in the development of ASEAN was the establishment of the ASEAN Economic Community (AEC) in 2015. The AEC purports to be a single market place of over 622m people and a combined gross domestic product (GDP) of USD2.6 trillion.

However, the declaration of the AEC was just one waypoint to a more harmonized and integrated intra-ASEAN economy. In November 2015, the ASEAN Leaders adopted the ASEAN Blueprint 2025 that has as its core aim the achievement of an economic community that is "highly integrated and cohesive; competitive, innovative, and dynamic; with enhanced connectivity and sectoral cooperation."

This implies that there is still a lot of work to be done before a true economic community in ASEAN can be realized. And a recent study by professional services firm EY suggested that as the 2015 AEC approached, a lack of uniform and harmonized trading rules was hampering progress towards this goal.

The report,[2] published in April 2014, suggested that two of the important issues affecting intra-regional trade in ASEAN were the various barriers to entry and the lack of certainty in the application of preferential tariff concessions under the ATIGA.

Additionally, the free flow of goods in ASEAN had yet to become a reality, given existing non-tariff barriers to cross-border trade. By way of example, it pointed to the inconsistent use of the common eight-digit tariff classification system established by ASEAN, intended to smooth the flow of goods traded across the bloc's borders. EY's study found that, in practice, it was still common for importing customs authorities to adopt differing product classifications and therefore deny access to ATIGA preferential duties.

Other impediments to trade highlighted in the report included the disparity in the time taken for goods to clear customs checkpoints, which ranged between four days and 26 days across ASEAN countries at the time of the study, resulting in unnecessary costs and inefficient and unpredictable supply chains.

It remains to be seen whether these impediments to trade can be smoothed out by the ASEAN member states over the period to 2025. However, considering ASEAN is now approaching its 50th anniversary, the slow pace of economic integration must be of concern to those calling for the rapid conclusion of the RCEP, which is explored below.

The Regional Comprehensive Economic Partnership (RCEP)

With the status of the TPP in doubt, China has been pushing for a completion of negotiations for the RCEP, which would bring together the existing FTAs of China, Japan, South Korea, India, Australia, and New Zealand with ASEAN into a single enhanced comprehensive agreement. These negotiations were launched by leaders from the ten ASEAN member states and its FTA partners during the East Asia Summit in Phnom Penh, Cambodia, in November 2012, with the first round of negotiations taking place in the following May in Brunei.

The economic potential of the RCEP is likely to be enormous, given that an agreement would form one of the largest FTAs in the world. Currently, the RCEP countries represent a marketplace of around three billion people, and account for 30 percent of the world's GDP. These countries also racked up total trade of USD11.9 trillion in 2015, while total FDI inflows to RCEP members reached USD329.6bn.

The RCEP's goal is described as a "modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement." The core areas of negotiation include trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement, and other relevant issues. It is envisaged that tariff and non-tariff barriers will

be progressively eliminated on substantially all trade in goods to establish a free trade area among the RCEP participating countries.

Given the size of its economy, China's trading relationship with ASEAN is particularly important. Total trade between China and ASEAN member countries was USD54.8bn in 2002; in 2014 (four years after the ASEAN–China FTA went into effect) this increased substantially to USD480.4bn. In 2015, China was ASEAN's largest trading partner, accounting for 14.5 percent of ASEAN's total trade, and ASEAN is China's third largest.

A protocol to upgrade the ASEAN–China FTA was signed on November 22, 2015, in Kuala Lumpur, Malaysia, after only four rounds of negotiations, and the two sides are targeting total trade of USD1 trillion by 2020. This is an agreement that China hopes will boost moves towards economic integration in the region, and in particular completion of the proposed RCEP.

However, reaching an agreement on the scale and timetable for tariff reductions is proving difficult, with the communiqué issued after the 14th round of talks in Vientiane, Laos, in September 2016, suggesting that the negotiations are a hard slog. This is largely due to the diversity of the nations taking part, each of which is at varying stages of economic development and has its own national interests to protect. The Joint Leaders announced in a statement on this round of negotiations: [3]

> "We welcome intensified efforts to advance market access and text-based negotiations whilst remaining mindful that considerable work lies ahead. While acknowledging the complexities of the RCEP negotiations and the diversity of the participating countries, including differences in the level of development, we resolve to find appropriate ways to address the various sensitivities and interests of each participating country."

The 15th and most recently concluded round of negotiations was held in Tianjin, China, on October 17–21, with the 16th round scheduled taking place in December 2016. The development of a provisional work program and hosting schedule for negotiations in 2017 suggests therefore that participants remain some way from a final agreement.

These negotiations could become further protracted if the remaining members of the TPP decide to throw in their lot with the RCEP group. Analysts suggest that this scenario is likely to be the best "Plan B" to save the TPP if, as expected, the US seeks not to ratify the deal. In fact, the leaders from seven TPP countries (Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam) were involved in September's RCEP talks in Laos.

However, the recently concluded TPP is regarded as a higher standard agreement with considerably more market access commitments from its participants. And reconciling the two approaches could be complicated. As the Asian Trade Centre, a regional trade policy advocacy service, observed recently: [4]

> "TPP members involved in RCEP have taken mixed views towards this 'other' mega-regional [trade treaty]. While some have been enthusiastic supporters from the beginning, others have not pushed terribly hard. After all, they have had the TPP which will provide significantly better benefits than anything on offer in RCEP.
>
> But if TPP is not going to happen, Plan B will surely involve higher ambition by all seven TPP players in the RCEP talks."

Unpicking The Noodle Bowl

In the meantime, investors are struggling to digest something of an alphabet soup of existing regional free trade initiatives at bilateral level – including many of the ASEAN+6 – and at multilateral level. Indeed, there are over 100 bilateral and multilateral trading arrangements in place in the 21-member Asia-Pacific Economic Cooperation (APEC) group of countries.

It is this maze of overlapping and often conflicting FTAs – a situation often referred to as the "noodle bowl" effect – that China is particularly keen to untangle. Indeed, Chinese President Xi Jinping has previously said that "there are worries about the potential for fragmentation" in the region's trading rules.[5]

In addition to regulatory inconsistencies and uncertainties, investors are also concerned about political shifts in the region, which has cast huge doubt over the future direction of trade policies. These anxieties were highlighted in PwC's 2016–17 APEC CEO survey, which found that growth in trade volumes could lag growth in global GDP this year "amid uncertainty surrounding the future of established trade flows."

As PwC noted: [6]

> "New shifts in political leadership – most notably in the presidential contest in the US – open the possibility for fresh looks at current and future trade policies. Given the significant public attention on 'mega' regional trade projects, risks are rising that these

arrangements will not be implemented as fully intended or, as now seems likely in the case of the Trans-Pacific Partnership (TPP), even at all."

Therefore, the successful completion of the RCEP is seen as crucial, especially by the Chinese; such an agreement is expected to become the platform upon which future trade and investment integration in Asia would rest. What's more, the RCEP would be a major step on the path towards a Free Trade Area of the Asia Pacific (FTAAP). And with the US likely to remain on the sidelines, this would provide China the opportunity to have the largest say on the most significant free trade deal of modern times.

An ambitious idea the FTAAP may be. But APEC seems undeterred, and determined to bring about what would surely exceed the EU in its scope, even though participation in this project by the US, a key APEC member, is uncertain. This was demonstrated on November 20, when the 21-member APEC Leaders Meeting in Lima committed to the eventual realization of the FTAAP "as a major instrument to further deepen APEC's regional economic integration agenda." [7]

APEC leaders endorsed the recommendations of the strategic study on the FTAAP's realization (which had been initiated in 2014 and finished on time this year), and issued their own Lima Declaration on the FTAAP regarding the development of work programs towards its future conclusion. And according to their joint declaration, they looked forward "to regular progress reports on implementation of these work programs" and, based on the study, instructed "officials to consider next steps that can be taken towards the eventual realization of an FTAAP."

Conclusion

Any steps being taken are part a very long journey, however. From a practical point of view, the relatively slow pace of trade liberalization in ASEAN demonstrates that the RCEP will certainly not come to fruition overnight.

There are also political considerations to throw into the mix. The election of Donald Trump, who stood on a largely protectionist platform, to the US presidency was a perfect demonstration of how political shifts can change the whole complexion of a region's trade policies, and stall momentum towards deeper regional trading relationships – almost overnight.

As far as China and other key economies in Asia are concerned, the probable lurch towards protectionism by the world's largest economy is unlikely to detract from efforts to continue

liberalizing trade. Indeed, the US abandonment of the TPP could lead to a RCEP that is much wider in scope.

For the foreseeable future, negotiators are likely to continue making solid, albeit slow, progress towards a free trade area in the Asia-Pacific region. But it cannot be discounted that further political twists and turns down the road could result in a change of course.

Endnotes

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Recent Italian Tax Developments

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Second Version Of The Italian Voluntary Disclosure Program Released

On October 24, the Italian Government published the second version of the Italian voluntary disclosure (VD) program under Article 7 of Decree-Law No. 193/2016.

In the same fashion as the first VD program, introduced in 2014, this measure is aimed at Italian tax residents holding assets abroad that have not been disclosed to the tax authorities.

Additionally, it covers the disclosure of cash held in Italy: thus, this law allows Italian taxable entities and individuals to regularize their assets by reporting them to the Italian Revenue Agency. As discussed in more detail below, this program provides applicants with some benefits; however no fiscal advantage is granted to those who regularize "national assets," namely undisclosed cash held in Italian safe deposit boxes.

Subjective Requirements: Who Can Participate?

The new VD program is aimed at anyone who has violated the Italian tax regime up to September 30, 2016; all applications should be presented by July 31 and completed by September 30, 2017.

There is only one proviso: applicants who benefited from the previous version of the VD with respect to assets held abroad can only now apply for regularizing their "national assets," and *vice versa*.

Relevant Changes From The First Program

The VD program has introduced four main changes. Firstly, taxpayers, together with their advisors, should calculate and pay the exact amount of taxes and sanctions due. The sanctions to be applied for any violations of "Section RW," which concerns any assets held abroad by Italian taxpayers (roughly

speaking the Italian equivalent of the US Foreign Bank Account Reporting (FBAR) requirement) will be reduced at a rate of either 0.5 percent or 1.5 percent respectively, depending on whether the foreign country in which the assets were held was on Italy's White or Black List of jurisdictions.

The Italian Revenue Agency will only intervene in exceptional circumstances in the new procedure; namely in case of any mistakes regarding the assessment of the amount due. In particular, the Agency will have the powers to address any faults in the use of the VD procedure up until December 31, 2018, and can subject taxpayers to severe sanctions:

(a) With respect to withholding taxes, the sum due will be increased by 10 percent, where, due to errors, the taxpayer paid at least 10 percent less than they should have;
(b) In other cases, an increase of 10 percent will be applied to those who paid 30 percent less than the amount due;
(c) For any other errors, there will be an increase of 3 percent on the amount due.

Secondly, the legislator has clarified the procedure for regularizing cash held in Italy, although those who disclose such assets will enjoy no advantages. In particular:

(a) By the time they apply for the VD, taxpayers should provide a declaration that states that the assets do not derive from criminal offenses;
(b) By the time they deposit all the documents related to the VD, they should open and register, under the control of a Notary, the safe deposit boxes in which the assets are held;
(c) By the same point, they should also deposit the cash or other assets with financial intermediaries who are authorized for this purpose.

Thirdly, the taxpayer is exempted from preparing his tax return for 2016, although this exemption covers only the assets included in the VD procedure. In fact, the new VD permits the taxpayer to disclose any activity not declared to the Italian Revenue Agency before December 31, 2016. More noteworthy, the statute of limitations for assessments is extended to (i) December 31, 2018, with regard to the new VD program, and (ii) June 30, 2017, with regard to the former VD program.

Lastly, the legislator has introduced a new criminal offense for the fraudulent disclosure of assets related to crimes that are not exempted under the VD procedure. This provision concerns only those who apply for the new VD, whereas those who applied for the previous VD program are not involved.

What Makes The New VD Attractive?

The success of the previous VD program was primarily due to the appeal of regularizing assets held abroad before the introduction of the automatic exchange of information between Italy and some financial havens, such as Switzerland and Monaco (as well as the full introduction of FATCA and CRS measures).

Another incentive was the introduction of a new criminal offense for "self-laundering"; in other words, any attempt by those using the voluntary disclosure process to disguise the origins of undeclared funds or goods.

As before, any person filing a voluntary disclosure is granted impunity for specific crimes, such as misrepresentation, failure to declare, non-payment of certified withholding tax, non-payment of VAT, and fraudulent misrepresentation using invoices or non-existent transactions or other mechanisms.

Italy Set To Introduce A Territorial System Of Taxation For Non-Tax Residents

Italy is considering a proposal to introduce a territorial system of taxation to attract high-net-worth individuals (HNWIs), including successful individuals in the sports, arts, and fashion and design sectors, who could be interested in moving to Italy to take part in these thriving sectors.

The new measure is contained in the Finance Bill for 2017, currently under discussion in the Italian Parliament and expected to be approved by early/mid-December. This timing, which coincides with the changes to the UK's resident non-dom regime, suggests that Italy might be seeking to woo HNWIs looking for a new home following Brexit, or deterred by the tightening of rules in the UK. The draft rules contain recommendations to simplify Italy's immigration law in connection with the new tax system.

Withers was involved in lobbying the authorities to introduce a system along these lines, and the proposed new rules include the following:

- Italian-source income and gains would be taxable in the usual way; but
- Foreign income and gains would be sheltered from Italian tax, provided the taxpayer pays an annual charge of EUR100,000 (USD106,415). This may be extended to family members, at a cost of EUR25,000 per member. This is reminiscent of the remittance basis charge in the UK.
- Additionally, the individual must disclose their tax residency location to the Italian authorities.

This territorial system of taxation would be available for up to 15 years (which is another swipe at the UK remittance basis system), unless the individual fails to pay the full annual charge.

As currently designed, the new system would be available to all persons (regardless of their nationality or domicile) who have been non-tax resident in Italy at any time during the nine years preceding their relocation to Italy. Thus, the new system would also be available to Italian returnees. The rules identify individuals as tax resident if they are a registered Italian citizen or reside in Italy for more than half the year (183 days).

The regime requires that all applicants for non-domiciled status request a preliminary ruling from the tax authorities, with the request filed along with their annual income tax return for their first tax year as an Italian tax resident. The tax authorities will have 120 days to approve or deny the request and, if the tax authorities do not reply within this period, the request would be deemed to have been approved.

In addition to shielding foreign income and gains from Italian tax, the annual charge would exempt the taxpayer from a duty to disclose foreign assets in their tax return under the ordinary disclosure rules (*a.k.a.* "RW" rules). Of course, CRS/FATCA reporting requirements would still apply, meaning that the existence and value of foreign assets may still be reported to the Italian tax authorities.

It is currently unclear whether the draft provision intends that a non-domiciled individual would be able to make use of the treaties for the avoidance of double taxation. This topic is still under discussion among tax specialists and, at this stage, due to the peculiarities of the new regime that make it different from the UK model, there may be grounds to argue that an Italian "non-dom" could be entitled to benefit from tax treaties. This aspect will have to be carefully assessed from both an Italian and source State perspective.

Interestingly, the new territorial regime would also extend to succession taxes, with inheritance tax only due on assets located in Italy at the time of demise of the individual. This is good news for potential candidates, as there are persistent rumors that Italy might overhaul its current gift and succession tax regime in the near future (currently, gift and succession taxes are levied at very low rates of 4 percent to 8 percent with exemptions for certain business assets).

It remains to be seen whether the proposed rules will make it to the statute book (possible challenges may include claims of discrimination and even state aid). And if introduced, the new rules would add to the choice currently available to individuals without fixed domicile such as the "res-non-dom" systems in place in the UK, Ireland and Malta, the Swiss "forfait" rules, and the Spanish Beckham Law.

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Topical News Briefing: A Corporate Tax Cut With Strings Attached

by the Global Tax Weekly Editorial Team

US businesses have repeatedly called for tax reform legislation featuring a deep corporate tax rate cut at its heart. Following the Republican victory in the presidential elections, it finally looks like they will get it – but with strings attached.

In late November 2016, the businesses and associations that make up the RATE (Reforming America's Taxes Equitably) Coalition wrote to President-elect Donald Trump urging him to focus on cutting the US corporate tax rate in 2017. These 34 American companies and associations, which account for nearly one-third of all US private sector employees, pointed to the damage that the punitive 35 percent US corporate tax rate is doing to the US business environment.

The Government and Congress now have a historic opportunity to "jump-start" the US economy by slashing the corporate tax rate to as low as 15 percent, as Trump has proposed in his tax plan, they argued. And by simultaneously reforming a tax that actually encourages business to invest overseas, US corporations would have an incentive to shift production, research and innovation back to the US, they said.

Fortunately for corporate America in general, they are about to get a government and Congress that agrees with the Coalition. Mostly. Because, as the likely direction of a Republican tax reform plan begins to emerge, there could be something of a sting in the tail for companies continuing to "globalize" their operations to the detriment of US workers and the economy in general.

As reported in this week's issue of *Global Tax Weekly*, President-elect Trump took to Twitter on December 4 to reiterate his proposal to impose a substantial tariff on imports from US multinational companies that move their production facilities abroad.

It is by no means guaranteed that Trump's production-shifting tariffs will make the final cut in a new tax reform bill. Indeed, the more detailed House Republican "Better Way" tax reform plan, set out in June 2016 by House Speaker Paul Ryan (R – Wisconsin), is expected to form the nucleus of tax reform legislation, and there are differences between the two approaches.

Ryan's controversial "destination basis" corporate tax plan has a built-in incentive for US companies to base their activities in the US. His plans would mean goods and services imported into the US will be subject to a border adjustment tax, irrespective of the jurisdiction in which they are produced, to counteract the effect of foreign value-added taxes on US exports.

On this matter, it is also worth noting the legislative proposals that erstwhile presidential candidate for the Democrat Party, Senator Bernie Sanders (I – Vermont), intends to introduce soon. His bill would also punish those companies shifting jobs and facilities to countries like Mexico to take advantage of lower costs, in this case by imposing a 35 percent "outsourcing tax" on these savings. It is remarkably similar to Trump's proposal in seeking to penalize US firms when they import goods that have been made abroad back to the US, and shows that Republicans and Democrats remain on the same page with regards to some of the core objectives of a tax reform plan – that is, a more competitive tax code and penalties for firms "shipping jobs overseas."

Until now, both parties have been entrenched behind their own tax reform red lines. In the Republicans' case, this was an insistence on revenue-neutral tax reform, and tax cuts for all, regardless of income. For the Democrats, tax reform had to be fiscally 'responsible' by raising revenue and taxing the rich more than at present.

While there will still be a lot of negotiating, bargaining, and haggling to do on any tax reform proposals introduced in Congress next year, these political obstacles have, to a large extent, been removed, clearing the way for a long-awaited corporate tax cut. However, for US corporations, the alleviation of their tax burden could come with new responsibilities.

FIRS Releases Revised Transfer Pricing Forms

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Introduction

The Nigerian Federal Inland Revenue Service (FIRS) has issued revised transfer pricing (TP) declaration and disclosure forms (TP forms). Effective from January 2017, taxpayers are required to submit their TP returns using the revised TP forms.

The revised TP forms include new disclosures, while some of the old disclosures which taxpayers considered to be ambiguous have been made clearer.

Summary Of The Changes

Some of the changes to the TP forms are listed below, and include:

- The requirement to indicate if there are transactions with a low-tax jurisdiction has been replaced with a requirement to indicate if there are transactions with an entity resident in a jurisdiction having no income tax or whose income tax rate is less than 30 percent;
- Reporting entities are now required to disclose both their Nigerian and Foreign (if applicable) Tax Identification Numbers (TIN);
- Specific disclosures are now required for intercompany transactions such as procurement and marketing activities;
- A summary table has been introduced that captures certain details of intercompany transactions including the transaction amount, jurisdiction of related party, and accounting classification of the transactions; and

- The requirement to confirm that contemporaneous TP documentation exists has been added, with taxpayers also required to confirm the date when the document was approved *etc*.

Conclusion

Overall, it would appear that the FIRS is seeking more disclosures to enable it to perform more effective TP risk assessments.

The introduction of specific disclosures for some transaction types is an indication of the amount of attention that the FIRS is giving those transactions during TP risk assessments and audits.

The changes also suggest that the FIRS is looking to increase compliance with the requirement for taxpayers to prepare contemporaneous TP documentation and have this in place by the due date.

Taxpayers should expect to see more requests for information regarding non-resident related parties. These could be requests to the Nigerian resident party or to the tax authority of the jurisdiction where the related party is registered.

State Offshore Voluntary Disclosure – Because One Tax T-Rex Wasn't Enough

by Mike DeBlis Esq., DeBlis Law

Introduction

The Tax-osaurus Rex, or the fearsome offshore voluntary disclosure programs, has made thousands of taxpayers panic since it smashed through the scene a few years ago. While some chose to run and probably ended up torn to parts by raptors … sorry, tax collectors, others are trying to survive by disclosing their foreign accounts and making up for previous tax returns and FBAR transgressions.

Unfortunately, federal raptors aren't the only terrors that'll drive you behind a kitchen counter; "friendly" state raptors are also sniffing US taxpayers out.

"You Just Went And Made A New Dinosaur?"

Well, the few states with state income tax were tempted to get a piece of the IRS's action. After all, taxpayers who didn't report their interest income from an undisclosed Swiss account to the IRS probably didn't report it for state tax purposes either. Therefore, if you're amending up to eight income tax returns to disclose and report income to the IRS, prepare to amend your state tax returns as well.

Now most states have their own offshore voluntary disclosure programs. While some are knock-offs of the IRS's program, some are quite unique despite being the me-too type. Regardless, getting these out of the way, even if your state doesn't mandate it, is definitely the right way to go. This is especially true since the state can seek criminal penalties even if the IRS has already decided against gobbling you whole.

The purpose of this article is to discuss the reporting obligations that a taxpayer has to the state taxing authority in his home state when he is participating in the IRS's Offshore Voluntary Disclosure Program.

Setting The Scene

Picture this, as an advisor: You are sitting behind your desk when your phone rings; it is a new client. His name is John, and John is a US citizen who lives in New Jersey and is seeking advice regarding foreign, unreported bank accounts in Switzerland. You recommend that John apply to the Offshore Voluntary Disclosure Program.

As part of this process, you file amended federal income tax returns on John's behalf in addition to delinquent FBARs. John then pays the miscellaneous offshore penalty on the highest aggregate maximum balance in his foreign bank accounts during an eight-year look-back period. Finally, John pays additional taxes and penalties for each of the preceding eight years.

At the end of the disclosure process, you sign IRS Form 906, otherwise known as a closing agreement, to settle the liability for the years covered by the disclosure once and for all. Right about now, you are ready to kick your feet up, and pat yourself on the back for a "job well done." After all, John's Federal tax issues are resolved. But are *all* of John's tax issues resolved? Not quite.

The question now becomes, "What about state taxes?" Does John have an obligation to notify the New Jersey Division of Taxation about what happened at the Federal level? Indeed he does. In fact, failing to do so could have serious consequences. We'll get to that in a second.

As tempting as it might be to bury your head in the sand and disregard this section entirely, perhaps justifying your decision on the grounds that you do not have any clients from New Jersey, a word of caution is in order. New Jersey isn't the only state that imposes such an obligation on its residents. There are many others, including New Jersey's northern neighbor, New York.

Some Basics

Internal Revenue Code § 6103 authorizes the IRS to share information with state agencies for tax administration purposes. This authorization applies whenever the IRS enters into an agreement with a taxpayer. What type of information? Information pertaining to examinations, tax return information, and even employment tax information.

Many tax practitioners mistakenly believe that the IRS will automatically notify the New Jersey Treasury, or the appropriate state treasury, about Federal changes to their clients' returns under IRC § 6103. While that thinking might sound completely logical, it nonetheless could prove costly for taxpayers.

Background Information On The NJ Offshore Voluntary Compliance Initiative

Back in 2013, the New Jersey Department of Treasury, Division of Taxation, unveiled the Offshore Voluntary Compliance Initiative (NJOVCI), a voluntary compliance program designed to complement the IRS's Offshore Voluntary Disclosure Initiative. Its purpose was to identify assets and income from unreported offshore accounts.

Penalties Under The NJOVCI

Taking John's case above as an example to examine in a little more depth: are the penalties as severe under the NJOVCI as they are in the Federal OVDI? In other words, should a New Jersey taxpayer expect to pay the same offshore penalty under the NJOVCI as he or she paid under the Offshore Voluntary Disclosure Program? The answer is a resounding "No." Only two penalties apply: a 5 percent late payment penalty, and a 5 percent amnesty penalty. Of course, the taxpayer must also pay any NJ tax liability, including interest.

Practically speaking, how does the NJOVCI penalty structure work? Assume that the taxpayer applied to OVDP in late 2014 and to NJOVCI on March 1, 2015. Assume further that the taxpayer has already submitted his Offshore Voluntary Disclosure package and paid the miscellaneous offshore penalty.

First, identify the taxpayer's disclosure period under the OVDP. It includes tax years 2006 through 2013. Now let's calculate the taxpayer's penalties under the NJOCVI. With respect to the 5 percent late payment penalty, such penalty applies for all eight tax years: beginning with 2006 and ending with 2013.

How about the 5 percent amnesty penalty? That's a little tricky. It applies for tax years 2006 and 2007 only.

Is State Offshore Voluntary Disclosure Much Ado About Nothing?

Why should New Jersey residents such as John, who participate in the OVDP, concern themselves with New Jersey's offshore compliance program? There are two reasons. First, a New Jersey taxpayer who participates in the Federal Disclosure Program is not at liberty to choose whether to participate in the NJ Offshore Voluntary Compliance Initiative. In other words, he doesn't get a dispensation just because he put an inordinate amount of time and effort into making an OVDP submission. As explicitly stated on the New Jersey Department of Taxation website, an NJOVCI submission is required if the taxpayer is participating in the OVDP.

And second, if New Jersey discovers that one of its residents has undisclosed offshore assets and income before a disclosure has been made, then it will be too late for the resident to make a voluntary disclosure under the NJOVCI. In that case, the taxpayer risks the full panoply of penalties, including a possible referral to the attorney general's office for criminal prosecution. Sound familiar? The New Jersey Department of Taxation has taken a page right out of the IRS playbook.

What Information Must Be Submitted Under The NJOVCI?

Not only must the taxpayer submit a letter requesting acceptance into the program, but he must also submit a copy of the IRS acceptance letter into the IRS Voluntary Disclosure Program along with copies of IRS documents reflecting the federal tax examination changes.

The letter should contain the following items:

- Applicant's complete name and address;
- The tax type and the tax years affected;
- A New Jersey original or amended return and a copy of the federal original or amended return, for each year;
- An explanation of the circumstances to support the application;
- Whether an application was submitted to the IRS Offshore Voluntary Disclosure Program;
- A certification that the applicant will cooperate with the Division of Taxation to establish the correct tax liability incurred from this voluntary disclosure.

The taxpayer may be disqualified from participating if:

- He has previously been contacted by the Division or any of its Agents;
- He is currently under criminal investigation;
- He refuses to pay outstanding tax liabilities and/or file the prior year returns within a reasonable period.

Which Other States Have An Offshore Voluntary Disclosure Program?

There follows below a list of states with offshore voluntary disclosure programs of their own. However, this information may change in the future, so always rely on professional legal opinion to ensure that you're covered and safe from your local raptors before they decide that you're their next meal.

- **Arizona:** The Arizona Department of Revenue offers its program for those who haven't fulfilled their individual tax, corporate tax, use tax, transaction privilege tax or withholding tax obligations

in the state but would like to come into compliance with current filing requirements. The qualifications are, however, quite superficial, which is why you should consult with your tax lawyer to find out if you'd be well served going under the program.

- **Connecticut:** The Connecticut Department of Revenue Services (DRS) offers businesses and individuals who are not in compliance with the state's tax laws to come forward voluntarily or ensure that their accounts are in compliance. While it does mirror the federal programs, you'll need to find out whether the look back is six or eight years for standard.

- **Florida:** The voluntary disclosure administered by the Florida Department of Revenue applies, but isn't limited, to sales and use tax, county tax (*a.k.a.* discretionary sales surtax), corporate income tax, communications services tax, documentary stamp tax, gross receipts tax, fuel taxes, insurance premium tax, and reemployment compensation tax. The department will consider the three years preceding taxpayers' requests. So if you're a business entity with foreign holdings, file right away.

- **Georgia:** The Georgia Department of Revenue's Voluntary Disclosure Agreement (VDA) program is available for individuals and businesses alike. Participants will receive a waiver of all penalties as well as a time limit for disclosing and paying previous liabilities. The look-back period is usually for a minimum of three years for all tax types. However, the department can extend the period to five years for taxpayers who filed their federal income returns but not their Georgia individual income tax.

- **Indiana:** Indiana's Department of Revenue has established a voluntary disclosure program, but it's relatively simpler than the rest on this list. The program is only available for taxpayers who don't have brick-and-mortar nexus in Indiana. The rest may submit requests, but the department will offer an alternative proposal. Anonymity is a must while applying formally; therefore you'll need to work with a third-party representative.

- **Iowa:** A non-specific program, Iowa's voluntary disclosure program covers individual income tax, corporation income tax, motor fuel tax, franchise tax, use tax and local option sales tax, fiduciary income tax, withholding income tax, and cigarette and tobacco tax.

- **Kansas:** Kansas' Department of Revenue offers another non-specific voluntary disclosure program which alleviates penalties for late filing and payment while mandating the payment of interest.

- **Kentucky:** The Kentucky Department of Revenue designed its program to tackle taxes administered by the department as well as domestic or foreign taxpayers who are subject to taxation in the state. It isn't for taxpayers who underreport taxes due while filing returns. As in Arizona, the program's description is quite superficial.

- **Louisiana:** The Louisiana Department of Revenue also offers a non-specific program where taxpayers can anonymously and voluntarily pay their taxes at either no penalty or a reduced one. The program covers all the taxes the department covers, including individual income tax, excise tax, sales and use tax, and severance taxes.

- **Maryland:** The Comptroller allows individuals as well as businesses to report and pay their previously due tax liabilities in the state. However, the non-specific program mirrors the federal program without really providing much detail.

- **Minnesota:** The Department of Revenue in Minnesota offers its program to qualifying individuals with back taxes. In addition to reducing/waiving some penalties when possible, the program may allow you to limit how far back the department can audit through your records.

- **Mississippi:** The Mississippi State Tax Commission's program aims to promote compliance and benefit taxpayers with previous filing obligations and liabilities. Again, this is a nonspecific program.

- **Montana:** Specifically addressing foreign accounts, the Montana Department of Revenue's voluntary disclosure program mandates reporting foreign assets on both state and federal returns. However, the program doesn't specify a look-back time.

- **New Hampshire:** Administered by the New Hampshire Department of Revenue Administration, the program helps resolve prior tax liabilities. It covers all tax types tackled by the Department as well as any type of domestic or foreign taxpayer. However, the state doesn't have income tax on unearned income such as foreign investment earnings.

- **New Jersey:** As discussed in detail above, the Department of the Treasury, Division of Taxation in New Jersey announced a voluntary compliance program that would follow the IRS initiative and identify assets and reported income from offshore accounts. The program is for both individuals and businesses that "realize they have a tax filing obligation or that their business activity creates nexus for New Jersey state tax purposes".

- **New York:** New York's Tax Department's Voluntary Disclosure and Compliance program invites taxpayers who owe back taxes and haven't filed related returns to avoid penalties and possible

criminal charges. The look-back period in this case is a minimum of six years or the number of years the offshore account was held if it was less. On the other hand, if you're in an IRS OVDI program, the look-back period will be equal to the tax years you're required to file with the IRS.

- **North Carolina:** North Carolina's Department of Revenue has established a tricky program that applies to taxpayers who failed to file returns and pay taxes to the department. Its main goal, though, is to resolve corporate income, franchise tax, and sales and use liabilities when nexus is an issue.

- **Ohio:** The Ohio Department of Taxation rolled out its own voluntary disclosure program to encourage individual taxpayers to tackle and resolve income tax liabilities they believe they may have. As a result, they can avoid the consequences of a nexus investigation, audit or assessment. Since the program is for "those who believe they have a liability," it's not specific, and can be misleading without professional guidance.

- **Pennsylvania:** Pennsylvania's voluntary disclosure program offers individuals and businesses that recently became aware of their tax obligations a chance to come forward. Again, penalties will be waived and only tax and interest should be paid. However, you'll need to prove that you're one of those who weren't aware of their obligations prior to the time of disclosure.

As for the rest of the states with income taxes, they have their own programs which are only for business compliance or for non-filers.

"That's How It Always Starts. Then Later There's Running And Um, Screaming"

After finding out, either as an advisor or a taxpayer, that your T-Rex horrors aren't limited to the IRS, the temptation may be to run. However, to borrow once again from Jurassic Park, "T-Rex doesn't want to be fed. He wants to hunt."

Therefore, and in conclusion, it is strongly recommended that you don't give the IRS and the state the chance to pile evidence against you and penalize you heavily, but inform yourself of your obligations both on a state level and a federal level.

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Topical News Briefing: EU VAT Reform – Let's Keep The Champagne On Ice!

by the Global Tax Weekly Editorial Team

It is often said that the EU's nightmarishly complex value-added tax rules are the single biggest impediment to the growth of e-commerce in the EU.

With its newly proposed administrative reforms designed to improve the VAT environment for e-commerce businesses in the EU, announced on December 1 (and reported in this week's issue of *Global Tax Weekly*), the European Commission is promising to lift this tax barrier.

At present, complex EU rules require that businesses selling goods cross border must keep track of a number of different thresholds and conditions, to determine whether they should be subject to rules in the jurisdiction from which the goods are being sold, or where the goods are eventually supplied. Depending on the nature and value of a business's supplies, it can be required to register for VAT in a country where its management may be unfamiliar with the law and face potentially severe penalties for non-compliance.

These requirements do not necessarily affect micro-businesses making a few hundred, or even a few thousand, euros a year from selling things online. Large companies, meanwhile, are able employ departments of experts to ensure compliance with the rules.

But there is a huge swathe of businesses in between that are severely impacted by these requirements, to the point that many do not bother to sell within the EU at all. As the head of Estonia's tax department observed recently according to EU Observer: "For small companies the message is clear: stay at home. [It's] too complicated to deal with 28 different auditors."

Therefore, the reaction from the vast army of mainly self-employed online traders upon hearing the Commission's announcement will likely have been one of relief. And the EUR7bn boost to EU VAT revenues for European states will make it an easy sell.

However, as is so often the case with these types of reforms – and especially changes to EU VAT rules – the devil could be in the detail.

Trump Pushes Plan For Tariffs On US Corporate Departees

On December 4, President-elect Donald Trump took to Twitter to reiterate the proposal he made during his election campaign to impose a substantial tariff on imports from US multinational companies that move their production facilities abroad.

His tweets came only a few days after his negotiation on December 1 of an agreement with Carrier Inc. for the company to receive USD7m in tax incentives from Indiana in exchange for an agreement the company will keep in the state around a half of the 2,000 jobs it had planned to transfer to Mexico. It was indicated that the company was also told that the new Administration would simplify business regulations and reform corporate taxes.

In his new tweets, the President-elect said: "The US is going to substantially reduce taxes and regulations on businesses … but any business that leaves our country for another country, fires its employees, builds a new factory or plant in the other country, and then thinks it will sell its product back into the United States without retribution or consequence, is WRONG."

"There will be a tax on our soon to be strong border of 35 percent for these companies wanting to sell their product, cars, A.C. units etc., back across the border," he tweeted. Adding: "Please be forewarned prior to making a very expensive mistake!"

Sanders To Introduce US 'Outsourcing Tax' Legislation

US Senator Bernie Sanders (I – Vermont) has stated his intention to introduce legislation into Congress that would impose an "outsourcing tax" on companies moving jobs out of the US, as well as stripping them of their US tax breaks and benefits.

In a reaction to the plan by United Technologies (UTEC) and its subsidiary Carrier to move jobs to Mexico, Sanders stated that, if any company "wants to keep outsourcing decent-paying American jobs, those companies must pay an outsourcing tax equal to the amount of money it expects to save by moving factories to Mexico or other low-wage countries," or 35 percent of its profits, whichever is higher.

His proposed Outsourcing Prevention Act would also require all companies that outsource more than 50 jobs in a given year to pay back all federal tax breaks, grants and loans they have received from the federal government over the last decade. In addition, such companies would be prohibited through tax penalties from rewarding their executives by way of golden parachutes, stock options, bonuses, or

other forms of compensation, and would be prevented from buying back their own stock.

The terms of the proposed bill contrast with the reported outcome of President-elect Donald Trump's recent negotiations with UTEC to stop its plan. He has appeared to move away from his election threat to impose a tax on the imports back into the US of those companies moving production overseas (with particular reference, at the time, to Ford's decision to move its small-car production out of the US to Mexico).

Study Looks At GOP's US Border Tax Proposals

The American Action Forum (AAF) has published a paper explaining the border adjustments proposals in the Republican Party's framework for US corporate tax reform, plugged recently by House Ways and Means Committee Chairman Kevin Brady (R – Texas) at a Heritage Foundation event.

The Republican Party's Better Way tax reforms, set out in June 2016, would establish a border adjustment tax, alongside a cut to the US corporate tax rate and a switch to a territorial international tax system.

The proposal would in effect adopt a system similar to that under a value-added tax in respect of international trade, to eliminate a current disadvantage for US companies. Value-added taxes provide for tax credits for exported goods, ensuring that that jurisdiction's VAT is incurred only on value added to goods supplied to a final consumer in its domestic market. Under the Republican Party's proposals, a tax would be imposed on goods imported from those countries that have an indirect tax system, such as a value-added tax system, and US taxes on exports would be rebated or waived.

The AAF said border adjustments should not be considered trade policy, which would be subject to World Trade Organization rules. Instead, it said, the taxation of imports and rebates for exports should be paired, cancelling out any distortion. It said "equal adjustments … create a level tax playing field for domestic and overseas competition."

It added that "border adjustments do not distort trade, as exchange rates should react immediately to offset the initial impact of these adjustments. As a corollary, border adjustments do not distort the pattern of domestic sales and purchases."

Furthermore, the paper noted that such border adjustments, as part of a larger tax reform package, would "eliminate the incentive to manipulate transfer prices in order to shift profits to lower-tax jurisdictions; and also eliminate the incentive to shift profitable production activities abroad simply to take advantage of lower foreign tax rates."

Brady told the Heritage Foundation event: "We propose to take taxes off 'Made-in-America' products being sold around the world and put it on imports coming into the United States."

"Combined with lower rates in a territorial system, this provision ensures that we have eliminated every tax incentive to move jobs, innovation, or headquarters overseas," he said. "In fact, our goal is not simply to stem the tide and stop businesses in America from locating overseas. Our goal is to bring those investments back … we will become a 21st century magnet for new investment on this planet."

Mnuchin Confirms US Tax Reform A Top Priority

During a CNBC interview on November 30, Steven Mnuchin, chosen by President-elect Donald Trump to become his Treasury Secretary, confirmed that the new Administration's "number one priority is tax reform," to bring about increased US economic growth and jobs.

"This will be the largest tax change since Reagan," he said. "We're going to cut corporate taxes, which will bring huge amounts of jobs back to the United States. … We're going to get to 15 percent."

He rejected a suggestion that the rate would go up, perhaps to 25 percent, during subsequent negotiations with Congress.

With regard to personal income taxes, he reiterated the President-elect's message that there would be "a big middle income tax cut," and that the majority of tax cuts would not go to the wealthiest individuals. "The child care credit is a big aspect of this," he added, and "any reductions we have in upper income taxes will be offset by less deductions."

However, Mnuchin disclosed that the deduction for charitable donations would remain, as would a capped deduction for mortgage interest.

He also thought the consequent rise in tax revenues would pay for the tax cuts, with "sustained" 4 percent economic growth.

"We think by cutting corporate taxes we'll create huge economic growth," he said. "And we'll have huge personal income. So, the revenues will be offset on the other side."

EU Announces Massive Overhaul To EU Digital VAT Rules

The European Commission on December 1 unveiled a series of measures to improve the value-added tax (VAT) environment for e-commerce businesses in the EU. The proposals are intended to enable consumers and companies – in particular startups and SMEs – to buy and sell goods and services more easily online.

By introducing an EU wide portal for online VAT payments (the "One Stop Shop"), the Commission is hoping to reduce VAT compliance expenses for businesses by about EUR2.3bn (USD2.9bn) a year. Currently, online traders have to register for VAT in all the member states to which they sell goods. Often cited as one of the biggest barriers to cross-border e-commerce, these VAT obligations cost businesses around EUR8,000 for every EU country into which they sell. The Commission is now proposing that businesses make one simple quarterly return for the VAT due across the whole of the EU, using the online VAT One Stop Shop.

The new rules will also ensure that VAT is paid in the member state of the final consumer, in what is intended to lead to a fairer distribution of tax revenues among EU countries. Since January 1, 2015, this system already exists for sales of electronic services, such as mobile phone apps. This has proven successful, said the Commission, with more than EUR3bn in VAT being collected through the system in 2015.

Administrative burdens for companies will be reduced by 95 percent, the Commission said, giving an overall saving to EU business of EUR2.3bn and increasing VAT revenues for member states by EUR7bn.

In addition, a new yearly threshold of EUR10,000 in online sales will be introduced under which businesses selling cross-border can continue to apply the VAT rules they are used to in their home country. This will make complying with VAT rules easier for 430,000 companies across the EU, representing 97 percent of all micro-business trading cross-border. A second new yearly threshold of EUR100,000 will make life easier for SMEs when it comes to VAT, with simplified rules for identifying where their customers are based. The thresholds could be applied as early as 2018 on e-services, and by 2021 for online goods. Other simplifications would allow the smallest businesses to benefit from the same familiar VAT rules of their home country, such as invoicing requirements and record keeping. The first point of contact will always be with the tax administration where the business is located, and businesses will no longer be audited by each member state where they have sales.

The Commission is also to take action to tackle VAT fraud. Small consignments imported into the EU that are worth less than EUR22 are currently exempt from VAT. With around 150 million parcels imported free of VAT into the EU each year, the system is open to massive fraud and abuse, the Commission said. First, EU businesses are put at a clear disadvantage since unlike their non-EU competitors, they are liable to apply VAT on all goods, irrespective of their value. Second, the Commission said imported high-value goods such as smartphones and tablets are consistently undervalued or wrongly described in the importation paperwork in order to benefit from this VAT exemption. The Commission has therefore decided to remove this exemption.

Finally, the Commission is to enable member states to apply the same VAT rate to e-publications such as e-books and online newspapers as for their printed equivalents, removing provisions that excluded e-publications from the favorable tax treatment allowed for traditional printed publications. Current rules allow member states to tax printed publications such as books and newspapers at reduced rates or, in some cases, super-reduced, or zero rates. The same rules exclude electronic publications, meaning that these products must be taxed at the standard rate. Once agreed by all member states, the new set-up will allow – but not oblige – member states to align the rates on e-publications to those on printed publications.

Andrus Ansip, Vice President for the Digital Single Market, said: "We are delivering on our promises to unlock e-commerce in Europe. We have already proposed to make parcel delivery more affordable and efficient, to protect consumers better when they buy online and to tackle unjustified geo-blocking. Now we simplify VAT rules: the last piece in the puzzle. Today's proposal will not only boost businesses, especially the smallest ones and startups, but also make public services more efficient and increase cooperation across borders."

Pierre Moscovici, Commissioner for Economic Affairs, Taxation and the Customs Union, said: "Online businesses operating in the EU have been asking us to make their lives simpler. Today we're doing that. Companies big and small that sell abroad online will now deal with VAT in the same way as they would for sales in their own countries. That means less time wasted, less red tape and fewer costs. We're also simplifying rules for micro-businesses and startups, allowing them to tap new markets more easily. Our proposals mean that European governments stand to gain an additional EUR100m a week to spend on services for their citizens."

Australia Consults On GST Rules For Electronic Services Suppliers

The Australian Taxation Office (ATO) is seeking feedback on new rules for operators of electronic distribution platforms (EDPs), following the passage of legislation to impose goods and services tax (GST) on digital supplies and services.

Examples of EDPs include websites, internet portals, gateways, stores or marketplaces supplying digital products or services.

There are now special rules for operators of EDPs concerning the GST on the sale of digital products and services to Australian consumers. Broadly, the rules are intended to ensure an EDP operator is treated as having made any supplies of digital products and services through the EDP.

The ATO explained that the EDP operator, instead of the supplier, includes the value of the supplies in its GST turnover to determine whether it is required to register for GST. The operator also pays the GST on the supplies.

The ATO's new discussion paper seeks input to highlight areas of the new law that may be unclear, or where there may be practical compliance issues, and to identify advice or guidance that it should issue.

The consultation will remain open until January 20, 2017. The new GST rules for digital supplies and services will apply to tax periods starting on or after July 1, 2017.

China Hikes Tax On Luxury Car Imports

In an effort to "guide reasonable consumption and promote energy conservation," China's State Council has approved a consumption tax on the retail value of ultra-luxury imported cars, such as Ferrari and Rolls-Royce.

Cars affected are those sold in China from December 1, 2016, at a price above RMB1.3m (USD189,000), excluding VAT. They will be subject to a tax rate of 10 percent.

The tax on such cars was introduced at the same time the Communist Party of China adopted new measures against "extravagance" by officials, including not having vehicles exceeding certain standards.

Study Notes Tax Haven Cost To US Small Business

In a recent report, the US PIRG Education Fund has calculated the notional cost to US small businesses of the taxes unpaid because of the use by US multinational corporations of offshore tax havens.

The report noted that some US multinationals "shift US earnings to subsidiaries in offshore tax havens – countries with minimal or no taxes – in order to reduce their federal and state income tax liability," and thereby "avoid paying their fair share" for the benefits of being in the US. That shortfall then has to be made up by other taxpayers, it says.

Small business owners, the report pointed out, are seldom involved in tax havens and "end up picking up the tab for offshore tax avoidance in the form of higher taxes, cuts to public programs, or increases to the federal debt."

The Fund noted it has been estimated "the United States loses approximately USD147bn in federal and state revenue each year due to corporations using tax havens."

It calculated that, when divided among small businesses in each US state, "every small business would need to pay an additional USD4,481 in federal taxes to account for the revenue lost, [and] on average an additional USD647 to make up for lost state taxes."

The report added that, "because state corporate tax rates vary considerably, small businesses in some states would have to pay as much as USD2,520 to make up for state tax revenue lost."

ICC Welcomes OECD's Multilateral Convention

The International Chamber of Commerce (ICC) has welcomed the conclusion of negotiations toward the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS).

The negotiations, involving more than 100 jurisdictions, were concluded on November 24, 2016. The Convention will implement minimum standards designed to counter treaty abuse into existing double tax treaties and improve dispute resolution mechanisms. The first high-level signing ceremony will take place in the week beginning June 5, 2017.

The treaty-related measures from the BEPS project include those under Action 2 (Hybrid Mismatches), Action 6 (Prevention of Treaty Abuse), Action 7 (Avoidance of Permanent Establishment Status), and Action 14 (Improving Dispute Resolution).

"The delivery of the multilateral convention is a reflection of the remarkable effort by the OECD to enable countries to reach a position of consensus and pave the way for consistent implementation of the tax treaty related measures in the BEPS project," said Christian Kaeser, Global Head of Tax at Siemens and Chairman of the ICC Commission on Taxation.

"From the perspective of the business community, international consistency is an important prerequisite to avoid double taxation and ensure the required legal certainty to facilitate international trade and investment. Steps to reach alignment at a global level are therefore always welcome."

Transfer Pricing Behind Jump In UK Tax In Dispute

The amount of tax potentially underpaid by big businesses by shifting profits to other jurisdictions has increased by 60 percent in the last year, to GBP3.8bn (USD4.8bn), according to figures obtained by international law firm Pinsent Masons.

The figure is the "tax under consideration" by HMRC's Large Business Directorate, being an estimate of the maximum potential additional tax liability across all open inquiries but before any investigations have been completed.

Pinsent Mason tax expert Heather Self said that the increase suggested HMRC has opened a significant number of new inquiries over the last 12 months, in particular into multinationals' transfer pricing affairs. She suggested transfer pricing is becoming the single largest risk or source of potential tax inaccuracies for large businesses.

"It seems [HMRC] is taking a fresh look at the UK's largest businesses, with a focus on intra-group, cross-border transactions," she said. "This is likely to be a reaction to the increasing focus of the OECD and EU on international taxation, and it suggests that HMRC is getting bolder at challenging the amount of profit which should be allocated to UK economic activities."

"HMRC has been investing in transfer pricing specialists, and this is quite clearly reflected in the figures," she added.

Self said that the 2015 introduction of the diverted profits tax, which aims to ensure multinationals pay appropriate levels of tax in the UK, could be driving the increase in HMRC tax investigations.

Asian Nations Discuss BEPS Implementation

More than 50 delegates from 16 countries and four international organizations gathered on November 30 through December 1, 2016, in Manila, Philippines, to participate in the first regional meeting in the Asia-Pacific region

under the OECD's new inclusive base erosion and profit shifting (BEPS) project framework.

The framework was announced by the OECD in February 2016 to allow all interested countries and jurisdictions to more actively participate in the implementation and monitoring processes of the BEPS project. As "BEPS Associates," these countries will contribute towards the development of further BEPS recommendations on an equal footing.

At the meeting, most participants indicated that transfer pricing remains one of their top priorities. They highlighted that challenges in this area included lack of experience on practical cases (especially on intangibles, on financial transactions, and on risk analysis) and difficulties in accessing information on comparables (including availability of databases). Delegates also indicated indirect transfer of assets as an area of concern, and welcomed the toolkit work currently undertaken by international organizations on this topic to support developing nations with compliance matters.

Delegates also underlined the importance for businesses of exchanging country-by-country (CbC) reports consistently through treaty networks or other appropriate means. Representatives from industry highlighted the importance of mandatory binding arbitration and a better functioning of dispute resolution mechanisms to increase certainty and facilitate inward investment in the region.

Concluding, participants expressed the need for continued training on tax treaties, and welcomed the direction of the work on transfer pricing and on the toolkits, particularly in possible simplified approaches and practical guidance.

The event was jointly organized by the OECD and the Korea Policy Centre, and was hosted by the Asian Development Bank. Participants included senior officials from finance ministries of Bhutan, Brunei, Cambodia, Fiji, Indonesia, Japan, Korea, Malaysia, Maldives, Myanmar, China, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam.

Spain To Hike Corporate Tax Burden

The Spanish Government announced a revenue-raising Budget on December 2 that will increase the tax take from corporations.

While the recently formed Government chose to leave the 25 percent corporate tax rate intact, Spain will restrict corporate tax deductions. These will contribute much to the EUR7bn in new revenues the Government is targeting.

The Budget imposes new limits on loss carrybacks, and restrictions on the use of losses linked to shareholdings in companies located in "tax havens or in territories that do not impose an appropriate level of tax," among other changes.

The new corporate tax measures are expected to raise an extra EUR4.65bn in revenue for the Government.

In addition, property values will be updated for the immovable property tax, to boost revenues. The Government also intends to raise a number of "sin" taxes, including those on alcohol, tobacco, and sugary drinks.

Other changes are designed to modernize the value-added tax system and combat VAT fraud. This includes a new real-time VAT reporting system, which was announced back in 2014. Taxpayers will be required to report transactions for which an invoice has been issued or received, generally within four days. The regime will cover 62,000 of Spain's largest taxpayers, comprising large companies, groups, and those that file VAT returns monthly. It will therefore cover businesses responsible for 80 percent of taxable supplies by turnover, with other taxpayers also able to use the system voluntarily.

Announcing the plans in 2014, the tax authority said the information will support tax enforcement efforts and ease tax return filing for taxpayers covered by the regime. Further, the compliance burden associated with the completion of VAT returns is to be substantially reduced through automation, it said.

OECD Reports On Tax Trends In Southeast Asia

Southeast Asian countries have recently made advancements towards expanding their tax bases but further effort is needed, says a new report from the OECD.

In 2014, levels of tax revenues among the six Asian countries ranged from 12.2 percent of gross domestic product (GDP) in Indonesia to 32 percent in Japan. The tax-to-GDP ratio in Japan, Korea, the Philippines, and Singapore

increased while it decreased slightly in Indonesia and Malaysia in the same year.

The report, which includes Singapore for the first time, shows that the tax-to-GDP ratios in all six Asian countries are lower than the OECD average of 34.2 percent, especially in emerging Southeast Asian economies, where the OECD said scope for increased tax mobilization remains.

The report says that corporate income taxes are a significant source of tax revenue in all six countries. The share of corporate income taxes as a percentage of total tax revenues in all six countries was higher than the OECD average of 8.8 percent. It ranged from 12.8 percent in Korea to 52.6 percent in Malaysia in 2014, although in each country the share was lower than in 2013. In contrast, the share of value-added tax to total tax revenues in 2014 remains lower than the OECD average of 20 percent in all countries – due to generally lower VAT rates – except for Indonesia where the share was 32 percent.

In addition, a special feature of the report discusses the development of large taxpayer offices in tax administrations in Asian and Pacific countries that increasingly have adopted segmented approaches to tax administration to better mobilize tax revenue from large companies and manage their complex tax matters. For example, in the Philippines, the Bureau of Internal Revenue (BIR) stepped up the monitoring of large taxpayers and took measures to address compliance issues in 2015. In Indonesia, the Foreign Enterprise and Individual Tax Office was strengthened to better manage all tax matters relating to foreign-owned firms and individual taxpayers.

Australian Treasurer Explains New Backpacker Tax Rules

The Australian Government has explained how its new 15 percent backpacker tax regime will work.

The Government last week reached an agreement with the Green Party to lower the proposed tax rate for working holiday makers from 19 percent to 15 percent. Legislation to implement the rate was passed by the Senate on December 1, by 43 votes to 19.

Treasurer Scott Morrison explained that the tax rate for 417 and 462 visa holders will now be set at 15 percent from January 1, 2017, consistent with the rate applicable to visa holders under the Seasonal Workers Program. The 417 visa is available to those aged over 18 and under 31 who wish to holiday and work in Australia for up to a year. The 462 visa is applicable to individuals holding passports from certain countries, including Argentina, China, and the US.

In addition, the Departing Australia Superannuation Payment rate for 417 and 462 visa holders will be set at 65 percent, rather than the 95 percent the Government had previously proposed.

Morrison said these measures will contribute AUD560m (USD415.5m) net to the Budget, "almost 74 percent of the revenue the original Budget measure would have raised over the current forward estimates [period]." The Government had originally intended to tax backpackers at 32.5 percent from July 2016.

"These new arrangements will ensure that the Australian agriculture, horticulture, tourism, and hospitality sectors, as well as other industries in regional areas, can have a competitive tax rate for working holiday makers that does not compromise other important visa classes such as those under the Seasonal Workers Program," Morrison stated.

The Australian Chamber – Tourism welcomed the end to an 18-month political deadlock, but warned that the Government appears to be treating the tourism industry as a cash cow.

CEO James Pearson said: "Resolving the backpacker tax issue has involved a tax on backpackers that means the vast majority who previously claimed the tax-free threshold will now pay 15 cents in the dollar. It has also involved an additional AUD100m per year tax on international travelers, in the form of the AUD5 increase in the Passenger Movement Charge announced without any consultation or assessment of the impact."

"While we welcome the settlement of the issue by the Parliament, the process has dealt a blow

to tourism and the visitor economy. As a major source of export earnings, tourism should be treated as a hero rather than as a cash cow."

Fiona Simson, President of the National Farmers' Federation, said the outcome was "a victory for common sense."

South Korea's 2017 Budget To Hike Top PIT Rate

South Korea's Government and parliamentary lawmakers have agreed to introduce an increased top rate of individual income tax in the 2017 Budget, to part-fund a child care support program.

Individuals with annual taxable earnings of more than KRW500m (USD428,500) will be subject to a 40 percent income tax rate. The previous top rate was 38 percent for those with taxable earnings of over KRW150m.

The opposition's suggestion for an even higher top income tax rate (of up to 50 percent) was not taken up, and a hike to the country's headline corporate tax rate from 22 percent to 25 percent was also turned down.

EU Claims WTO Victory In Boeing Tax Break Case

The EU has claimed victory in a World Trade Organization (WTO) dispute with the US over tax treatment afforded by the state of Washington to Boeing.

In December 2014, the EU requested consultations with the US on "conditional tax incentives" established by the state of Washington in relation to the development, manufacture and sale of large civil aircraft. The EU alleged that the measures are prohibited subsidies, inconsistent with the WTO's Subsidies and Countervailing Measures (SCM) Agreement.

Following a further EU request, a WTO panel was set up in September 2015. The panel's final report was published on November 28.

The dispute concerned legislation that amended and extended various tax incentives for the aerospace industry. In particular, the EU raised objections to seven separate incentives, including a reduced business and occupation tax rate, credits against business taxation, and exemptions from various other taxes in the state of Washington.

While the panel did not rule in favor of the EU on all arguments, it did say that "in each of the contested measures, there is a financial contribution by the Washington state government, and that a benefit is thereby conferred. As a result, the measures are deemed to constitute subsidies under the SCM Agreement."

However, the WTO said the EU had not demonstrated that the measures are *de jure* (by right) contingent upon the use of domestic, rather than imported, goods.

Nevertheless, it did conclude that the reduced business and occupation tax rate for the manufacturing or sale of commercial airplanes under the Boeing 777X program – one of seven contested – is *de facto* contingent upon the use of domestic over imported goods. It said this measure is inconsistent with the SCM Agreement.

Reacting to the ruling, EU Trade Commissioner Cecilia Malmström said: "Today's WTO ruling is an important victory for the EU and its aircraft industry. The panel has found that the additional massive subsidies of USD5.7bn provided by Washington State to Boeing are strictly illegal. We expect the US to respect the rules, uphold fair competition, and withdraw these subsidies without any delay."

The EU's claims were however challenged by Boeing. In a statement, the company said: "The WTO rejected entirely the EU's challenge to six of the seven incentives and rejected most of the challenge to the seventh. The WTO held only

and narrowly that a reduction in Washington state's Business and Occupancy (B&O) tax rate for future 777X revenues is inconsistent with the WTO agreements. The WTO threw out all of the EU's other challenges to various incentive programs and left untouched even the B&O tax rate as it applies to revenue from the other Boeing models produced in Washington state – the 737, 747, 767, 777 (current model), and 787."

It added: "In total, the EU claimed that Boeing had received USD8.7bn in subsidies. This claim was rejected by the WTO, which found future incentives totaling no more than USD50m a year to be impermissible. The WTO found that to date Boeing has received no benefit from the 777X rate incentive, and will not until 2020, because the first airplane will not be delivered until then."

EFTA Approves Eco Tax Incentives For Norwegian Ships

The European Free Trade Association Surveillance Authority (EFTA Surv) has approved a tax-based state aid scheme aimed at reducing maritime transport pollution in Norway.

Under the program, a reduced rate of taxation will be applied to electricity directly provided to vessels, with the exception of private pleasure craft. The tax break applies to electricity supplied to vessels while in port, and to the recharging of ships' batteries.

The aim of the scheme is to encourage the use of a cleaner source of power over traditional fossil fuels, and reduce Norway's overall carbon emissions.

The Norwegian Government has notified EFTA Surv that the tax incentive will be in place for ten years starting on January 1, 2017.

"This scheme can alleviate air pollution in ports, fjords, and along the Norwegian coast in general," said EFTA Surv President Sven Erik Svedman.

"The EEA [European Economic Area] state aid rules can be used to further such environmentally friendly and cost-efficient solutions," he explained.

MENA Airlines Concerned About Rising Tax Burden

Aviation industry players in the Middle East and North Africa (MENA) region are concerned about rising taxes and charges, says the International Air Transport Association.

The taxation of the aviation sector in the MENA region was one of the four items on the agenda at the Arab Air Carriers Organization's 49th Annual General Meeting in Casablanca, Morocco, alongside infrastructure, consumer protection regulations, and security.

According to the International Air Transport Association (IATA), about USD700m in extra

costs were imposed on the industry in 2015 alone. It called for "cooperation to reverse unprecedented rises in taxes and charges."

"Every dollar that a passenger spends in the region creates jobs and spreads prosperity. And every dollar collected in taxes or charges is an incentive for travelers to go elsewhere," said Alexandre de Juniac, the IATA's Director General and CEO, in his opening remarks at the meeting.

"A low cost structure is a key component of the region's success, particularly in the Gulf," he added.

The IATA says tax is one of the major obstacles to growth in the global aviation sector, and frequently criticizes governments for introducing taxes that "unjustly target the industry," especially in cases where tax revenues are not reinvested in aviation infrastructure and related areas. "Unwarranted or excessive taxation on international air transport has a negative impact on economic and social development," it says.

According to the IATA, airlines and their customers are expected to generate USD118bn in tax revenues in 2016, equivalent to 45 percent of the industry's gross value-added.

Progress Made On 'Green Goods' Trade Treaty

World Trade Organization (WTO) members negotiating an agreement to cut duties and tariffs on trade in environmentally friendly goods were said to have made progress in their latest round of talks, although a final deal appears to be some way off.

At a recent meeting in Geneva, 18 WTO participants, representing 46 WTO members, continued their work towards liberalizing trade on a range of important environmental goods. According to the WTO, while "constructive progress" was made towards an agreement, the participants were "not in a position to close the existing gaps at this point."

"The intensive discussions set the stage for further talks in the near future," the WTO said.

Commenting after the latest round of negotiations, WTO Director-General Roberto Azevêdo said: "Participants negotiated in good faith and made good progress towards an agreement. I believe that the knowledge and understanding gained in these discussions will help us to move forward in the near future. I urge participants to show whatever flexibility they can to help conclude the deal."

The Environmental Goods Agreement initiative was originally built on a commitment made by Asia-Pacific Economic Cooperation (APEC) countries to reduce import tariffs on environmental goods to 5 percent or less. The APEC list extended to 54 goods, but was intended to be expanded as more products promoting energy efficiency were developed or identified. The WTO list includes, for example, solar water heaters, wind turbines, water treatment filters, and catalytic converters.

WTO Members Split On Ecuador's Import Surcharge

The Ecuadorian Government has been praised by some World Trade Organization (WTO) members for its decision to phase out surcharges applied to certain import tariff lines, although some are calling on the country to eliminate the taxes more rapidly.

Ecuador originally introduced the tariff surcharges in an effort to narrow its balance of payments deficit and "consolidate the country's economic recovery." The Government began to reduce the surcharges earlier this year, and plans to phase them out completely next year.

Currently, Ecuador applies a tariff surcharge at top rates of 35 percent on the import of final

consumer goods, and 15 percent on imports of various products such as ceramics, tires, motorbikes, and televisions. These surcharges have been reduced from 45 percent and 35 percent, respectively, this year, with a 5 percent surcharge on non-essential capital and primary capital goods eliminated in October 2016.

According to the Government, the surcharges now cover 18 percent of imports compared with approximately 30 percent in January 2016. The remaining surcharge rates will be reduced by one-third by April 2017 before being abolished in June – one year later than originally agreed with the WTO.

At the meeting of the Committee on Balance-of-Payments Restrictions on November 29, most WTO members welcomed Ecuador's efforts to reduce and eventually abolish the surcharges, with some suggesting that the measure was justified by the deterioration of the nation's balance of payments situation.

However, according to the WTO, other members "questioned the conformity of these measures with WTO rules," with several claiming the surcharges are causing a burden on their exporters, and urged Ecuador to remove the measures as soon as possible.

Ecuador was also urged to implement economic reforms and to remain consistent with WTO rules, while looking for less trade-distortive measures.

ANDORRA - LIECHTENSTEIN

Into Force

The DTA between Andorra and Liechtenstein entered into force on November 21, 2016.

CANADA - MADAGASCAR

Signature

Canada and Madagascar signed a DTA on November 24, 2016.

CHILE - SWITZERLAND

Signature

Chile and Switzerland have signed an automatic TIEA, the Swiss Government confirmed on December 6, 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 - 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 its 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.

MONACO - LIECHTENSTEIN

Initialed

Monaco and Liechtenstein initialed a DTA on November 30, 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

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

The Americas

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

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

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

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/

Share Schemes & ERS

1/18/2017 - 1/18/2017

Informa

Venue: TBC, London, UK

Chair: David Pett (Pett Franklin & Co)

https://finance.knect365.com/share-schemes-and-ers/

Tax Treatment of Employment Related Securities

1/19/2017 - 1/19/2017

Informa

Venue: TBC, London, UK

Chair: Mahesh Varia (Travers Smith)

https://finance.knect365.com/tax-treatment-of-employment-related-securities/

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

Western Europe

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

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.

A listing of recent key international tax cases.

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)*

United States

On November 30, a federal court in the Northern District of California entered an order authorizing the Internal Revenue Service (IRS) to serve a John Doe summons on Coinbase Inc., to discover information on US taxpayers who transacted in virtual currencies, such as bitcoin, during the years from 2013 to 2015.

The IRS is seeking the records of Americans who engaged in business with or through Coinbase, a major virtual currency exchanger headquartered in San Francisco, California. It was said that, "because transactions in virtual currencies can be difficult to trace and have an inherently pseudo-anonymous aspect, taxpayers may be using them to hide taxable income from the IRS."

There has been no allegation that Coinbase has engaged in any wrongdoing in connection with its virtual currency exchange business.

Permitting the summons, the judge said there is a reasonable basis for believing that virtual currency users may have failed to comply with federal tax laws.

The John Doe summons directs Coinbase to produce records identifying US taxpayers who have used its services, along with other documents relating to their virtual currency transactions.

"As the use of virtual currencies has grown exponentially, some have raised questions about tax compliance," said Principal Deputy Assistant Attorney General Caroline Ciraolo, Head of the Justice Department's Tax Division. "Tools like the John Doe summons authorized today send the clear message to US taxpayers that whatever form of currency they use – bitcoin or traditional dollars and cents – we will work to ensure that they are fully reporting their income and paying their fair share of taxes."

"Transactions in virtual currency are taxable just like those in any other property," said IRS Commissioner John Koskinen, referring to the IRS's guidance, issued in 2014, that virtual currencies that can be converted into traditional currency are property for tax purposes, and that a taxpayer can have a gain or loss on the sale or exchange of a virtual currency, depending on the taxpayer's cost to purchase it.

https://www.justice.gov/opa/press-release/file/914226/download

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

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.

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*

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*

Dateline December 8, 2016

I don't know why countries bother to sort out their trade spats through the **World Trade Organization's** dispute resolution mechanism. Typically both sides will claim victory irrespective of what the WTO panel decides. The most recent example was last week, when the **European Union** claimed a comprehensive victory against the **United States** in the latest round of the long-running saga over tax breaks and subsidies for aircraft production on both sides of the Atlantic.

From reading the European Commission press release on the matter, you'd think it was a pretty open-and-shut case. Especially as the Office of the US Trade Representative hasn't commented on the ruling, at least not through the medium of its website. But then you get to Boeing's comments, and actually it's a pretty solid win for the **state of Washington** and the US after all. No wonder free trade is under threat! This is also ominous for the **United Kingdom**, which considers "WTO rules" as a fallback option if it fails to negotiate a suitable Brexit settlement with the EU.

Staying with confusing matters, it emerged last week that the **Scottish Government** is proceeding with legislation that would give it responsibility over elements of individual income tax policy, under the negotiated agreement on tax devolution with the UK Government. For me, this process all feels a bit ad hoc and messy, and likely to put taxpayers into a tangle. But perhaps I should stop being so skeptical about these arrangements.

Revenue figures relating to taxes already devolved to Scotland make for interesting reading, and suggest that Revenue Scotland, the body charged with collecting the devolved taxes, appears to be doing a good job. According to these statistics, GBP572m (USD718m) was collected from the Land and Building Transaction Tax and Scottish Landfill Tax in the first full year of the new tax department's operation. To me, this sounds like quite a lot, given that the population of Scotland is less than 5.5m and these are two relatively minor taxes.

When added to the revenues from the Scottish Rate of Income Tax, Scotland's tax revenues could grow to be fairly substantial, perhaps signaling the end of the complex block grant system which has traditionally financed Scottish public spending. Having said this, Revenue Scotland had better hope that Scots continue to make liberal use of their trash cans.

However, perhaps the most interesting development in the past couple of weeks has been the primaries for the **French** center-right Republican Party, which François Fillon won with room to

spare. And what's so interesting about Fillon? Having already served in high office in France as a former Prime Minister, he could easily be seen as "establishment".

However, his policies jar hugely with the tradition of French statism, including EUR50bn in **tax cuts** for corporations, de-regulation, EUR100bn in government spending cuts, and the laying off of half-a-million public sector workers. And, as if these proposals weren't controversial enough (and certainly for France), he wants to finally scrap the nation's sacred 35-hour working week. What's more, at a time when we're seeing populations turn against political and corporate elites, Fillon is all for the established order of globalization, and wants to **reform the EU** from within.

Therefore, a Fillon presidency sounds like a recipe for strikes, protests, political paralysis, and more economic pain. Surely France would sooner restore the monarchy than vote for the reincarnation of Margaret Thatcher? Might they even welcome back the deeply unpopular François Hollande? And if the UK couldn't get a mandate for EU reform – which resulted in a post-referendum resignation of then Prime Minister David Cameron, just how far does Fillon believe he can get? Yet, somehow, Fillon has become favorite for the top job.

Perhaps this is because the Socialist Party is effectively broken and in need of a savior, which may put them out of the running; and Fillon's main rival is expected to be the highly divisive Marine Le Pen, leader of the far right nationalist party Front National. There is a long way to go before now and the elections. But the forces of radical change might be about to visit France.

Once again, this column concludes Down Under, and as you can probably guess, I'm not going to finish on a very amicable note. Indeed, **Australia's** rap sheet of tax-related misdemeanors grew yet longer in the past few days. First, we had further backpedaling on the backpacker tax, followed by the news that Australia is forging ahead with a UK-style diverted profits tax, a BEPS-inspired measure that has made even the OECD a little uneasy. Then the OECD itself was on the Australian Government's case for repeated failures to follow through on tax reform pledges.

There was one bright spot though, and it came in the form of an announcement by the Australian Tax Office that it would issue **"tax certainty" letters** to taxpayers, guaranteeing them that, as far as the tax man is concerned, they are fully tax compliant and that they need not fear checks or audits. However, given the upending of the tax ruling systems in other parts of the world, namely the EU, taxpayers might be forgiven for treating such promises with a large pinch of salt.

The Jester