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a closer look

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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

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Major Upcoming UK Corporate Tax Reforms: The Good, The Bad, And The Incomplete

by Sally Fildes and David Klass, Gide Loyrette Nouel

On December 5, 2016, the UK Government published the draft provisions for this year's Finance Bill ("**Finance Bill 2017**") setting out the legislative changes to UK tax law that will take effect in April 2017. For multinational businesses within the charge to UK corporation tax, these draft provisions promise some significant changes which will present both challenges and opportunities.

This article will look at three of the biggest areas of planned tax reform – some of which will be more welcome than others – from the perspective of multinational businesses with interests in the UK.

Loss Relief

Two key reforms to the availability of loss relief, which were originally announced at the time of the Government's Budget delivered in March 2016 (with further details being provided in a consultation paper in May 2016), have been confirmed and will take effect from April 2017, as set out below.

1. Loss restriction

From the perspective of UK companies and UK branches of overseas companies that have carried-forward losses and profits over GBP5m (USD6.07m) per year, there is not-so-good news in the form of a loss restriction.

From April 2017, each standalone company or group of companies will have a GBP5m annual profit allowance (which in the case of group companies applies to the *whole* group) above which carried-forward losses, whenever arising, may only be used against 50 percent of taxable profits.

Previously there was no such restriction at all.

Banking companies and building societies within the charge to UK corporation tax are singled out in a measure designed to restrict the rate at which the significant losses accumulated by banking groups during the financial crisis are offset, with a lower profit threshold of 25 percent of taxable profits applying to losses accrued prior to April 1, 2015.

2. Loss relaxation

The more positive reform takes the form of a loss "relaxation" which provides that carried-forward losses arising from April 1, 2017 will not be subject to the existing requirement which states they can be set off only against total taxable profits of the same income stream – a move that will allow companies and groups increased flexibility in choosing how to allocate reliefs against their various trading and non-trading profits.

Some further positive changes which will be introduced include the following:

3. An extension of terminal loss relief, which will allow companies that have ceased to trade to carry forward losses (without restriction) to use against profits accrued during the final 36 months of its trading (but not before April 1, 2017), without having to apply the abovementioned 50 percent restriction.

4. The automatic expiration that currently applies to a company's losses when it goes into liquidation, will be abolished.

5. Simpler loss relief calculations will be introduced for companies that have no pre-2017 carried-forward losses and those that elect to forgo them.

6. UK real estate investment trusts ("REITs"), which benefit from their own favorable UK tax regime, will be excluded from the loss relief reforms (on the basis that they would not benefit from the relaxation with regards profit streams).

While the planned loss relief rules are significantly relaxed compared to the original proposals announced during the first half of 2016, the new rules are expected to be complicated to apply, in

particular for banking companies. What is more is that the rules will be accompanied by a host of targeted anti-avoidance provisions, the drafting of which we have not yet seen.

Concerns also emanate from the insurance industry as to the effect the rules will have on their regulatory capital position, with no clear proposals to address these concerns having so far been made (although the UK Government has said it will continue to monitor the regulatory consequences of the new rules closely).

Corporate Interest Restriction

Although the draft provisions governing the deductibility of interest are not yet complete, they do provide some wanted clarity as to how the UK Government will implement Action 4 (*limiting base erosion involving interest deductions and other financial payments*) of the OECD/G20's base erosion and profit shifting ("**BEPS**") initiative.

UK companies that have interest (or interest like) expenses on which they claim relief for UK tax purposes will see those expenses subject to the new legislation from April 1, 2017. The new rules were first announced in an HM Treasury and HM Revenue & Customs joint consultation document in May 2016, with the key resulting reforms being the following:

1. The introduction of a fixed ratio rule that limits the amount of net interest expense a group is able to deduct against its taxable profits to 30 percent of its tax EBITDA (Earnings Before Interest, Tax, Depreciation and Amortization).
2. The introduction of a group ratio rule (calculated with reference to accounting EBITDA and then applied to UK tax EBITDA). Groups will be able to apply the group ratio rule if it results in a better position than the fixed ratio rule.

The rules will apply to expenses that relate to loan relationships, contracts for derivatives relating to financial assets, and financing costs payable under arrangements such as debt factoring.

In line with OECD recommendations, a key exemption from the rules will be the public benefit infrastructure exemption ("**PBIE**") for qualifying interest expenses incurred by "qualifying companies" which invest in infrastructure projects for the public benefit.

Although the draft provisions have not yet been provided (they are expected at the end of January 2017), the Government's response to the initial consultation states that the PBIE will be somewhat wider than envisaged in May 2016, and will broadly speaking apply in the following way:

- The exemption will be elective and irrevocable once an election has been made.
- Qualifying interest paid by a company which has made the election, to an unrelated third party, will fall outside the scope of the corporate interest restriction rules mentioned above.
- "Qualifying companies" will be those that provide "public benefit services," being:
  - Services procured by a public body (or its wholly owned subsidiary);
  - Services provided in consequence of specific Parliamentary arrangements, such as the regulatory frameworks for the transmission of water and electricity, for port and airport operators, and for the rail network;
  - Services performed in the interest of national security; and
  - Somewhat surprisingly, services for the provision of rental property to unrelated parties.

On the whole however, the UK Government seems to be taking a tough line in its interpretation of the OECD Action 4 guidance, which as per the case with the loss relief reforms discussed above, will hit banking and insurance groups hardest. Whereas the OECD's guidance on Action 4 seems to suggest a modification of the fixed ratio rule would be appropriate for the banking and insurance sectors, the UK Government's current position – while acknowledging "the significant constraints that regulation provides to the use of interest for base erosion purposes in banking and insurance groups" [1] – is that it does not intend to implement such a modified rule.

To what extent (if any) continuing concerns from the two industries with respect to interest deductibility will be addressed when the remaining draft legislation is published later this month, remains to be seen.

Reform Of The Substantial Shareholding Exemption

Of particular interest for UK corporation taxpayers will be the proposed changes to the substantial shareholder exemption (the "**SSE**"). The SSE exempts the disposal of certain shares in subsidiaries from UK corporation tax on capital gains. Very broadly speaking, the SSE currently applies where the following conditions are met:

1. The investing company has held a substantial shareholding (broadly, at least 10 percent) in the investee company and such shareholding was held for a continuous 12-month period beginning not more than two years before the disposal.
2. The investing company was a sole trading company (or member of a trading group) during the 12-month holding period.

3. The investee company was a sole trading company (or member of a trading group) during the 12-month holding period.
4. The investee company remained a trading company immediately after the disposal.

The above conditions will be significantly relaxed (and simplified) in Finance Bill 2017, with the following changes applying to disposals made on or after April 1, 2017:

(a) The SSE will be extended to disposals of shareholdings of less than 10 percent, provided that at least 10 percent was held for a 12-month period within the six years (as opposed to two years under the current rules) leading up to the disposal – *i.e.*, condition 1 has been relaxed.
(b) It will no longer be a requirement that the investing company is a trading company – *i.e.*, condition 2 above is removed.
(c) Provided the disposal is being made to an unconnected person, there will no longer be a requirement for the investee company to meet the post-disposal trading condition – *i.e.*, condition 4 above is removed.

These changes should provide companies and groups with greater certainly as to the availability of the SSE, for example in situations where shareholdings are to be sold in tranches or where it is unclear that the investee company will remain a trading company after the disposal. It should also, for larger groups in particular, prove to be more user friendly and remove some of the administrative burden in claiming the SSE.

There is welcome news too for companies owned by qualifying institutional investors ("**QIIs**") insofar that in addition to the abolishment of conditions 2 and 4 above, where the investee is owned at least 80 percent by QIIs, any gains made on the disposal will be exempt from UK corporation tax in full. Where the ownership is anywhere between 25 percent and 80 percent by QIIs, a proportionate exemption will be available.

"Qualifying institutional investors" for the purposes of the SSE include trustees and managers of registered or overseas pension schemes, sovereign wealth funds, charities, life assurance businesses, investment trusts, and certain widely marketed authorized investment funds or exempt unauthorized investment funds (but notably not at present, REITs).

Concluding Thoughts

The draft provisions are now open for consultation until February 1, 2017; however, Finance Bill 2017 itself is not expected to depart materially from the draft provisions published on December 5, 2016. Rather, it will be a question of fine-tuning.

As described above, for multinational businesses there are major changes on the horizon with regards to loss relief and restrictions on interest deductibility, with each regime boasting over 40 pages of new legislation that businesses will need to make sense of and implement relatively quickly.

What may soften the blow to some degree is the welcomed simplification of the SSE rules, which in their current form are quite cumbersome and in certain circumstances can lead to results which are contrary to the original policy intention.

It is clear, however, that the UK Government – despite calls from some in the wake of the result of the referendum on EU membership to slow down its reform of the UK tax system – is pressing on with corporate tax reform.

Endnote

1 HM Treasury / HM Revenue & Customs response to the consultation on tax deductibility of corporate interest expense (December 2016).

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Transfer Pricing Developments – A Year In Review

by Cym Lowell, McDermott Will & Emery

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Introduction

Transfer pricing, the allocation of income or loss between members of a controlled group, (TP) continues to be the critical taxation issue in the cross-border world (international, federal or state), whether in planning, controversy or other purposes. Why is this the case? Because the tax consequences of each entity begins with its income or loss posture.

In 2016, there were many areas of evolution.

Overall Turmoil And Uncertainty

In our taxation world, turmoil has become even more apparent in 2016. Countries are actively defining how their domestic tax base can be maximized to provide revenue for economic progress, as multinational entities (MNEs) are evaluating their effective tax rate planning strategies (ETR Strategies) to address the changing world. This is an epochal process, reflecting a rather stunning transformation from all sides of the table, reflecting the ever-weakening foundation of the tax models implemented just after World War I.

Opportunities for international tax planning are, and always have been, largely a consequence of navigating rules developed by countries for their own purposes (rather than anything MNEs have created on their accord). In the face of the uncertainties existing in the international tax world, all MNEs are, or should be, in the process of reassessing their ETR Strategies.

While there is turmoil, the good news is that adapting the evolving world is a voyage that has been undertaken in many contexts in the past. Learning from that experience should provide a beacon for MNE groups to chart the way forward to cope with the evolving world.

BEPS

The G20 Base Erosion and Profit Shifting process (BEPS) is turning toward implementation of many of the final reports issued in late 2015 (an aggregate of almost 1,800 pages). The reports for the TP Actions 8–10 were essentially precatory in nature, intended to provide a base for ensuring that transfer pricing outcomes will better align with value creation. Specifically, it is intended that the role of capital-rich, low-functioning entities in BEPS planning will become less relevant.

The TP focus was in the following areas:

- *Intangibles:* Action 8 addressed the perception that base erosion may have been achieved *via* misallocation of income from valuable intangibles.
- *Risk:* Action 9 addressed the role of risk in TP. The central question is whether a party denominated as the risk taker actually has the capacity to manage the exposures and earn income that is allocated to such functions. A related issue involves so-called cash-boxes, in which a capital-rich member of an MNE may be allocated income that is greater than would be the case for the level of activity actually undertaken by such entity.
- *Commercially Reasonable Allocations:* Action 10 focused on other areas where profit allocations may not reflect commercial rationality. In such cases, it may be appropriate to recharacterize the respective functional responsibilities of the parties to provide for a commercially reasonable allocation. One area is management fees and head office expenses.
- *Utilization of Profit-Split Methodologies:* As a result of the BEPS process, including Actions 8–10 and the CbC requirements, it can be anticipated that tax authorities will make increasing use of profit-split methodologies.

This new guidance will be supplemented.

The initial element of the BEPS process to be adapted in many countries is the so-called "country-by-country" reporting regime (CbCR), which will require virtually all MNE groups to prepare global documentation packages. The purpose of the CbCR process is to provide tax authorities with information needed to make TP and tax base protection determinations in the most efficient manner. Like the TP Actions noted above, it is likely that CbCR will ultimately generate more profit split-type proposed adjustments.

The most recent BEPS-related element is the publication in November of a draft multilateral instrument (MLI), which is intended to implement many of the BEPS Action items in treaty

language to prevent having to renegotiate some 3,000 treaties. While consistency is obviously an intended result, the MLI recognizes the reality that many countries will not agree to all of the provisions. Accordingly, countries are allowed to sign the agreement (anticipated deadline in mid-2017), but then opt out of specific provisions or make appropriate reservations with respect to specific treaties. In other words, like the other elements of BEPS, the MLI will be a continuing source of potential turmoil for ETR Strategies.

US Tax Base Defense And Continuing Court Case Losses

The US response to these developments has been interesting. It is unclear whether the US will ultimately support some or all of the BEPS developments, including the MLI. The coming to power of the Trump Administration with an avowed intention to undertake significant tax reform, these issues will remain uncertain for a period of time.

While the IRS has suffered from budget cutbacks, it has responded with an increased focus on TP-related matters, including the development of updated internal strategies to successfully develop cases. At the same time, the Service has continued to suffer stinging defeats in the courts. The most important case in 2016 was *Medtronic, Inc. v. Commissioner*.[1] A US-based medical technology company had developed the patents and related IP for a series of medical devices, operating in some 120 countries. The case involved licenses granted by parent to its subsidiary authorized to do business in Puerto Rico, which had been the subject of prior periods agreements with an IRS examination team. In the current examination, an adjustment was proposed under Section 367(d) transfer ("commensurate with income" adjustment). The court was critical of the IRS expert's approaches, ultimately finding the IRS position to be arbitrary, capricious or unreasonable.

The Service had lost on similar issues in an earlier case (*Veritas Software Corp. and Subsidiaries v. Comm'r*).[2] Thereafter, the Service adopted proposed and temporary regulations under Sections 367(d) and 482 seeking to establish its positions in such cases *via* regulatory action, some portions of which were finalized in late 2016. In this regard, the Service's action is a rather transparent effort to give credence to the litigating position it lost in *Veritas*.

The positions asserted by the Service in these types of cases are similar in nature to those asserted by other countries, which the Service is then in the position of defending in Competent Authority, APA, or other contexts.

Digital Economy

One focus of BEPS has been the digital economy (which was Action 1). In view of the ever-expanding universe of digital transactions, this is a critical issue from the standpoint of all MNEs and countries. Unfortunately, the various BEPS reports on this subject have merely noted different theories that countries could use to defend their tax bases. In the absence of clear guidance, countries are beginning to consider various means of:

- A specific nexus standard applicable to digital presence (*i.e.*, downloading of content);
- Modification of permanent establishment (PE) standards (*via* expansion of reach or narrowing of exceptions);
- Replacement of PE rules in the digital context with a significant presence test (*e.g.*, *via* customer contact) and a gross basis tax on digital transactions;
- Withholding tax;
- Consumption tax;
- Other forms to be developed.

US Tax Reform

As noted, its seems highly likely at this point that there will be material tax reform in 2017 or shortly thereafter, which is likely to produce a material alteration of traditional rules for corporate and international taxation. Any such evolution would certainly add to the turmoil in our international tax world.

Anticipation Of Controversy: Focus On Dispute Resolution

In view of these various evolutions, there is broad consensus that governments and MNEs alike can anticipate a continuing surge in tax controversy, certainly involving TP issues. In the cross-border context, the so-called Competent Authority process has been a successful means of resolving such disputes between the few countries with experience in handling the cases. Unfortunately, the vast majority of countries have little or no experience with such processes. In the BEPS process, there has been demand for the use of binding mandatory arbitration to resolve such disputes. Such an approach is roundly rejected by many countries for a variety of reasons, including their experience of tax dispute arbitration in the context of investment treaties.

The United Nations is actively working on a range of alternative dispute resolution mechanisms that would complement the demand for mandatory binding arbitration.

Reevaluation Of ETR Strategies

As a result of these various elements, most MNEs are undertaking processes to carefully evaluate and update their ETR Strategies. The working group approaches and checklists developed reflect broad understanding of the potential opportunities in a world of turmoil to develop evolutions that will have materially improved overall results.

To say the very least, it is an interesting TP world.

Endnotes

1 TC Memo 2016-112 (2016). *See generally* Amanda Athanasiou, "IRS Acted Arbitrarily in Medtronic Transfer Pricing Case," 2016 *TNT* 112.

2 133 TC 297 (2009).

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Topical News Briefing: Risk Versus Reward

by the Global Tax Weekly Editorial Team

Those responsible for the creation and ongoing implementation of the OECD's base erosion and profit shifting (BEPS) project probably didn't intend to make the world a riskier place for taxpayers. But that seems to be the outcome.

As reported in this week's issue of *Global Tax Weekly*, research from international law firm Allen & Overy suggests that corporations are shifting their tax emphasis from managing tax liability to managing tax risk.

In a sense this conclusion is not that surprising, as numerous surveys of senior management and tax professionals at multinational companies have pointed to an international landscape in which tax authorities have become increasingly aggressive in pursuit of unpaid tax, especially in the area of transfer pricing. And ironically, the increased uncertainty that has resulted from rapid changes to tax laws and regulations at country level – considered another unintended consequence of the BEPS project – appears to have emboldened tax authorities to launch more audits rather than fewer, as was initially envisaged at the start of the project.

One way in which multinational companies are seeking to mitigate tax risk is through being much more transparent, both with national tax authorities and with their investors. This would appear to be the case with companies based in the UK, where the Financial Reporting Council recently noted improvements in the transparency of tax disclosures by the UK's largest companies. And the UK is surely not the only place where this shift towards more openness is taking place.

However, the flip side is that companies may end up spending more time and resources on managing tax risk than on carrying out their core activities. And even the OECD has stressed the need for policymakers at jurisdictional level to provide certainty in the tax environment for businesses, to maintain trade and investment.

"Of course there will always be some degree of policy uncertainty due to economic change," OECD Secretary General Angel Gurría observed at an informal meeting of EU finance ministers last September, "but governments can design tax policies to minimize tax uncertainty."

Unfortunately for taxpayers, despite the OECD's good intentions, the message doesn't seem to be filtering down to the national governments implementing BEPS policies, even within the membership of the OECD itself. And countries may continue to be willing to turn a blind eye if the outcome of rising tax risk – unintended or otherwise – is more transparency, and, ultimately, higher tax revenues.

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FATCA Brings End To Switzerland's Time-Honored Tradition Of Bank Secrecy

by Michael J. DeBlis, DeBlis Law

"*There is only one thing in the world worse than being talked about, and that is not being talked about.*" [1]

Oscar Wilde's insightful observation about mankind's proclivity toward public recognition does have exceptions. For example, men and women throughout the ages have often sought confidentiality in their financial affairs, chiefly through banking in jurisdictions with a tradition of bank secrecy.

Usually, the customer seeks "assurances from the bank that it will not disclose account information to curious tax inspectors, anxious creditors and intrusive relatives." [2] On occasion, the customer "may seek to hide his identity from the bank itself, as well as from third parties." [3] To this end, the customer may open an anonymous account.

An anonymous account is a bank account where the accountholder's name is kept secret. The purpose behind an anonymous account is to keep to a bare minimum the number of bank employees who have *access* to the client's account.[4] The idea is simple: the fewer the number of bank employees that know the identity of the accountholder, the less vulnerable the accountholder will be in the event that such an employee becomes the target of an inquiry (or bribe) from a third party who wants access to this information.[5]

The classic numbered account is legendary in pop culture, making it a story element in countless *films noirs*. You know the one I'm talking about. A spy from right out of the pages of a "James Bond" thriller struts into a Swiss bank, hands over a note with some writing on it, and passes it to his private banker in exchange for a briefcase full of cash.

In some cases, the money is "dirty," and the spy is attempting to conceal its illegal source from government authorities. In others, the money is "clean," but the spy seeks to hide it from government authorities in order to avoid having to pay taxes on it. Either way, the intrigue and suspense that this storyline creates is enough to keep moviegoers on the edges of their seats.

There are certain aspects of this pulp fiction that do not stray too far from reality. For example, numbered accounts *do* offer increased privacy.[6] In the usual case, "a customer's name, address and signature are provided in the account opening agreement." [7] But "only the account number is entered in the general bank system." [8] The numbered account is then "assigned to an individual account manager for personal handling." [9] The file containing the customer's name "is maintained separately from the numbered account, with only key personnel having access to it." [10]

As owners of anonymous bank accounts have grown accustomed to expect, depositing and withdrawing money is based upon an agreed form of communication between the account manager and the customer. And in cases when that communication "is not face-to-face, such as when the accountholder calls the bank or issues written instructions, a secret code is used *in addition* to the account number." [11]

Once upon a time, it could work that way. Back then, the world was a much different place. For example, a banker might "sign up a customer for an offshore bank account at the same time he sold him an offshore company or an offshore trust." [12] In those days, governments were smaller and less aggressive in collecting taxes. Today, governments – both big and small – are facing a financial crisis of epoch proportions.[13] They are looking anywhere and everywhere for taxable sources of income in order to replenish their coffers. Not even your mattress is safe.

Only recently have governments come to realize something that has been staring them in the face for decades: that there is no more rich a source of taxable income that has been virtually untouched than unreported offshore accounts, which hold as much as USD600bn of the world's wealth.[14] Very simply, the taxes and penalties that stand to be collected from these accounts alone could single-handedly lift a nation out of its debt crisis.

The other way in which anonymous accounts have caught the ire of government officials is their illicit use in money laundering. How might a criminal use an anonymous account as a vehicle to launder the proceeds of his ill-gotten gain? First, he might deposit his ill-gotten gains into a numbered account through a wire transfer from another bank.[15] Because the numbered account is anonymous, the criminal has the peace of mind of knowing that there will be few, if any, inquiries into where the funds originated from. Second, when he wishes to use the funds, he need only transfer them to an account in his name in a large onshore jurisdiction, such as the United States.[16]

By filtering the criminal proceeds through these anonymous accounts, onshore banks will be unable to trace the source of the funds.[17] Requests for information by other jurisdictions will fall on deaf ears. In other words, they'll either be declined because the information is not available or because of laws protecting financial secrecy.[18]

A combination of the economic crisis that most governments find themselves in today along with the risk that anonymous accounts could be used as vehicles to facilitate international tax evasion has been the death knell for bank secrecy. For better or for worse, these accounts have gone the way of the dinosaur. And like dinosaurs, the only place that they still "live" are in books and movies.

While the Swiss banking system's reputation for concealing numbered bank accounts under a cloak of anonymity was once considered sacrosanct, the seal was broken on this time-honored tradition back in 2013 when it signed an international agreement with the OECD (Organisation for Economic Co-operation and Development) to fight tax evasion. Since then, other international agreements, such as the FATCA, have continued to chip away at the remaining vestiges of bank secrecy. Today, these agreements have marked the end of bank secrecy in Switzerland as the world once knew it.

ENDNOTES

1 Oscar Wilde, *The Picture of Dorian Gray* (Isabel Murray ed., Oxford University Press, 1974) (1891).

2 William W. Park, "Anonymous Bank Accounts: Narco-Dollars, Fiscal Fraud and Lawyers," 15 *FDMILJ* 652 (1992).

3 *Id.*

4 Numbered Account, as described by the Law Office of Robert J. Mintz

5 G. Philip Rutledge, "Bank Secrecy Laws: An American Perspective," 14 *Dick. J. Int'l L.* 601 (1996).

6 *Supra*, note 4.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Richard A. Johnson, "Why Harmful Tax Practices Will Continue After Developing Nations Pay: A Critique of the World's Initiatives Against Harmful Tax Competition Offshore: The Dark Side of the Global Economy," 26 *BC Third World L.J.* 351, 370 (2006).

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United States Online Sales Tax – The Wait For Answers Continues

by Stuart Gray, Senior Editor, Global Tax Weekly

As things currently stand, there is something of an uneven sales tax playing field between "virtual" retailers and their physical counterparts in the United States, as elsewhere. Efforts to level it up, however, have come up short.

Introduction

Brick-and-mortar retailers in states that impose sales and/or use taxes are legally obliged to collect these taxes from customers who make purchases in their stores at the point of sale and remit them to the state tax authority. However, if a resident of the same state chooses to purchase the same item from an online retailer or catalog seller based out-of-state, sales tax usually goes uncollected by the vendor because they do not have a physical presence, or tax nexus, there.

In an age when e-commerce is gaining significant market share, traditional retailers say this uneven playing field is becoming a greater concern. And the disparity is only likely to become more apparent. E-commerce sales are still small relative to overall retail sales, but have been grabbing an increasing share of these sales in the United States every year, and were worth in excess of USD100bn in the third quarter of 2016 alone, or almost 10 percent of retail sales, according to the latest US Census Bureau data.[1]

It is not just Main Street that claims to be suffering as a result of outdated sales tax laws. State and local governments are said to view the taxes they cannot collect on most online sales as lost revenue. Estimates of revenue forgone vary, but the National Conference of State Legislatures previously calculated that figure would reach USD23bn by 2012,[2] although a study by the University of Tennessee estimated the revenue loss was about half this level.[3]

Attempts to refresh the case law in this area (summarized below), or to legislate around the problem at federal level, have been frustrated at almost every turn. This has resulted in a patchwork of new measures as states take it upon themselves to redress the balance. What's more, the confusion and uncertainty facing remote sellers and consumers has been exacerbated by the varying interpretations of such measures by state courts.

It is a state of affairs which threatens to distort or, worse, inhibit the growth of interstate trade and e-commerce in the US, leading the Supreme Court to recently conclude that a national-level fix is becoming increasingly urgent, and is in the interest of all parties concerned – businesses, consumers, and state governments alike. Yet, even though the Supreme Court is keen to set a new precedent in this area, and last November's federal elections have provided a clean legislative slate for Congress, a resolution may not be as close at hand as most would like.

The *Bellas Hess* And *Quill* Decisions

The situation is not helped by the fact that most of the case law in this area originates from the pre-internet era.

An important precedent was set as a result of the US Supreme Court's ruling in *National Bellas Hess v. Department of Revenue* (1967).[4] National Bellas Hess (NBH) was a mail order company whose principal place of business was in the state of Missouri. The company sold goods throughout the country via catalogs that it mailed to out-of-state customers, with these goods shipped by mail or common carrier. The Illinois Department of Revenue attempted to force the company to collect and remit state sales tax from purchases of goods by customers resident in the state, despite the fact that it had no physical presence there, had no sales outlets or representatives there, did not advertise in Illinois through any medium, and was not even listed in the local telephone directory.

After NBH refused the Illinois Revenue Department's demand, the case went all the way to the Supreme Court, which ruled that only businesses with "nexus," or a physical presence, in a state have to collect sales tax for that state (although what exactly defines a company having "nexus" in a state is still open to some interpretation).

"The Commerce Clause prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail," the Supreme Court stated in its majority verdict, adding:

"[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. …

In order to uphold the power of Illinois to impose use tax burdens on [NBH] in this case, we would have to repudiate totally the sharp distinction which … other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which, until now, has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it."

In *Bellas Hess*, the Supreme Court was also of the opinion that this was a matter for Congress to resolve. "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements," the Court stated. "Under the Constitution, this is a domain where Congress alone has the power of regulation and control."

Currently, the main source of guidance for taxpayer and state governments on when remote sales should be taxed comes from the almost quarter-of-a-century-old US Supreme Court's decision in *Quill Corp. v. North Dakota* (1992),[5] which established the "physical presence" test for applying existing sales taxes to out-of-state merchants. The vagaries of this landmark decision make it difficult and complex to apply, however.

As in the *Bellas Hess* case, office equipment supplier Quill Corp. was taken to court by the state of North Dakota for not remitting tax to the state from sales to customers located there. At the time, Quill Corp. totted up around USD1m in sales to 3,000 North Dakotan residents, soliciting business through catalogs and flyers, advertisements in national periodicals, and telephone calls. A Delaware corporation, Quill Corp. had offices and warehouses only in Illinois, California, and Georgia. None of its employees worked or resided in North Dakota, and its ownership of tangible property in that state was said to be either insignificant or non-existent.

Therefore, according to the Supreme Court, Quill Corp. did not have a "physical presence" in the state under the accepted meaning of that term, which includes offices, branches, warehouses,

employees, *etc.*, and the existence of customers alone did not therefore create sufficient nexus under the Commerce Clause of the US Constitution for North Dakota to impose a sales tax collection burden on Quill Corp.

Drawing heavily on *Bellas Hess*, the Supreme Court also concluded in the *Quill* ruling that the underlying question:

> "… is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. … Indeed, in recent years Congress has considered legislation that would 'overrule' the *Bellas Hess* rule. Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail order concerns with a duty to collect use taxes."

Direct Marketing Association v. Brohl

Discussions on the taxation of internet sales have also been stimulated by Justice Anthony Kennedy's additional comments within the Supreme Court's hearing of *Direct Marketing Association v. Brohl*, [6] a procedurally complex case which examined Colorado's internet sales notice and reporting law.

Enacted in 2010, the law imposes three obligations on online retailers that do not collect sales taxes ("non-collecting retailers"). Under the law, non-collecting 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.

Subsequently, the Direct Marketing Association (DMA) brought a case against Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue, challenging the Colorado law, and convinced a district court that it violates the Commerce Clause because it discriminates

against, and unduly burdens, interstate commerce. However, in 2016, the Appeals Court for the Tenth Circuit 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."

Prior to the Appeal Court's decision, Justice Kennedy made some important observations about the continuing compatibility of *Quill* in an internet age as the Supreme Court considered the DMA's challenge to the Colorado law under the Tax Injunction Act, in which he suggested that a review of the 25-year-old decision is overdue.

"[T]here 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," he said, adding that "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*."

"The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions," Justice Kennedy observed. He continued:

> "Although online businesses may not have a physical presence in some states, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away – regardless of how close or far the nearest storefront.
>
> Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.
>
> Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms states to a degree far greater than could have been anticipated earlier."

Following the DMA's petition to the Supreme Court in August 2016 to pick up the case once again, Brohl cross-petitioned explicitly asking the Court to reconsider *Quill*. Her petition argued 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."

The Supreme Court rejected both petitions on largely technical grounds. However, had it granted the DMA's appeal, the Court said that a re-examination of the *Quill* decision would have been necessary. The Court observed: [7]

> "The … question [of] whether a state law that seeks to enforce the existing and constitutional use tax within the limitations of Quill runs afoul of the anti-discrimination principles of the dormant Commerce Clause is of significant national importance. The artificial physical presence test and the resulting loss of tax revenue have forced states like Colorado to craft special regulations to address the problem. The result is that, despite the dormant Commerce Clause's purpose of preventing state economic protectionism, the States are forced to treat differently those local and national retailers that maintain a brick-and-mortar presence within their boundaries. Colorado's reporting law, for instance, applies only to the subset of retailers that 'do[ ] not collect Colorado sales tax.' … In other words, it applies only to retailers who lack physical presence in Colorado and are thus able to take advantage of *Quill*'s artificial protection."

The Court also took issue with complaints by remote sellers that new tax requirements were unduly burdensome, pointing out that the very technology enabling them to sell remotely has greatly eased tax compliance in many cases: [8]

> "As Justice Fortas recognized decades ago in his dissent [in *Bellas Hess*], while there is 'no doubt' that collecting taxes is a burden, retailers' complaints regarding burdensome administrative and record keeping requirements 'vastly underestimates the skill of contemporary man and his machines.' …
>
> This observation, while perhaps debatable in the 1960s and 1990s, is undeniable today. The advent of electronic Internet-based transactions and vendor software largely automates the tax collection and reporting process, making the burdens of that process marginal at most. … As the record here bears out, remote retailers' cost of complying with Colorado's reporting obligations – which are 'comparable' to many obligations associated with tax collection – are 'nominal' and 'inconsequential,' amounting to no more than 0.017 percent of gross annual sales. …
>
> Thus, the very technology that allows online retailers to fully tap the online marketplace also permits them to facilitate with ease the reporting and collection of the owed tax."

The argument in favor of a review of *Quill* is lent further weight by the current unsatisfactory state of affairs, whereby current case law has triggered a patchwork of state regulatory approaches, the Court suggested, going on to describe these measures as "half solutions": [9]

> "Colorado's reporting law is only one of several approaches that the States have devised to mitigate the tax losses caused by *Quill* … None has proven an adequate substitute for requiring the retailer to collect the owed tax at the time of sale. …
>
> Of greater concern is that the States' disparate answers to *Quill* are, in many cases, incompatible with one another, frustrating the development of a more evenhanded national solution … The result is a patchwork of conflicting and largely ineffective half-measures that have proven incapable of curing the growing tax gap caused by e-commerce sales or leveling the competitive playing field in the national retail market."

A sample of these tax approaches is summarized below.

Examples Of State Regulatory Approaches

The Streamlined Sales Tax Project

Congress may well be free to decide this matter, but it is evident that it has failed to do so in the time that has elapsed since the *Quill* decision, even though the rapid growth of e-commerce sales now makes this issue an increasingly urgent one. It is a situation that has led state authorities to take matters into their own hands: enter the Streamlined Sales Tax Project (SSTP).

Created by the National Governor's Association and the National Conference of State Legislatures in 1999, the SSTP culminated in the Streamlined Sales and Use Tax Agreement (SSUTA), adopted on November 12, 2002. The SSUTA, a voluntary initiative, now has 44 states and the District of Columbia on board, although only 24 of these states have so far passed legislation conforming to the agreement. Proponents of the SSUTA contend that it levels the playing field so that local "brick-and-mortar" stores and remote sellers (*i.e.*, those selling goods over the internet, by telephone, or through mail order) operate under the same rules.

The Streamlined Sales Tax Governing Board says this has been achieved by the agreement of tax law simplification and more efficient administrative procedures, such as uniform definitions for taxable goods, uniform sales tax exemption administration, rate simplification, and

uniform sourcing where the sale is taxable. The SSUTA defines 69 different administrative terms and products and services that states either tax or exempt. Therefore, according to the Governing Board, a business making sales into a streamlined state only needs to know whether the product or service it sells is taxable or exempt. Also, a streamlined state has just one state tax rate, but is permitted to levy a second (usually lower) state rate in limited circumstances (*e.g.*, on food and medicines).

By 2011, 1,400 retailers had collected over USD700m in sales tax for the "streamlined" states, but the Governing Board concedes this is "a very small fraction" of the amount of sales tax that remains uncollected.

Click-Through Nexus Taxes

Some states have enacted laws that impose collection and reporting duties on remote retailers who market their products using in-state affiliates, including through websites that link to the seller's website. However, such taxes have had mixed results, with state supreme courts split over the legality of such measures, and online retailers severing ties with affiliates in states with click-through taxes.

"Look-up" Tables

Nine states permit taxpayers to report their use tax by using a percentage of their income found in a "look-up" table. Again, however, this approach has had limited success in states employing this approach with compliance rates reported to be inconsistent

Use Tax Line On Income Tax Return

Taxpayers are encouraged in 25 states to report their use tax liability by including a use tax line on their state income tax return form. However, compliance rates with such requirements have been described as paltry, and average just over 3 percent.

Federal Legislation – Marketplace Fairness

On the legislative front, several bills have been put forward in Congress in an attempt to find a federal solution to the problem. And the most likely candidate has been the now-expired Marketplace Fairness Act 2015 (MFA),[10] last introduced by Senator Mike Enzi (R – Wyoming) in March 2015.

The MFA would certify the SSUTA and provide states which choose to use it with the clear authority to require remote retailers to collect sales taxes already owed. It would also require

them to meet a list of simplification requirements to ease administrative burdens for sellers because of the country's more than 9,000 diverse sales tax jurisdictions, with an exemption for remote retailers with less than USD1m in national sales.

A Congressional Research Service summary of the MFA is provided below.

> "Section 2 would authorize each member state under the [SSUTA] to require all sellers with annual gross receipts in total US remote sales of USD1m or more in the preceding calendar year to collect and remit sales and use taxes for remote sales under the provisions of the Agreement, but only if the [SSUTA] complies with minimum simplification requirements for administration of such taxes, audits, and streamlined filing. The state would be authorized to exercise its authority under the Act beginning 180 days after publication of its intent to exercise such authority, but not earlier than the first day of the calendar quarter that is at least 180 days after the enactment of the Act.
>
> Section 2 would also allow a state that does not participate in the [SSUTA] to collect and remit sales taxes if that state adopts and implements the minimum simplification requirements under the Act. The section would provide that such taxing authority must commence no sooner than six months after the state:
>
> - Enacts legislation specifying the tax(es) to which the simplification requirements apply
> - Specifies the products and services otherwise subject to such taxes that would be exempt
> - Implements minimum simplification requirements, including providing a single entity within the state responsible for all state and local sales and use tax administration, a single audit and tax return for all state and local jurisdictions, and a uniform sales and use tax base for all state and local taxing jurisdictions
> - Adopts a uniform rule for sourcing all remote sales
> - Provides information indicating the taxability of products and services, and exemptions from tax
> - Provides free software for remote sellers that calculates sales and use taxes, files tax returns, and updates tax rate changes
> - Exempts remote sellers and certified software providers from liability for incorrect collection, remittance, or non-collection of sales and use taxes, and
> - Provides remote sellers and certified software providers with 90 days' notice of tax rate changes.

Section 3 would declare that nothing in the Act shall be construed to:

- Subject a seller or any other person to franchise, income, occupation or any other type of taxes, other than sales taxes, affect the application of such taxes, or enlarge or reduce state authority to impose such taxes
- Create any nexus or alter the standards for determining nexus between a person and a state or locality
- Deny the ability of a remote seller to deploy and utilize a certified software provider of the seller's choice
- Permit or prohibit a state from licensing or regulating any person, requiring any person to qualify to transact intrastate business, subjecting any person to state or local taxes not related to the sale of products or services, or exercising authority over matters of interstate commerce
- Encourage a state to impose sales and use taxes on any products or services not subject to taxation prior to enactment, and
- Alter or preempt the Mobile Telecommunications Sourcing Act.

Section 4 would provide definitions used in the Act, including defining 'remote sale' to mean the sale of goods or services into a state in which the seller would not legally be required to pay, collect, or remit state or local sales and use taxes unless provided by the Act. It would also provide rules for determining the source of a remote sale (*i.e.*, the location where the product or service sold is received by the purchaser).

Section 6 would declare that nothing in the Act shall be construed to preempt or limit any power exercised or to be exercised by a state or local jurisdiction or under federal law."

However, as with other attempts to legislate in this area, the MFA was not offered up for a vote in the Senate. This is because lawmakers are far from united on the issue of internet sales taxes. Indeed, many of Enzi's Republican colleagues appear hostile to the idea of allowing Congress to "interfere" in interstate commerce in such a way, as evidenced by Jim Sensenbrenner's (R – Wisconsin) No Regulation Without Representation Act of 2016,[11] introduced into the House of Representatives in July 2016, which was intended to "stop those states that are increasingly looking for ways to shift tax and regulatory burdens to people from other states" and "help

reduce burdensome over-regulation, keep government overreaches in check, and ensure that only residents of a state are subjected to tax obligations."

The Wait Continues?

The situation is unlikely to improve until Congress itself acts, or the Supreme Court provides a more definitive post-*Quill* opinion on the matter.

For its part, the Supreme Court may soon be offered another opportunity to take a fresh look at *Quill*, as the Ohio Supreme Court's decision in November 2016 to uphold the state's commercial activity tax (CAT) may be presented to it. 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 only applies if a business has USD500,000 or more in annual gross sales in the state.

In *Crutchfield Corp. v. Testa*,[12] the Ohio Supreme Court 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 annual sales threshold for the CAT means that a seller has a "substantial nexus" to that state.

However, on the legislative front, the growing pile of bills that have fallen by the wayside in previous congressional sessions suggests that this hasn't been a priority for Congress in recent years. In any case, the support needed to push a bill like the MFA through the House and Senate was probably lacking.

So, with a new Congress in place, and a new US President about to take office, could we finally see legislative action on this matter in the coming weeks and months? It is certainly not out of the question that a new version of the MFA, or similar proposals, could be reintroduced. However, for those who have long called for action in this area, the signs are not promising.

It was notable that President-elect Trump made no mention of this issue in his (brief) campaign tax plan. Similarly, such proposals are absent from the more thorough tax reform blueprint signed off by House Speaker Paul Ryan (R – Wisconsin) last June, which concentrates on an overhaul of the federal income tax system.

This isn't to say that both men, who will obviously be key figures in shaping tax and economic policy, necessarily oppose the idea of using congressional authority to tackle this problem. But their silence does suggest that, again, it may be a low priority.

It had seemed the momentum was building towards a solution which would permit states to tax goods and services supplied from out of state in certain circumstances, with the courts suggesting that businesses with relatively large amounts of sales in a given state have created sufficient "nexus" for states to do so.

However, with Republicans in charge of both the Government and Congress, and strongly opposed to new or higher taxes, and with the legislative emphasis now on passing substantial tax cuts, the political climate at least may well have turned against those seeking a level sales tax playing field.

Endnotes

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The Autumn Statement: Thoughts And Reflections

by Pete Miller, The Miller Partnership

Having reviewed the UK Finance Bill clauses after they were published in December, here is my personal view of the more important or noteworthy issues.

Tinkering With Partnership Taxation

The most interesting among the tax updates and technical changes is the "clarification of tax treatment for partnerships". All we know, so far, is that there will be legislation "to clarify and improve certain aspects of partnership taxation to ensure profit allocations to partners are fairly calculated for tax purposes."

This type of issue was one of the main themes of the consultation document earlier in 2016 on partnership taxation. HM Revenue & Customs (HMRC) seemed only concerned with ensuring that the right partners paid the right tax at the right time, and how to deal with inconsistencies between, for example, persons listed as partners at Companies House and those shown as partners on the accounts or partnership returns.

What was completely missing from the consultation document, and from the later announcements, is any suggestion that the Government might deal with the inherent unfairness in the compliance rules for partnerships.

The particular problem is that partnerships must have a nominated partner who is the person required to submit an annual partnership return to HMRC. That return includes a list of the partners and their profit allocations and those are the amounts that each individual partner must put on their own personal tax return. The nominated partner is also the only person who is entitled to, for example, amend the return or appeal HMRC decisions.

What this means, of course, is that if individual members of the partnership dispute the figures on the tax return, they have no standing to amend the partnership return or, indeed, to force the

nominated partner to do so. Therefore, for example, a partner who disputes their profit share as shown on the partnership return is required by these rules to put what they believe to be an incorrect number onto their personal tax return. But their personal tax return must be signed by them as being complete and correct to their best of their knowledge and belief, so there is a clear dichotomy here.

Tribunals and courts in the UK have had to look at a number of cases in this area, and concepts such as natural justice and human rights have been raised on several such occasions. But the situation is clearly unsatisfactory and has not always been resolvable by the tribunals: in one relatively recent case, the tribunal held that they could not disturb the current position because the legislation could not possibly be read in compliance with the Human Rights Act, so the tribunal itself had no jurisdiction.

If the Government was serious about people paying their fair share of tax, making it possible for individual partners to self assess what they consider to be the right amounts in those cases when there is some dispute over partnership shares or other similar issues, which can only be dealt with by the nominated partner, should take priority.

Tax Planning Penalties To Be Extended

Another key change emerging from the Finance Bill 2017 concerns the way in which "enablers," such as tax advisers and accountants, are treated from a taxation perspective. Currently, tax avoidance penalties are only targeted at taxpayers themselves, not the professionals who advise people on their tax affairs, so this development is quite a significant step.

Under the new proposals, enablers who assist their clients in trying to gain tax advantages that HMRC believes were never intended by Parliament could be fined up to 100 percent of their fees, if the tax planning fails. The new rules only apply to tax-saving arrangements that would be subject to the general anti-abuse rule, in contrast to HMRC's original suggestion that these penalties might apply to tax advice on normal commercial transactions, such as the transactions in securities rules.

In a related development, taxpayers will find it harder to avoid penalties if they have failed to take proper care when submitting their tax returns. Currently, businesses have only to prove to HMRC that they sought general professional tax advice, but that is about to change. Under the proposed new rules, business owners must be able to demonstrate that they took "appropriate" advice which is pertinent to their own business's needs and circumstances. So relying on generic advice, taken, for example, from a scheme promoter, will no longer be adequate to prove that the taxpayer was not careless if the scheme fails and that they have therefore submitted an incorrect tax return.

Substantial Shareholdings Exemption To Be Extended

A very welcome change is the extension of the substantial shareholdings exemption, whereby a sale of a trading company by a trading group is exempt from corporation tax. This was occasionally difficult to operate, either because it was hard to prove that the vendor was a trading group or because of problems ensuring that the company that was sold continued to trade after the sale. Both these requirements are to be repealed, so that from April 1, 2017, most sales of a trading subsidiary will be exempt from corporation tax.

Increased Flexibility Around Losses

Another set of welcome changes means that companies will be able to use losses more flexibly, with carried-forward losses being available to set against all future sources of income and also being available for group relief. Currently, carried-forward losses can usually only be set against the same kind of income in future years and cannot be used for group relief.

On the downside, companies with profits in excess of GBP5m (USD6.07m) will not be able to shelter all their profits with losses brought forward. The use of such losses will be restricted to 50 percent of the profits over GBP5m (25 percent for banks and similar companies).

Patent Box Reliefs Tweaked

There is also a minor change to the patent box. The relief available is related, in part, to the proportion of the relevant research and development (R&D) carried out by the claimant company, which has caused some difficulties where R&D has been carried out by more than one company under some kind of cost-sharing arrangements. So the intention is to clarify these rules so that companies will get appropriate credit for the R&D which they financed.

Employee Shareholder Status Reversal

One final point worth mentioning, as it was a bit of a surprise, relates to the employee shareholder status. This is the relief whereby companies can allow employees to acquire shares in the company in return for giving up certain employment rights. The tax element is designed to ensure that the first GBP2,000 value of shares issued to employees is free of income tax on earnings and any gain on selling all the shares, up to a maximum of GBP100,000, is free of capital gains tax.

The Government has decided that this relief is not being used appropriately and the entire regime, including the employment law aspects, will be repealed in due course.

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China's VAT Roll-Out: An Update

by the Global Tax Weekly Editorial Team

Introduction

On May 1, 2016, China finalized the implementation of value-added tax (VAT) in place of business tax, with the introduction of VAT on the last remaining industries: financial services, the "living services" sector (consumer services), and construction and real estate.

Nine months on from this, and with the announcement this month of a stay of execution for asset managers, and plans floated for a potential simplification of the system, we take a look at the history of the sales tax in China, its implementation, and its reception.

History

The previous business tax, which VAT replaced was charged at every stage of the supply chain on the gross amount, rather than the net value added. Its replacement with VAT therefore eliminated the double taxation issues that businesses had encountered, and removed distortions to supply chain decisions.

China's revamped VAT began life from January 1, 2012, as a pilot program covering just Shanghai and a few select industries. Those plans were set out by the Ministry of Finance and the SAT on November 16, 2011, in Circular 110.[1]

During 2012, Beijing was also added to the pilot, alongside Anhui, Fujian (including Xiamen), Guangdong (including Shenzhen), Hubei, Jiangsu, Tianjin, and Zhejiang (including Ningbo), through Circular 71 of 2012.

The VAT regime was rolled out nationwide for the first time in August 2013, covering the transportation industry and six modern services sectors: research and development, information technology, cultural and creative industries, logistics, and authentication and consulting

services. Then, on January 1, 2014, VAT was imposed on the railway and transportation sector and the postal sector, through Circular No. 106 of 2013. Finally, the telecoms sector was added from June 1, 2014.[2]

Breaking New Ground

The roll-out of VAT to cover the last remaining sectors, however, presented perhaps the most significant challenge for the SAT, tax professionals and businesses' compliance teams.

While VAT is typically levied on the real estate and construction sectors and the "living services sector" in other territories with VAT, China was breaking new ground in levying VAT on financial services so broadly and, also contrary to international norms, VAT was to apply to real estate transactions between individuals.

It was announced in January 2017 that VAT on the asset management industry would only apply from July this year. Previously, the Chinese authorities had announced in December 2016 that they intended to charge VAT retroactively from May 1, 2016. Following the u-turn, input tax already paid can be credited against VAT due from July 1, 2017.

China's decision to levy VAT on financial services — contrary to international norms — has received a mixed reaction from the industry, as it had been argued that the asset managers should not be liable to pay the tax. However, the recently announced delay will at least allow time to hammer out the logistical aspects.

The SAT estimated that the May 1, 2016, change would affect eight million taxpayers,[3] with tax professionals expressing concerns at the time about the enormous changes that would be needed from these taxpayers in such a short time. As the Chinese tax authorities also flagged up plans in January 2017 to simplify the four-tier VAT regime, such concerns appear justified.

Taxpayers

Under China's VAT regime, taxpayers with monthly sales above CNY30,000 (USD4,346) are required to register for VAT. The standard threshold is CNY20,000, but this has been raised to CNY30,000 until December 31, 2017, as a transitional measure.

This threshold is significantly above international norms. The SAT previously noted in October 2014 that of the OECD members that levy VAT (33 – all OECD members except the US),

only four did not have VAT registration thresholds (Chile, Mexico, Spain, and Turkey). Among the other 29 countries, the average threshold was an annual turnover of USD39,500, equivalent then to approximately CNY240,000, and 19 OECD members had registration thresholds below CNY240,000.

China also operates a special scheme for small businesses ("small-scale taxpayers"). Those falling outside this term are deemed general taxpayers. Small-scale taxpayers typically pay VAT on all goods and all taxable services at a flat rate of 3 percent, without the ability to deduct input VAT.

Meanwhile, general taxpayers engaged in certain business activities may be subject to different VAT rates, without the ability to deduct input VAT, under a simplified VAT calculation method.[4]

Circular 36

The framework for China's final VAT regime was set out in Circular 36, released on March 23, 2016.[5] Spanning 81 pages, it provided for a complete overhaul of the VAT regulations in place for Chinese businesses, to establish a final framework for the regime.

Prior to that, China's pilot VAT regime was principally governed by Cai Shui [2013] No. 106 (Circular No. 106), which was released alongside the addition of the rail transport and postal industry sectors to the VAT pilot. Since then, this guidance has been added to with the release of Cai Shui [2013] No. 121, providing supplementary guidance, and later Notice No. 43 of 2014 on the addition of the telecoms industry to the VAT base.

Thereafter, Cai Shui [2014] No. 50 prescribed the tax rules applicable to international water-based transportation, and then Cai Shui [2015] No. 118 set out the rules on the VAT treatment of television and export services as well as specific zero VAT rate rules. Numerous other circulars and notices have been issued subsequently to add to the regime.

Circular 36 replaced each of the above notices and has broadly the same format as Circular 106. It comprises four documents, on implementation; the pilot program; transitional measures; and zero rated treatment and exemptions.

China has also issued rules that brought into the scope of VAT cross-border e-commerce transactions (discussed below).[6]

What Does China's VAT Regime Look Like?

Real Estate

Since May 1, 2016, VAT of 5 percent has been levied on homes if they are resold less than two years after purchase. Those sold after the two-year window are exempt from the levy.

Previously, homes that were sold less than five years after they were purchased were subject to a 5 percent business tax.

The above rates were intended to smooth the transition to taxation of real estate and construction sector activities at an 11 percent rate. New builds post May 1 and the second sale of properties after that date were immediately subject to the 11 percent rate – this covers sales of real estate, property, and land use rights.

For those transactions subject to the 11 percent rate, input VAT deduction is allowed over two years – 60 percent in the first year and 40 percent in the second – for general taxpayers' transactions post May 1, 2016, provided the property is not self-built. There are some restrictions to eligibility for leasing activities.

Property developers may opt to use the simplified method for calculating VAT. There is a 36-month lock-in period for opting to use this method. Small-scale taxpayers are subject to a 5 percent tax rate for real estate and leasing services, rather than the standard 3 percent rate that applies to construction activities.

Property-related services, such as those provided by lettings agents and surveyors are subject to a 6 percent rate, as "other services."

Specific rules were also set out in the transitional measures section of Circular 36 for the real estate sector. In addition, the Circular provides for exemptions for transfers of real estate and land use rights as part of the transfer of a business as a going concern, whether as part of a merger or acquisition or a restructuring, subject to conditions.

Other specific rules apply to leasing activities.

Financial Services

For the financial services sector, leasing of movable and tangible property is subject to a 17 percent rate. Otherwise, financial services are generally subject to a 6 percent rate.

VAT is applied on trading margins only.

As previously mentioned, it was announced on January 11, 2017, that asset management firms had secured something of a reprieve; in a circular released in December 2016 [Cai Shui] 140), it had been announced that returns from assets under management would be subject to VAT, retroactive to the date of the final phase of the rollout, but significant concerns were expressed by the industry regarding how to apportion the costs, potential double taxation concerns, and compliance.

Consumer Services

Services offered by China's "living services sector" are subject to tax at 6 percent. This covers such supplies as accommodation, medical care, hairdressing, and food and drink.

Intangible Assets

Transfers of intangible assets, other than land use rights, are also subject to a 6 percent rate.

Other Reduced Rates

The following reduced rates apply:

Activities subject to a 13 percent VAT rate:

1. Agriculture, forestry and fishing:

    - Certain animal feed, including pet foods, deep-processed corns and puffing meat powder. Note that certain other animal feed is VAT-exempt
    - Most chemical fertilizers and pesticides
    - Plastic sheeting for agricultural purposes
    - Machinery and tools used in agriculture, forestry and fishing, and
    - Agricultural excavators, chicken farming equipment and pig farming equipment.

2. Energy and energy saving, power, utilities and heating:

    - Air conditioning
    - Coal gas
    - Furnace gas
    - Liquefied petroleum gas
    - Marsh gas

- Natural gas
- Coal (and charcoal) products for household use
- Heating, including solar, geothermal and other low-carbon forms of heating
- Hot water for household use, and
- Supply or extraction of natural unprocessed water.

3. Food and drink:

   - Cereal grains and soybeans and their direct products, such as flour. Note that certain grains and soybeans are VAT-exempt
   - Tap water
   - Vegetable oil for cooking or human consumption (except hydrogenated vegetable oil, which is standard-rated), and
   - Apricot seed oil and grape seed oil.

4. Printed material:

   - State-approved books (except antique books and certain other books, which are exempt), and
   - State-approved newspapers and magazines, excluding those delivered by mail order

Activities subject to an 11 percent rate:

1. Domestic transport services; international transport services are zero-rated (see exempt supplies below)
2. Postal services
3. Basic telecommunication services
4. Leasing (including financial and operating leasing) of real estate
5. Sales of real estate
6. Transfer of land use rights, and
7. Construction services

Activities subject to a 6 percent rate:

1. R&D and technology services
2. IT services
3. Cultural and creative services
4. Logistical support services

5. Authentication and consultancy services
6. Value-added telecommunication services
7. Business support services
8. Financial and insurance services
9. Radio, film and television services
10. Other so-called "modern services"
11. Cultural and sports services
12. Education and medical services
13. Tourism and entertainment services
14. Catering and accommodation services
15. Daily services to residents
16. Other everyday life services, and
17. Sales of intangible assets (except land use rights).

Exempt activities (no VAT applied):

General exempt activities include:

1. Plant and animal farm products made and sold by agricultural producers, including pigs, cattle, sheep, chickens, ducks, geese and their meat, chilled or frozen, and others, as well as certain feed for animals used in agriculture/animal farming
2. Aquacultural products (that is, farmed fish and other seafood, and aquatic plants)
3. Forestry products
4. Building/construction-related prefabrications used on the site where they were built
5. Contraceptive medicines and devices
6. Items imported by organizations to be used exclusively by disabled persons
7. Antique books and second-hand books purchased from the public
8. Instruments and equipment imported for use in scientific research and education
9. Materials and equipment imported from foreign governments for economic assistance
10. Master films, videos and cassettes arising from transfer of copyright
11. Computer software arising from transfer of ownership of technologies
12. Financial leasing
13. Books (including wholesale and retail), until December 31, 2017
14. Grains and soybeans produced by state-owned businesses
15. Trade between Hengqin and Pingtan free zones, excluding supplies used in the construction or development of commercial real estate

16. Supplies of film copies, copyright transfer, film distribution or income from showing films in rural areas (until December 31, 2018)
17. Settlements of crude oil and iron ore futures done within bonded warehouses that are owned by the Shanghai and Dalian bourses (effective from April 1, 2015)
18. Certain international transport services, subject to conditions
19. Engineering services when the related project is overseas
20. Exploration services when the related resources are overseas
21. Technological consulting and analysis
22. Intellectual property services when provided overseas and consumed outside of China
23. Trademark and copyright transfer services
24. Conference and exhibition services provided outside of China
25. Advertising services for advertisements that are released outside China
26. Logistical and ancillary services, including freight forwarding services (except warehousing services) when provided overseas and consumed outside of China
27. Warehousing services when the warehouse is outside China
28. Certification, authentication and consulting services, except when the service relates to goods or immovable property within China)
29. Leasing tangible movable property with the object of the lease being used outside China;
30. Postal and courier services for exported goods
31. Exports of animation software (until December 31, 2017)
32. Construction services for overseas projects
33. Broadcasting services of radio and television outside of China
34. Cultural, sports, educational, medical care and tourism services provided outside of China
35. Postal and courier services for exported goods, including related insurance services
36. Residential charges for college students and the provision of food and beverage services to college students and teachers in college canteens
37. Income obtained by qualifying technology business incubators from leasing business premises to incubated businesses and the provision of incubation services, and
38. Income obtained by heating supply companies from the heating supply provided to individual residents (until December 31, 2018).

Exported services are only exempt when payment for the supply is made from outside China and the supply is subject to a written contract.

When these services are supplied, no VAT invoice should be issued. However, the business must present to the tax authority various documentation, such as:

- A "Cross-border taxable service tax record filing form," detailing the supplies of exempt services;
- The original and photocopy of the written contract between the parties, as well as a translation if the contract is in a foreign language; and
- The original and photocopy of a confirmation proving that the recipient of the services was located outside China.

Services supplied to businesses located in Chinese free trade areas or bonded logistic parks are not considered to be exempt from VAT.

Zero-rated items:

1. Most export commodities. Note that exports of goods are not subject to VAT. However, different circumstances govern whether an exported good is subject to zero-rating or exemption. First, zero-rating is only applicable to those taxpayers that are able to deduct input tax, (that is, "general taxpayers"). The exportation of supplies by small-scale taxpayers is always VAT-exempt. Second, goods that are always exempt from VAT are shown under "Exempt activities" directly above. Other exported goods are taxed at zero percent, that is, zero-rated with credit. The exact amount that will be credited depends on the product. Exports of the services that are subject to VAT throughout mainland China, namely processing, repair and spare part replacement, are VAT-exempt;
2. Licensed international transportation services (except rail transportation services)
3. Exports of research and development for overseas entities
4. Design services provided to overseas entities, except those relating to immovable property within China
5. Certain goods imported from domestic areas into the Hengqin and Pingtan free zones
6. Contractual energy management services provided to entities overseas, except when related to contracts within China
7. Software services provided to entities overseas
8. Business process management services provided to entities overseas
9. Circuit design and testing services provided to entities overseas
10. Offshore outsourcing services
11. Production and publishing of radio, film, and TV programs for entities overseas, and
12. Transfer of technology rights to overseas entities.

"Consumer Pays" Principle

According to the SAT, although rates of VAT on certain goods and services are higher than under the previous business tax regime, businesses should be able to fully pass the tax burden onto consumers.

China's regime is very complex, and the International Monetary Fund in August 2015 recommended that China introduce a single rate of VAT to simplify compliance. It said the policy objectives of having multiple rates could be more efficiently achieved with other fiscal instruments.[7] Although with the release of Circular 36, China appears to be keen to retain multiple rates, recent reports have suggested that the Government may be planning to reduce the number of VAT rates, to reduce complexity.

Registration

Businesses seeking to register for VAT should submit the applicable registration application form to the local tax office where the business is established. Several local offices offer the option for electronic registration via the e-portal of the respective tax authority. Note, however, that registration procedures differ from one tax office to another.

In general, businesses are required to complete a registration application form ("Approbation form for General Taxpayers of VAT") and submit the following supporting documentation:

- A business license;
- Articles of association and relevant contracts;
- The unified organizational code; and
- An ID card of the business representative.

In some cases, a business may be required to register *via* both state tax authorities and local tax authorities. In either case, businesses are advised to approach the local tax authority first.

Foreign businesses may only register for VAT if they form a permanent establishment in China. If foreign businesses perform taxable supplies in China without a permanent establishment, their local representative or local customers will be liable for VAT on their behalf.

Cross-Border E-Commerce

In addition to the measures detailed above, in April 8, 2016, rules to increase taxes on goods purchased online from foreign retailers came into effect.

Previously, retail products imported by consumers that had been purchased online were classified as "parcels," and were subject to a "personal postal articles tax" at a general rate of 10 percent for goods priced at less than RMB1,000. Tax payable of under RMB50 was waived.

The updated tax rules were said to be aimed at creating a more level playing field with other imported goods sold by Chinese domestic retailers. The rules provided that online purchases of goods from overseas are not subject to VAT providing the transaction is worth no more than RMB2,000 (USD292) per transaction. This exemption was limited to RMB20,000 per person each year.

Goods exceeding those limits are treated as normal imports, and may be subjected to variable tariffs, a general 17 percent import VAT, and a consumption tax payable on luxury or non-essential items, such as alcohol, petrol, jewelry and cars. However, for now, tariffs for imports purchased online will remain at zero, while import VAT and consumption tax will be levied at 70 percent of normal rates.

In addition, the Ministry of Finance issued a list of more than 1,000 products, including food, clothes, shoes and some cosmetics, that are considered necessary and purchased most often by Chinese consumers online and subject to a concession. The Ministry indicated that the list was a way to continue the previous "personal use" element in the parcels tax, and that it would be adjusted over time depending on the development of e-commerce and the demands of consumers.[8]

Conclusion

China has found that the introduction of VAT is supporting the Government's efforts to encourage the growth of the tertiary (services) industry, which was part of the reasoning behind its introduction.

China's shift to VAT in place of the distortive business tax is also bringing new opportunities for Chinese businesses and foreign investors in China. Specifically, businesses are able to outsource more functions and have more complex supply chains without facing cascading taxes.

However, taxpayers are still facing a high compliance burden as a result of often ambiguous and complex rules, even nine months after China completed the full roll-out of its regime. No doubt taxpayers will hope the reforms hinted by the Government will begin to ameliorate this.

Endnotes

1 http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/201204/t20120428_647605.html (In Chinese)

2 http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/201404/t20140430_1074110.html (In Chinese)

3 http://www.chinatax.gov.cn/n810219/n810724/c1479341/content.html (In Chinese)

4 Section 5.1, China, Small-scale and general taxpayers, CCH Global VAT Research Library.

5 http://szs.mof.gov.cn/zhengwuxinxi/zhengcefabu/201603/t20160324_1922515.html (In Chinese)

6 http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201603/t20160324_1922968.html (In Chinese)

7 http://www.imf.org/external/pubs/ft/scr/2015/cr15234.pdf

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Topical News Briefing: More Speed, Less Haste

by the Global Tax Weekly Editorial Team

Ultimately, it will probably come as no surprise to most with a stake in India's incoming goods and services tax (GST) regime that this important economic reform is to be delayed further, as reported in this week's issue of *Global Tax Weekly*.

After last year's major milestone was reached, and parliament finally approved the constitutional amendment law that would pave the way for the GST to be implemented nationwide, a lot of work was still required to lay the groundwork for the new tax.

This led to the formation of the GST Council, comprised of representatives of the state and central governments, to decide the basic parameters of the tax, including GST rates and registration thresholds.

Many of the important features of the GST have since been agreed. But for a country as vast, populous, and economically diverse as India, administering the tax effectively is going to be of paramount importance, if not the greatest challenge in the implementation of GST.

Under such circumstances, an introduction date of April 2017 was always going to be a stretch. And perhaps July 1 is also optimistic.

However, the extent to which the new GST regime promises to transform India's tax landscape, and with it interstate trade, should not be under-estimated.

Last October, international ratings agency Standard & Poor's stated that the introduction of GST would not only increase the efficiency of the tax regime, but also boost India's economic growth prospects.

"This is arguably the most important structural reform to date by the Modi Government, and will improve efficiency, cross state trade, and tax buoyancy," the firm observed. "The GST passage gives us additional conviction around our 8 percent-ish GDP growth forecast over the next few years."

Certainly, nobody can accuse India of attempting to rush the GST reform into place. But while the ongoing uncertainty over the proposals is unhelpful for taxpayers, some might forgive the Government for yet another delay if it results in a tax system that operates as smoothly as possible, and is a substantial improvement on the current situation.

Corporates Seeking Certainty From 'Safer' Tax Planning

Companies are now more focused on minimizing their tax risk than their tax liability, according to research from law firm Allen & Overy.

The firm said the shift towards stricter tax legislation and more aggressive scrutiny and enforcement from tax authorities has meant that corporates are transforming their approach to tax planning. Board members are discussing tax issues significantly more frequently than they used to, with roughly a quarter (23 percent) of corporates saying their board discusses tax issues more than once a month, up from just 5 percent five years ago, and 38 percent of respondents' boards meeting at least once a month.

Allen & Overy said there has been a change in tax transparency approaches. It said the expectation is that companies should be transparent, operating on a full disclosure basis at all times, going proactively to the authorities to discuss situations before they become problematic. Across the board, 34 percent of corporates say they operate on a full disclosure basis and another 46 percent say they do so partially. In the Netherlands, 48 percent of corporates say they operate on a full disclosure basis, compared with 44 percent in the UK, 40 percent in the US, and just 18 percent in Germany.

"The priority today is to have an effective and sensible tax strategy, but this is harder than ever – advance clearances are less available, there are new risks to consider such as challenges under state aid rules," said Godfried Kinnegim, Tax Partner for Allen & Overy in Amsterdam. "It remains to be seen what impact the recent seismic political events will have. But with the new transparency requirements, sizable financial penalties, and the increasing use of dawn raids and criminal law, the stakes have never been higher."

Google To Pay EUR280m In Back Taxes To Italy: Reports

Google has agreed to pay up to EUR280m (USD296m) to settle corporate income tax said to be due to the Italian Revenue Agency, according to Italian media reports.

One year ago, the Revenue Agency disclosed that the Guardia di Finanza, Italy's financial police, had served notice on Google with regard to its past tax payments in the country.

It was then reported that the Guardia was alleging that Google had a permanent establishment in Italy in the years between 2009 and 2013, and Italian taxes were therefore payable, for example, on the income received from clients in Italy.

The launching of the case against Google followed the agreement made by the Revenue Agency with Apple Italia at the end of December 2015, wherein Apple Italia agreed to pay EUR318m to fully settle Italian corporate income tax said to be due since 2008.

Sweden Disallows SEK17bn In Interest Deductions

Sweden's tax agency has said that it denied SEK17bn (USD1.9bn) in interest deductions on intragroup loans last year.

Restrictions on interest deductions for lending between related parties were introduced in 2013. The agency has been tasked with monitoring the impact of these reforms.

The agency said the changes seem to have had the effect of reducing the prevalence and success rates of such aggressive tax planning. It conducted numerous investigations into related party interest deductions in 2016 and denied deductions totaling more than SEK17bn.

Singapore Updates Transfer Pricing Guidance

On January 12, 2017, the Inland Revenue Authority of Singapore (IRAS) issued updates to its e-Tax Guide on the country's transfer pricing rules.

In its latest update, the IRAS has enhanced guidance on arm's length principle and on functional and risk analysis. Specifically, the IRAS has amended the relevant paragraphs of the guidance to note that profits should be taxed where the real economic activities generating the profits are performed and where value is created.

The IRAS has also enhanced its guidance on transfer pricing documentation and amended the relevant paragraphs to include advance pricing agreements (APAs) and other tax rulings as part of the transfer pricing documentation requirements at the group and entity levels.

Next, sections 8–10 of the guidance, on the mutual agreement procedure and APAs, have been amended to provide information on compulsory, spontaneous exchange of information concerning cross-border unilateral APAs; rollback provisions; and the details to be included as part of the APA application.

Finally, the updated guidance puts in place an indicative margin for taxpayers' related party loans. The indicative margin may be applied to each related party loan that does not exceed SGD15m (USD10.54m) at the time the loan is obtained or provided, after January 1, 2017. The threshold is based on the loan committed and not on the loan utilized.

Taxpayers who choose to apply the indicative margin for their related party loans will not be expected to prepare transfer pricing documentation for such.

Australia Consults On Failure To Disclose Penalties For MNEs

The Australian Treasury is consulting on plans to increase administrative penalties for multinationals that fail to adhere to tax disclosure obligations.

The new rules will apply to companies with global revenue of AUD1bn (USD749.7m) or more. From July 1, 2017, penalties relating to the lodgment of tax documents to the Australian Taxation Office (ATO) will be increased by a factor of 100. This will raise the maximum penalty for the failure to lodge a return, notice, statement, or other form with the ATO on time from AUD4,500 to AUD450,000.

Penalties for making false and misleading statements to the ATO will be doubled.

According to the Treasury, the aim is to encourage multinationals "to better comply with their tax obligations, including lodging tax documents on time and taking reasonable care when making statements."

The closing date for comments was January 13.

Majority Support Swiss Corporate Tax Reform III

Supporters of Switzerland's latest tranche of corporate tax reforms, known as Corporate Tax Reform III, have a 15 percent lead ahead of next month's referendum.

A poll was carried out by research institute GfS Bern, with details released by swissinfo.ch, a GfS Bern company. According to the research, 50 percent of those questioned were in favor of the measures, with 35 percent opposed and 15 percent undecided.

The referendum will take place on February 12.

If implemented, Corporate Tax Reform III will abolish the cantonal statuses for holding companies and management companies, and introduce a patent box regime for cantonal taxes. It will also abolish the issue tax on equity capital, and cap the tax applicable to dividends paid to shareholders.

French Court Of Auditors Urges Corporate Tax Cut

A committee of the French Court of Auditors has warned the Government that France will become increasingly uncompetitive unless its corporate tax is brought closer to rates in place across the EU.

The Board of Compulsory Levies report, published on January 12, notes existing plans to reduce France's headline corporate tax rate from 33 percent to 28 percent by 2020. However, the Board contends that on corporate tax, "France must seek a more harmonized framework with its European partners" in order to attract foreign companies.

According to the Washington-based Tax Foundation, the average corporate tax rate in Europe is just under 19 percent. This is almost 20 percent lower than France's combined rate of 38 percent, which includes the social contribution on profits and the exceptional contribution, the new report said, citing figures from Eurostat.

Yet, despite France's high rate of tax on companies, corporate tax revenues represent only 5 percent of compulsory levies.

Net corporate tax receipts totaled EUR33.5bn (USD35.6bn) in 2015, after the deduction of reimbursements and rebates (not including the CICE tax credit for business competitiveness).

Corporate tax revenues as a percentage of France's economy are about 2.6 percent, which the Board notes is at the lower end of the range among OECD countries. However, it concludes that this is due mainly to the lower profitability of French companies relative to companies in other countries.

While emphasizing the need for France to keep up with the competition on corporate tax, it is also stressed that any corporate tax reform must discourage base erosion and profit shifting.

Dijsselbloem U-Turns On Dutch Corporate Tax

Just weeks after suggesting the Dutch corporate tax rate should be reduced, Finance Minister Jeroen Dijsselbloem appears to have reversed his position.

In an interview with Dutch newspaper *Algemeen Dagblad* earlier this month, Dijsselbloem said that an increase in the 25 percent corporate tax rate would restore "the balance between ordinary Dutch and international companies, and between workers and the wealthy," although he stopped short of suggesting what the new rate should be.

However, the Finance Minister emphasized that he was speaking on behalf of the Dutch Labor Party, of which he is a senior member, rather than for the Government.

Dijsselbloem's comments were made as the country's political parties gear up for the next general election, to be held on March 15, 2017, with the Labor Party opposed to the idea of corporate tax cuts.

But his words were at odds with remarks he made in a November 2016 interview with Dutch broadcaster RTLZ, when he said the Netherlands would find it harder in future to compete with other countries on tax unless it cut corporate tax rate, as the Government aligns the country with the OECD BEPS recommendations by repealing deductions and special tax schemes for multinational companies.

For its part, the center-right Dutch People's Party, the largest party in the governing coalition, has said it would seek to cut corporate tax for all companies following the election. The party's manifesto also calls for a reduction in taxes on labor, a cut in capital gains tax, and simplification of the tax regime.

India Delays Goods And Services Tax

The Indian Government needs more time to reach a consensus on remaining goods and services tax (GST) issues and put in place the necessary frameworks for the regime to succeed, Arun Jaitley, the Finance Minister, has said, pushing forward implementation to July.

India had planned to have GST in place from April 2017, but given delays to the passage of the crucial legislation to amend the constitution late last year, the announcement that India will defer the start date does not come as a surprise. In fact, after more than a decade of failed negotiations towards the introduction of GST, and despite rapid progress made by the Government of late, a July 1, 2017, deadline remains optimistic.

Jaitley said that "there was a broad view [at a GST Council meeting on January 16] that July 1 appears to be a more realistic date for the implementation."

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

The GST will replace numerous centrally levied indirect taxes, including CENVAT, the central excise duty, services tax, customs duties, and any related surcharges. It will also subsume state-levied taxes such as VAT, sales taxes, entertainment and gambling taxes, the luxury tax, certain entry taxes, and related state surcharges.

Norway Releases Guidance On Reformed Import VAT Reporting Rules

Norway's tax administration has published guidance on reforms to the import value-added tax (VAT) reporting process for fiscal years beginning in 2017.

With the tax administration newly responsible for the collection of VAT on imports, a new VAT return (*mva-meldingen*) replaced the previous form (*omsetningsoppgave for merverdiavgift*) for supplies after January 1, 2017.

As a result of the changes, businesses are required to report import VAT on goods in their VAT returns rather than in customs declarations. Guidance from the tax authority states that taxpayers will no longer receive VAT invoices from a shipping agent or from customs authorities. Therefore, businesses are responsible for calculating VAT liable on the basis of the goods described in customs declarations.

The change will not affect individuals or non-VAT-registered businesses.

ATO Explains New Precious Metals Industry GST Reverse Charge

The Australian Taxation Office (ATO) has issued guidance on the application of a goods and services tax (GST) reverse charge for the precious metals industry.

From January 1, 2017, business-to-business sales of precious metal, including scrap gold, can be reverse charged.

The ATO explained that under a voluntary reverse charge agreement, the buyer will pay GST (which is normally paid by the seller) on behalf of the seller. The buyer must pay the GST amount when it lodges its business activity statement (BAS). The buyer will also need to provide the ATO with details of any reverse charge of GST it is liable to pay on behalf of the seller. Where the buyer is entitled to a GST refund when lodging its BAS, it can direct the ATO to use the refund amount to pay the GST it owes on behalf of the seller.

A voluntary reverse charge agreement will only cover taxable sales of precious metals, including: goods that consist of gold, silver, or platinum, even if those products are not classified as precious metals under GST law; gold ore; gold granules, and gold bars that are not in investment form.

The ATO said that one of the benefits of entering into a voluntary reverse charge agreement is that it is easier for sellers and buyers to meet their GST obligations, as the seller does not physically collect GST on the sale and the buyer has no refund to claim. It added that such agreements decrease the compliance risk rating for the seller and buyer, meaning that the ATO will make fewer inquiries about their sales, purchases, and claims.

The change is also intended to promote a level playing field so that members of the precious metals industry meet their GST obligations fairly.

Trump Reemphasizes His Tariff Threat

On January 11, during his first press conference since the election, President-elect Donald Trump reemphasized his plan for import tariffs on US multinational companies that move their production abroad at the cost of US jobs and then sell products back into the US.

The President-elect has frequently said he will impose a 35 percent tariff on their imports, and, in that respect, has particularly attacked US trading arrangements with Mexico under the North American Free Trade Agreement.

A number of automotive companies have already responded to the threat of a US border tax. Earlier this month, Ford announced the cancelation of a proposed Mexican investment in favor of a USD700m expansion of its plant in Flat Rock, Michigan; Toyota stressed that it has no plans to decrease investment or employment in the US, despite plans to build a new plant in Mexico; and Fiat Chrysler suggested it may be forced to reconsider its commitment to production in that country.

According to transcripts of the interview, Trump said that "the word is now out that, when you want to move your plant to Mexico or some other place, and you want to fire all of your [US] workers, it's not going to happen that way anymore. … You're going to pay a very large border tax."

He pointed out that, as far as he is concerned, such companies could move their production facilities anywhere between US states, but not outside the country: "I don't care, as long as it's within the borders of the United States. … There will be a major border tax on these companies that are leaving and getting away with murder."

EU Hopes To Launch New Zealand Free Trade Talks In 2017

European Council President Donald Tusk has said that the EU hopes to launch free trade negotiations with New Zealand this year.

Tusk met with New Zealand's new Prime Minister, Bill English, on January 10. He said talks would begin "once all the preparatory work is completed."

According to Tusk: "Such an agreement would not only boost sustainable economic growth, investment, and job creation on both sides. It would also send a strong political signal of economic openness and trade at a time where protectionist pressures are on the rise. Not only on our continent but also around the world."

Mexico 'Would Retaliate' Against Trump Tariffs

In press interviews, Mexico's Economy Minister, Ildefonso Guajardo Villarreal, has said that while US President-elect Donald Trump's threatened import tariffs are a global problem, Mexico will have to be prepared to retaliate immediately with its own measures.

He did not specify what form those measures would take, but pointed to the fact that Mexico is the second-largest export market for US goods overall.

The President-elect has frequently said that he would impose a 35 percent tariff on imports from US multinational companies (particularly motor companies) that move their production facilities abroad at the cost of US jobs, and then sell products duty-free back into the US.

Trump has particularly attacked US trading arrangements with Mexico under the North American Free Trade Agreement, and has confirmed that the trade treaty's renegotiation would be one of his immediate priorities.

Figures provided by the US Trade Representative show that, while the US goods trade deficit with Mexico reached USD58bn in 2015 (a USD4.5bn increase over 2014), Mexico's imports represented more than 15 percent (or USD236bn) of total US goods exports that year (of some USD1.5 trillion).

The top US export categories to Mexico in 2015 included machinery (USD42bn), electrical machinery (USD41bn), vehicles (USD22bn), mineral fuels (USD19bn), and plastics (USD17bn). US exports of agricultural products to Mexico were worth USD18bn, making Mexico the third-largest US agricultural export market.

Canada Could Be Hit By Trump Tariffs

While there has been a concentration by President-elect Donald Trump on warnings of increased import tariffs on Mexican exports to the US, his spokesman Sean Spicer has indicated that exports from Canada could also be subject to the same tax response.

Trump has frequently said he would impose a 35 percent tariff on imports from US multinational companies – particularly motor companies in Mexico – that move their production facilities abroad at the cost of US jobs, and then sell products duty-free back into the US.

He has also attacked US trading arrangements with Mexico under the North American Free Trade Agreement (NAFTA), and has confirmed that the trade treaty's renegotiation would be one of his immediate priorities.

While, as the other party to NAFTA, Canada would be directly involved in any such future renegotiation, the close links between its motor industry and the US could also be vulnerable. Any threat of a tariff on Canadian exports could trigger US multinationals (such as General Motors and Ford) to rethink their current manufacturing facilities in Canada.

Spicer is reported to have confirmed that, if a multinational moves its production facilities abroad "whether it's [to] Canada or Mexico, or any other country," to the detriment of its US employees, the new Trump Administration will take all possible action to prevent it.

Snapchat Chooses UK Tax Domicile

Snap, the US parent company of messaging app Snapchat, has chosen to establish its non-US base in London, in an endorsement of the UK's tax environment, despite the UK's decision to leave the EU.

Snap said on January 10: "Today, the media reported that we selected London as our International HQ. That is not true. We have one HQ, in Venice, and many offices throughout the world. We did, however, make a change to the way we operate our business in London. Going forward, we will bill our advertising revenue from the UK (and a few other countries) through a UK entity. This allows us to pay taxes in the UK, which we believe is part of being a good local partner as we grow our business."

"We want to pay taxes in the countries where we sell advertising, and this is an important step in building the infrastructure to achieve that goal."

The move comes amid the European Commission's increased scrutiny of multinationals' tax affairs, with technology companies in particular under scrutiny for their transfer pricing affairs. A particular point of contention is where they book revenues from intangible assets.

Irish CEOs Fearful Of Brexit

Nearly three-quarters of Irish CEOs surveyed by professional services firm PwC said they are concerned that Brexit will impact the Irish economy negatively "when the dust settles."

PwC presented the findings of its 20th annual global survey of CEOs at the World Economic Forum in Davos. It carried out its research into the attitudes of Irish business leaders in November 2016.

PwC said that "Irish businesses are more cautious than a year ago, but are still positive about growth opportunities while tackling the business disrupters."

According to PwC, 72 percent of those surveyed believe that the UK's departure from the EU will have an adverse impact on the Irish economy. Only 17 percent were positive about the potential effects of Brexit.

Nearly half of respondents (43 percent) said the key focus for the Irish Government "should be to ensure that Ireland continues to improve its competitiveness with a clear plan for attracting foreign direct investment (FDI) post-Brexit." The need to maintain a first-class FDI offering was also seen as key in the wake of Donald Trump's election as US President.

Fifty-six percent of those surveyed said they were confident about future growth prospects, with 32 percent apprehensive. Three-quarters (74 percent) expect revenue growth in the year ahead, down from 88 percent a year ago.

PwC said the top priority for Irish businesses in 2017 is to continue their growth strategy at a time of unprecedented change, with 23 percent saying that the key area of focus would be dealing with "disrupters" such as the changing tax landscape.

Ciarán Kelly, Advisory Leader, PwC Ireland, commented: "Contrary to global CEOs, based on our Irish surveys and what clients are telling us, Irish business leaders are more cautious about the outlook for the year ahead compared to this time last year. However, they remain positive about growth opportunities while tackling the business disrupters. Brexit looms large and, along with a new landscape leader in the US, a changing tax agenda and other geo-political uncertainties, will no doubt influence a period of change."

"We also see increasing disruption as we operate in an increasingly connected world. And with falling unemployment, a huge area of focus in the year ahead will be the recruitment and retention of the best people so that businesses remain fit for the future."

Hong Kong Urged To Increase Tax Incentives

Professional services firm PwC has recommended that Hong Kong should use available fiscal space to adopt financial and tax incentives.

PwC expects Hong Kong to record a HKD70.1bn (USD9bn) consolidated budget surplus in FY2016/17, much higher than the HKD11.4bn surplus previously forecast by the Government. It expects Hong Kong's fiscal reserves to reach HKD913bn by end-March 2017 – equivalent to 23 months of total Government expenditure.

It said the increased surplus is partly attributable to higher-than-expected revenues from land sales, profits tax, and stamp duty.

PwC proposed that the Government should use part of its increased surplus to provide capped investment credits for eligible technology startups for investment in advanced and new technologies, IT systems, infrastructure, and equipment.

PwC suggested also expanding the scope of tax deductions for capital expenditure incurred for the purchase of intellectual property rights, as well as the adoption of appropriate tax incentives to encourage multinational enterprises to establish their regional headquarters in Hong Kong.

The firm additionally called for measures to develop Hong Kong into a center for aerospace financing, in line with a commitment from the local government, by relaxing the restriction imposed on tax depreciation allowances to facilitate genuine leasing operations in Hong Kong, and providing a more favorable tax rate for aircraft lessors' qualifying income.

In addition, to strengthen Hong Kong's position as an international financial hub, PwC recommended that existing tax exemptions should be extended to onshore funds, and the tax incentives for insurers should be further expanded.

Cyprus, Russia Defer Key Double Tax Treaty Change

Cyprus and Russia have agreed to postpone a change to how capital gains from shares in Russian companies with substantial immovable property portfolios are taxed.

A change to the territories' bilateral double tax agreement was proposed to be in place this year, to tax capital gains at source.

Previously the two countries signed a Protocol to amend Article 13 (capital gains tax) of the treaty. This was intended to ensure that shares in Russian companies that appreciate in line with property holdings outside Cyprus are not

subject to double non-taxation, as currently Cyprus only subjects Cypriot property to capital gains tax under their double tax treaty.

The Protocol's entry into force has been deferred pending similar provisions being introduced into Russia's double taxation treaties with other European countries.

Jersey Removed From Portuguese Blacklist

Jersey has been removed from Portugal's list of privileged tax regimes, following the signing of a decree by the Portuguese Minister of Finance, Mário Centeno.

The removal of Jersey from the blacklist means that special anti-abuse measures laid down in Portuguese law no longer apply. These measures include a presumption that parties are related for the purposes of transfer pricing rules, limitations on the deductibility of expenses, and a ban on using the exemption method to eliminate double taxation on certain kinds of business and professional income.

Jersey Finance, the islands' business promotion agency, said the decision by Portugal was based on Jersey's strong track record of transparency and cooperation.

This includes signing a Tax Information Exchange Agreement with Portugal, agreeing to implement the Common Reporting Standard on the automatic exchange of Information, and Jersey's "largely compliant" rating by the Global Forum on Transparency and Exchange of Information for Tax Purposes.

It also follows representations made by Jersey's Minister for External Relations, Philip Bailhache, and his team, both to the Portuguese Embassy in London and to the Minister of Finance in Lisbon.

Commenting on Portugal's decision, Bailhache said: "I am very pleased that we have reached agreement with the Portuguese authorities on Jersey's removal from the blacklist. This is the right outcome given Jersey's commitment to tax exchange and mutual assistance, and follows sustained discussions between the Ministry of External Relations and our counterparts in the Portuguese government. It will encourage business links between Jersey and Portugal."

AUSTRALIA - GERMANY

Effective

The provisions of the new DTA between Australia and Germany became effective on January 1, 2017.

BELARUS - HONG KONG

Signature

Belarus and Hong Kong signed a new DTA on January 16, 2017.

CANADA - ISRAEL

Effective

The new DTA between Canada and Israel became effective on January 1, 2017.

CANADA - SWITZERLAND

Effective

A TIEA between Canada and Switzerland for the automatic exchange of information in tax matters came into effect on January 1, 2017.

CYPRUS - RUSSIA

Negotiations

During recent negotiations, Cyprus and Russia agreed to postpone the implementation of a Protocol to their DTA.

CZECH REPUBLIC - CHILE

Into Force

The DTA between the Czech Republic and Chile entered into force on December 21, 2016, the Czech Ministry of Finance announced on December 27, 2016.

GUERNSEY - UNITED KINGDOM

Into Force

A Protocol to the DTA between Guernsey and the UK entered into force on December 6, 2016, the UK Government confirmed on January 4, 2017.

INDIA - CYPRUS

Effective

The revised DTA between India and Cyprus will take effect from April 1, 2017.

INDIA - KAZAKHSTAN

Signature

India and Kazakhstan signed a DTA Protocol on January 6, 2017.

INDIA - SINGAPORE

Signature

India and Singapore signed a DTA Protocol on December 30, 2016.

INDIA - TAJIKISTAN

Forwarded

India's Cabinet on December 14, 2016, approved a DTA Protocol with Tajikistan.

JERSEY - UNITED KINGDOM

Into Force

The DTA Protocol between Jersey and the United Kingdom entered into force on December 2, 2016, the UK Government announced on January 5, 2017.

KAZAKHSTAN - SLOVENIA

Ratified

Kazakhstan's Senate on December 29, 2016, ratified the new DTA with Slovenia.

KUWAIT - INDIA

Signature

According to preliminary media reports, Kuwait and India signed a DTA Protocol on January 14, 2017.

SWITZERLAND - VARIOUS

Effective

Switzerland's revised DTAs with Albania and Norway became effective on January 1, 2017.

SWITZERLAND - VARIOUS

Effective

Switzerland's TIEAs with Belize and Grenada became effective from January 1, 2017.

TAIWAN - POLAND

Effective

A DTA and Protocol between Taiwan and Poland became effective on January 1, 2017.

UNITED KINGDOM - ISLE OF MAN

Into Force

The DTA Protocol between the UK and the Isle of Man entered into force on November 29, 2016, the UK Government announced on January 5, 2017.

UNITED KINGDOM - URUGUAY

Effective

The UK Government on January 12, 2017, confirmed that a new DTA with Uruguay had became effective from that date.

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

THE AMERICAS

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

Consolidated Tax Return Regulations 2017

2/13/2017 - 2/14/2017

Practising Law Institute

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

Chair: Mark J. Silverman (Steptoe & Johnson LLP)

http://www.pli.edu/Content/Seminar/Consolidated_Tax_Return_Regulations_2017/_/N-4kZ1z10p5i?ID=288681

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

2/21/2017 - 2/22/2017

Informa

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/

IFA USA 45th Annual Conference

2/22/2017 - 2/23/2017

IFA

Venue: Waldorf Astoria, 301 Park Ave, New York, NY 10022, USA

Key speakers: TBC

http://www.ibfd.org/IBFD-Tax-Portal/Events/IFA-USA-45th-Annual-Conference#tab_program

The 6th Offshore Investment Conference Panama

3/8/2017 - 3/9/2017

Offshore Investment

Venue: Hilton Panama, Esquina de Avenida Balboa y Aquilino de la Guardia, Av Balboa, Panama

Key speakers: TBC

http://www.offshoreinvestment.com/pages/index.asp?title=The_6th_Offshore_Investment_Conference_Panama_2017&catID=14286

Hot Issues in International Taxation

3/29/2017 - 3/30/2017

Bloomberg BNA

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

Key Speakers: TBC

https://www.bna.com/hot-issues_arlington2017/

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

STEP Miami 8th Annual Summit

5/19/2017 - 5/19/2017

STEP

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

Key Speakers: TBC

http://www.step.org/events/step-miami-8th-annual-summit-19-may-2017

16th Annual International Mergers & Acquisitions Conference

6/6/2017 - 6/7/2017

International Bar Association

Venue: Plaza Hotel, 768 5th Ave, New York, NY 10019, USA

Key Speakers: TBC

http://www.ibanet.org/Conferences/conf774.aspx

10th Annual US–Latin America Tax Planning Strategies

6/14/2017 - 6/16/2017

American Bar Association

Venue: Mandarin Oriental Miami, 500 Brickell Key Dr Miami, FL 33131-2605, USA

Key speakers: TBC

http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=264529724

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

International Taxation of Expatriates

4/3/2017 - 4/5/2017

IBFD

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

Key Speakers: TBC

http://www.ibfd.org/Training/International-Taxation-Expatriates-2

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

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

Informa

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

Informa

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

Landed Estates 2017

2/28/2017 - 2/28/2017

Informa

Venue: TBC, London, UK

Chair: Rhoddy Voremberg (Farrer & Co)

https://finance.knect365.com/landed-estates/

The 15th Annual Definitive Permanent Establishment & BEPS Mastercourse

3/1/2017 - 3/1/2017

Informa

Venue: TBC, London, TBC

Chair: Jonathan Schwarz (Temple Tax Chambers)

https://finance.knect365.com/permanent-establishment-beps-masterclass/

BEPs Action 15 – Multilateral Convention

3/2/2017 - 3/2/2017

Informa

Venue: TBC, London, UK

Chair: Jonathan Schwarz (Temple Tax Chambers)

https://finance.knect365.com/multilateral-convention-beps-action-15/

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

TP Minds International

3/6/2017 - 3/9/2017

Informa

Venue: Hilton London Bankside, 2-8 Great Suffolk St, London, SE1 0UG, UK

Chair: Ruth Steedman (FTI Consulting)

https://finance.knect365.com/tp-minds-international-conference/agenda/1

2nd International Conference on Taxpayer Rights

3/13/2017 - 3/14/2017

The Institute for Austrian and International Tax Law

Venue: TBC, Vienna, Austria

Key Speakers: TBC

https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/eventsn/ITRC_RegistrationFlyer_101216.pdf

International Tax, Legal and Commercial Aspects of Mergers & Acquisitions

3/29/2017 - 3/31/2017

IBFD

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

Key Speakers: Frank de Beijer (Liberty Global Plc Amsterdam HQ), Hugo Feis (ABN AMRO), Bart Weijers (PwC), Rens Bondrager (Allen & Overy LLP), among numerous others

http://www.ibfd.org/Training/International-Tax-Legal-and-Commercial-Aspects-Mergers-Acquisitions

International Tax Aspects of Permanent Establishments

4/4/2017 - 4/7/2017

IBFD

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

Key Speakers: TBC

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

Global Tax Treaty Commentaries Conference

5/5/2017 - 5/5/2017

IBFD

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

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

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

THE AMERICAS

United States

The US Supreme Court (SCOTUS) has denied a review of its 1992 *Quill* decision restricting sales taxes on online sales, by not taking up a case against Colorado's internet sales notice and reporting law.

A listing of recent key international tax cases.

Quill, a Supreme Court ruling 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 additionally decided that only Congress has the authority to regulate interstate commerce under the Commerce Clause of the US Constitution.

Colorado 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.

Subsequently, the Direct Marketing Association (DMA) brought a case against Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue, challenging the Colorado law and convinced a district court that it violates the Commerce Clause because it discriminates against, and unduly burdens, interstate commerce.

Last year, 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," In August this year, the DMA petitioned SCOTUS to pick up the case.

Brohl cross-petitioned explicitly asking SCOTUS to reconsider *Quill*. Her petition argued 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."

By refusing to consider both petitions, SCOTUS has not taken up an opportunity to repeal *Quill*, even though, in the Appeals Court, Justice Anthony Kennedy had 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."

Nevertheless, SCOTUS may soon be provided with another opportunity to re-examine at *Quill*, as the Ohio Supreme Court's decision last month to uphold the state's commercial activity tax (CAT) may be presented to it.

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 only applies if a business has USD500,000 or more in annual gross sales in the state.

The Ohio Supreme Court 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 annual sales threshold for the CAT means that a seller has a "substantial nexus" to that state.

The Colorado and Ohio cases are the latest elements 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.

http://www.scotusblog.com/case-files/cases/direct-marketing-association-v-brohl-2/

US Supreme Court: *Direct Marketing Association v. Brohl (16-267)*

France

The European Court of Human Rights has endorsed the decision of French authorities to compel UBS to put up a EUR1.1bn (USD1.16bn) security in its case against the bank concerning alleged tax fraud.

In its January 12 decision, the Court declared UBS's application inadmissible. The decision is final.

The ruling concerns a sum of EUR1.1bn required by way of security in the context of the court supervision of the bank, which was placed under formal investigation for illegal direct selling of banking products and aggravated laundering of the proceeds of tax fraud.

The Court noted that the security was intended to ensure the presence of the party under investigation for all the steps of the proceedings and for execution of the judgment, as well as payment of the fines and reparation for the damage caused.

In its judgment in favor of the French authorities, the Court noted the "growing and legitimate concern both in Europe and internationally in relation to financial offences, which constituted socially unacceptable behavior, and the difficulty of combating such offences." It stressed that in the present case, firstly, the security constituted an interim measure which did not prejudge the outcome of the proceedings, as the sum paid would be returned at the end of the proceedings if the person concerned was not convicted.

Secondly, it explained that the amount of the security had been assessed by the investigating judges and by the Investigation Division, using particularly thorough reasoning, on the basis of the findings of the investigations, the alleged facts, the scale of the offenses and the potential harm, and the amount of the fine payable in the event of a conviction. The assessment had also been based explicitly on the applicant bank's resources.

Lastly, the Court found that the bank had been afforded adequate procedural safeguards, as it had been able to make use of the remedies provided for by domestic law in order to challenge the decision in question and to debate in adversarial proceedings the factors taken into consideration by the judges, first before the Court of Appeal and then before the Court of Cassation.

Accordingly, the Court found that the interference to UBS had not been disproportionate and that a fair balance had been struck. In addition, it stated that UBS had not exhausted potential domestic remedies to the dispute before bringing a case before the Court.

http://hudoc.echr.coe.int/eng-press#

European Court of Human Rights: *UBS AG v. France (application no. 29778/15)*

France

The French Constitutional Court has ruled that legislation for a UK-style diverted profits tax (DPT) in France is unconstitutional.

According to the ruling, released by the Court in French on December 29, the method by which the French tax authority would apply the DPT was insufficiently detailed in the legislation and therefore gave the tax authority too much discretion in a company tax audit.

As a result, the provision violated Article 34 of the French Constitution, which stipulates that statutes must determine "the base, rates, and methods of collection of all types of taxes."

The law formed part of the 2017 Finance Bill approved by parliament last month. Based partly on the UK DPT, it would have allowed the tax authority to impose corporate tax on profits deemed to have been artificially diverted from France with the intention of avoiding tax, irrespective of whether the company was established inside or outside France.

The tax was due to be introduced on January 1, 2018.

http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-744-dc/decision-n-2016-744-dc-du-29-decembre-2016.148423.html *(In French)*

French Constitutional Court: *Decision No 2016-744 DC*

Ireland

The European Court of Justice (ECJ) has ruled that Aer Lingus and Ryanair benefited from illegal state aid in the form of reduced air passenger tax rates.

The ECJ found that the airlines that were able to benefit from the reduced rate enjoyed a competitive advantage of EUR8 (USD8.36) compared with airlines that paid the standard rate. It has ordered Ireland to recover a sum of EUR8 per passenger for each of the flights concerned.

In July 2009, Ryanair asked the European Commission to examine the air travel tax imposed by Ireland on airlines. Ryanair alleged that some of its competitors had derived a financial advantage from the fact that they operated a significant number of flights to destinations located less than 300km from Dublin airport. For such journeys, the tax was set at EUR2 per passenger. Other flights departing from Ireland were subject to a rate of EUR10 per passenger.

In July 2012, the Commission concluded that the application of a lower rate for short-haul flights constituted state aid incompatible with the internal market. It ordered the recovery of that aid from the beneficiaries (which included Aer Lingus and Ryanair). It argued that the amount of aid corresponded to the difference between the lower rate of EUR2 and the standard rate of EUR10.

Aer Lingus and Ryanair challenged the decision before the General Court of the EU. In February 2015, the General Court partially annulled the Commission's 2012 decision on the ground that the Commission had failed to show that the advantages enjoyed by the airlines was, in all cases, EUR8 per passenger. The Commission then lodged an appeal with the ECJ.

The ECJ has now concluded that "the airlines that were able to benefit from the reduced rate enjoyed a competitive advantage of EUR8 by comparison with airlines that paid the standard rate."

It explained: "The advantage in question did not consist in the fact that those airlines were able to offer more competitive prices than their competitors. It resulted quite simply from the fact that those companies had to pay a lower amount than they would have had to pay if their flights had been subject to the standard rate."

The ECJ added that "there was nothing to prevent the beneficiaries of the aid from increasing by EUR8 the price of their tickets that were subject to the lower rate so as to enjoy economic benefits corresponding to the difference between the lower and standard rates."

It therefore rejected the argument put forward by Aer Lingus and Ryanair that as they were no longer in a position to recover the amount of EUR8 from their customers, their obligation to repay that sum would be equivalent to an additional tax or a discriminatory penalty.

This decision was reported in an ECJ press release dated December 21, 2016.

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160142en.pdf

European Court of Justice: *Commission v. Aer Lingus Ltd, Ryanair Designated Activity Company and Ireland (C-164/15 P and C-165/15 P)*

Italy

According to an opinion delivered by Advocate General Campos Sánchez-Bordona on January 12 to the European Court of Justice (ECJ), Italy should not be precluded from taking both criminal and administrative action following a taxpayer's failure to pay value-added tax (VAT).

He noted a previous ECJ judgment which established a person's right not to be tried twice for a single breach of the obligation to pay VAT, and observed that this has created difficulties in the courts of some member states, such as Italy, where the tax code provides for both administrative and criminal penalties regarding the same VAT non-payment.

However, in his opinion, AG Sánchez-Bordona argued that EU law does not preclude Italy from filing criminal charges against the individual representative of a company that is already subject to an administrative penalty for its failure to pay.

He proposed that the ECJ should indicate to the Italian courts that its previous judgment is not applicable "where there are two sets of proceedings in respect of the same offense and the [administrative] tax penalties are imposed on a legal person, such as a company, while the criminal proceedings are brought against a natural person, even if that person is the legal representative of the company."

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CC0217

European Court of Justice: *Italian Tax Authorities v. Massimo Orsi et al. (C-217/15 and C-350/15)*

Spain

The European Court of Justice (ECJ) has upheld two decisions by the European Commission regarding the legitimacy of a Spanish law on the tax amortization of financial goodwill for foreign shareholding acquisitions in Spain.

The ECJ's ruling confirmed the Commission's earlier finding that, by allowing companies to deduct the financial goodwill arising from shareholdings in foreign companies from their corporate tax base, the Spanish measure gave those companies a selective advantage over their competitors in breach of EU state aid rules.

In reaching its decision, the ECJ set aside an earlier ruling by the General Court from November 2014.

According to the Spanish law on corporation tax, where a company that is taxable in Spain acquires a shareholding in a "foreign company" of at least 5 percent and holds it without interruption for at least one year, the goodwill resulting from that shareholding may be deducted through amortization of the basis of assessment for the corporation tax for which the undertaking is liable. The law states that, to qualify as a "foreign company," a company must be subject to a similar tax to the tax applicable in Spain, and its income must derive mainly from business activities carried out abroad.

Spanish tax law does not allow the goodwill resulting from the acquisition of a shareholding in a company established in Spain by a company which is taxable in Spain to be entered separately in the accounts for tax purposes. By contrast, Spanish tax law also provides that goodwill may be amortized where undertakings are grouped together.

In an announcement on October 15, 2014, the Commission had stated that the measure provided the beneficiaries with a selective economic advantage which cannot be justified under EU state aid rules, and which must now be repaid to the Spanish state.

Three Spanish companies – Autogrill España, Banco Santander, and Santusa Holding – subsequently brought an appeal before the General Court, asking for the Commission decisions to be annulled.

However, the ECJ ruled that the General Court had "erred in law" with its conclusion that the measure at issue was not selective because the Commission had not identified a particular category of undertakings exclusively favored by the tax measure concerned.

The latest ruling means that the Commission decisions of October 2009 and January 2011 are reinstated, including Spain's obligation to recover the aid granted under the measure.

This decision was reported in an ECJ press release dated December 21, 2016.

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160139en.pdf

European Court of Justice: *Commission v. World Duty Free Group; Commission v. Banco Santander SA et al. (C-20/15 P; C-21/15 P)*

Dateline January 19, 2017

To give Rudyard Kipling's immortal words a 21st century spin, if you can keep your head while all about you are losing theirs and blaming it on you, you have something in common with Theresa May, the British Prime Minister.

For sure, if reports are to be believed, there is some bungling afoot surrounding how the **British Government** appears to be handling Brexit, and the Prime Minister's Brexit plan, presented this week, has been condemned by many as wishful thinking. I suppose, however, May does deserve some credit for keeping her cool while tasked with arguably the UK's biggest challenge since de-colonization.

But maybe May has been keeping abreast of **recent tax developments** and seen the recent news that, despite the UK's decision to leave the European Union, Snapchat has chosen to establish its non-US base in London. The announcement comes hot on the heels of McDonald's decision to transplant much of its non-US financing activity from Luxembourg to the UK. Both moves are being perceived as ringing endorsements of the UK corporate tax environment.

Maybe there's even more to it: perhaps businesses are not as concerned about the outcome of the Brexit negotiations as first thought. Reports of companies leaving the UK in the wake of the EU referendum are few and far between.

Businesses appear to be saying that, fundamentally, the UK remains a good place for business, irrespective of whether the UK goes for a soft Brexit, a hard Brexit, or merely a slightly wobbly Brexit.

Things aren't exactly plain sailing for **Hong Kong** at present either. Yes, the Special Administrative Region retains the status of the world's freest economy, and is the go-to territory for Asia-focused businesses looking for a minimum of government interference. But it is exactly this type of low-tax investment conduit that is under threat as a result of the **BEPS project**.

Given the near-global consensus on BEPS, places like Hong Kong have little choice but to toe the line with regards to international tax standards, with the prospect of being blacklisted by the international community always lurking in the background. And these days, reputation is almost as valuable a currency as stable and easy tax laws for investors. Hence, we have seen

Hong Kong getting up to speed with the basic BEPS requirements over the last few weeks, and the Government is even considering new laws to increase the transparency surrounding the **beneficial ownership** of legal entities.

But won't these measures merely deter new investors, and send existing ones into the arms of Hong Kong's rivals, like **Singapore**? In theory, no – not if other jurisdictions adopt the same, or very similar, measures.

It's likely they will, despite the fact the **OECD's recommendations** are being implemented around the world at various speeds. Back to Hong Kong, and one could point to a small dip in recent incorporation figures as a sign that investors are being slightly turned off. For the Government and the financial center, these figures are probably nothing to worry about. Nevertheless, it will be interesting to watch how jurisdictions like Hong Kong adapt to ever-increasing demands for transparency.

Another country attempting to reposition itself in a post-BEPS world is the **Netherlands**. Judging by Finance Minister Jeroen Dijsselbloem's apparent backpedaling on the matter of corporate tax, the Dutch Government is struggling to decide exactly where it should stand.

Tax-wise, the Netherlands looks much like any other high-tax Western European country. It has a tax-to-GDP ratio of 40 percent; and at 25 percent, corporate income tax isn't especially attractive. But the country has something going for it – otherwise half of the **Fortune 500** wouldn't be there, and **foreign direct investment** would not have averaged almost EUR45bn (USD47.8bn) from 2003 to 2016. An attractive set of withholding tax exemptions, a large and favorable tax treaty network, low taxation of income associated with **intellectual property**, and other tax deductions have a lot to do with its standing as a hugely popular domicile for holding companies and European HQs.

Dutch policies have earned the country a bad reputation internationally, among those campaigning for tax justice at least. Even President Obama labeled the Netherlands a tax haven in the early stages of his presidency. And certain tax arrangements have of course landed it on the radar of the OECD and the European Commission's new state aid 'police'.

The Netherlands' commitment to BEPS could spell the end of tax privileges for some multinationals. While it wants the Fortune 500 companies to remain, like any other country, it also wants to be seen as a respectable global citizen, and not as a tax haven. So, does it risk respectability

and **cut corporate tax** to maintain competitiveness, as the conservative People's Party proposes? Or risk competitiveness to regain respectability by raising corporate tax, as Dijsselbloem, of the Labor Party, suggests?

With any luck, this will be settled by the upcoming election. Investors will be hoping that the result isn't as indecisive as Dijsselbloem appears to be on the subject!

The Jester