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a closer look

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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CONTENTS

FEATURED ARTICLES

The G20's New Challenge: Providing Tax Certainty In An Uncertain World
Jeffrey Owens, Senior Policy Advisor, EY — 5

Tax Preparer Beware: Understanding And Avoiding Tax Preparation Liability Penalties
Mike DeBlis Esq., DeBlis Law — 10

Between A Rock And A Hard Place – Gibraltar Between The UK And Brexit?
Stuart Gray, Senior Editor, Global Tax Weekly — 13

Topical News Briefing: Accommodating The Unconventional
The Global Tax Weekly Editorial Team — 23

Mexico: An Attractive Destination For French Companies
Mario Alberto Gutierrez and Clemence Siavellis, PwC, Mexico — 25

Amendment In India's Budget 2017 Relating To Thin Capitalization
Parul Jolly, S.C. Vasudeva & Co. Independent member of Morison KSi — 30

Non-Resident Minority Shareholder Found To Have De Facto Control Of Corporation
The Tax Topics Editorial Team — 33

Topical News Briefing: Nailing Tax Colors To The Party Mast
The Global Tax Weekly Editorial Team — 36

NEWS ROUND-UP

NAFTA — 38

New US Trade Representative To Begin NAFTA Push

Mexico Discusses US Trade Deficits Ahead Of NAFTA Review

Canadian Business Council Concerned Over NAFTA

Digital Taxation — 40

Airbnb Agrees To Collect Tax In Mexico City

UK Lawmakers Seek Action On 'Gig Economy Tax Dodge'

Country Focus: Australia — 41

Australian Budget Targets Housing, Tax Compliance

Numerous GST Changes Confirmed In Australian Budget

Australian Banks Criticize New Levy

Country Focus: United Kingdom 45

UK Labour Would Hike Corporation Tax

Think Tanks Say UK Corporate Tax Hike Would Be Self-Defeating

VAT, GST, Sales Tax 47

Russia Could Hike VAT Rate To 22 Percent By 2019

Indian IT Systems Ready For GST

Singapore Consults On GST Act Amendments

International Trade 49

Hong Kong, Australia Launch Free Trade Pact Talks

China, Georgia Sign Free Trade Deal

EU, Mexico To Speed Up Free Trade Talks

Environmental Taxes 51

Think Tank Criticizes Canadian Carbon Taxes Implementation

OECD Recommends Blueprint For Progressive Carbon Tax

Compliance Corner 53

Bill To Establish South African Customs Authority Fails Again

German State Receives 'MaltaLeaks' Data

TAX TREATY ROUND-UP 55

CONFERENCE CALENDAR 57

IN THE COURTS 63

THE JESTER'S COLUMN 71
The unacceptable face of tax journalism

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ISSUE 236 | MAY 18, 2017

The G20's New Challenge: Providing Tax Certainty In An Uncertain World

by Jeffrey Owens, Senior Policy Advisor, EY

2017 could be a pivotal year in international taxation, as the G20 moves beyond the G20/Organisation for Economic Co-operation and Development's (OECD's) Base Erosion and Profit Shifting (BEPS) agenda, grapples with questions of growth and tax certainty, and also revisits the challenges posed by the digital economy.

Germany, which holds the G20 presidency from December 1, 2016 through November 30, 2017, has indicated that its tax agenda will focus on transparency, implementation of BEPS recommendations, tax and development, tax certainty and digitization.

Promoting Tax Policies That Generate Sustainable And Inclusive Growth

Germany will continue to explore the so-called third plank of the G20's tax agenda – achieving strong, sustainable, balanced and inclusive growth. Under this plank, launched by the previous G20 presidency held by China, the G20 aims to boost economic growth through a range of tax policy tools. As part of this initiative, the G20 is exploring how it can increase certainty and predictability in the tax system, as it believes such factors are critical to fostering a pro-growth environment. The G20 has asked the OECD and the International Monetary Fund to prepare a report with recommendations on tax policies and mechanisms to generate sustainable and inclusive growth; the OECD and IMF published their report on March 18, 2017. This work is likely to form an ongoing part of the G20 tax agenda for years to come.

From a conceptual standpoint, one of the key questions that must be addressed by the G20 should be: Is all tax uncertainty bad? One could argue that having some amount of uncertainty in a tax system can be beneficial for tax administrations, as it forces taxpayers to act more cautiously. At the same time, uncertainty may give taxpayers more opportunity for tax planning. The G20 will therefore have to determine what level of tax uncertainty is "good" or "bad."

The G20 will also have to develop criteria for achieving tax certainty. In other words, what elements are needed to derive tax certainty? Clearly, governments can pledge to take a coordinated approach when developing tax policies – for example, by engaging in dialogue with the business community, adopting well-thought out polices that are translated into clear legislation and regulations, and ensuring that tax policies are consistent with international standards.

The G20 will also have to look at the role that tools like advance rulings and advance pricing agreements can play in bringing certainty to both tax administrations and taxpayers. However, given the amount of scrutiny that rulings were put under as part of the debate on BEPS Action 5 (Countering Harmful Tax Practices), touting the benefits of advance rulings could be a tricky endeavor in a post-BEPS environment.

Tax And The Digital Economy Revisited

Germany has indicated that the digital economy will be a big focus of its G20 presidency. At its first presidency meeting held in Berlin on December 1, 2016, Germany asked the OECD to prepare a report for the March 2017 G20 finance ministers' meeting on current developments within the OECD's Task Force on the Digital Economy, and to bring forward any other potential ideas on how taxation of digital activity can be improved. The task force is co-chaired by France and the United States, which have very different views on (and interests in) how to tax the digital economy.

The rapid digitization of our economies brings both challenges and opportunities for all sides, and will require an unprecedented level of cooperation – between tax administrations as well as between taxpayers and tax administrations – if tax is not to become a barrier to using these new technologies for the good of all citizens.

The debate on digitization comes at a critical time, as digital technology is transforming not just the way business is done but the way tax administrations interact with taxpayers and other tax authorities. To cope with the unprecedented amount of taxpayer data that is flowing between governments and business, tax administrations are increasingly relying on digital methods to collect and analyze this data. Many tax authorities are building sophisticated data-gathering platforms and using data analytics to help them develop a more complete picture of companies' tax profiles. Some are even extracting data directly from corporate systems as part of VAT and GST audits.

As tax administration goes digital, companies will need to make major investments in their tax and information technology functions to ensure they can meet the challenges – and opportunities – of providing information on an almost real-time basis.

Battle Of The Non-Cooperative Tax Jurisdiction Lists?

The G20's plans to develop a list of "non-cooperative" jurisdictions for tax transparency purposes could conflict with the European Union's (EU's) effort to compile its own black list of non-cooperative jurisdictions. In July 2016, the OECD, working with G20 members, agreed on a set of criteria for identifying non-cooperative jurisdictions. To avoid being considered non-cooperative, a jurisdiction must meet two of the following three criteria:

- It receives a rating of "largely compliant" or better from the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), as regards the "exchange of information on request" standard of transparency
- It commits to adopting the OECD's automatic exchange of information standard (the Common Reporting Standard, or CRS) and beginning exchanges by 2018 at the latest
- It has signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, or it has in place a sufficiently broad exchange network providing for exchange of information on request and automatic exchange of information.

At the G20 Leaders' Summit held in Hangzhou, China, in September 2016, the G20 asked the OECD to prepare a list by the July 2017 G20 Leaders' Summit of those jurisdictions that have not yet sufficiently progressed toward a satisfactory level of implementation of the agreed international standards on tax transparency. The G20 stated that defensive measures will be considered against listed jurisdictions.

The EU is carrying out a similar exercise. In January 2016, as part of an Anti-Tax Avoidance Package, the European Commission announced plans to create a list of third countries that do not respect tax good governance standards. The plan was endorsed in May 2016 by the Economic and Financial Affairs Council of the European Union (ECOFIN). In November 2016, ECOFIN agreed on the criteria and the process for compiling an EU list of non-cooperative jurisdictions. The jurisdictions selected for screening will be assessed cumulatively under three criteria: (i) tax transparency; (ii) fair taxation; and (iii) implementation of minimum BEPS standards.

The tax transparency standard is similar to the G20/OECD's. A jurisdiction will be considered compliant if it has committed to and started the legislative process to implement the CRS, with

first exchanges in 2018; it has a peer review rating of at least "largely compliant" from the Global Forum regarding the OECD's exchange of information on request standard; and it has ratified, agreed to ratify, is in the process of ratifying or has committed to the entry into force of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as an alternative to the last criterion, the jurisdiction has a network of exchange agreements covering all EU Member States that provide for exchange of information on request and automatic exchange of information).

However, the fair taxation standard goes beyond the criteria set by the G20/OECD. To be considered compliant on fair taxation, the EU's guidelines state that the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out by the EU Code of Conduct for Business Taxation, and the jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits that do not reflect real economic activity in the jurisdiction. The guidelines further state that by January 2017, the Code of Conduct Group should evaluate the absence of a corporate tax system or imposition of a nominal corporate tax rate equal to zero or almost zero as a possible indicator of non-fair taxation.

The EU's approach could lead to a tense debate within the G20/OECD. One could argue that a list of non-cooperative jurisdictions should be based only on criteria for which there is broad global agreement – in this case, the OECD's tax transparency standard as it pertains to exchange of information. By contrast, there is no globally agreed standard (yet) on what constitutes "fair taxation" or what should be considered a harmful tax regime. It can be expected that the non-OECD and non-G20 countries will put pressure on the EU to align its approach with the G20/OECD and focus only on tax transparency criteria.

Achieving Good Tax Compliance, Sustainable Growth And Restoring Citizens' Faith In Globalization

The G20 is to be congratulated for broadening its agenda beyond tax compliance to include issues that are at the center of the political debate in most countries: namely, how to reduce unemployment and improve living standards in a global economy, and how to ensure that the benefits and costs of globalization and new technologies are fairly shared between all segments of society.

Meeting these challenges will require a reconsideration of the structure of our tax systems and the relative reliance on different tax bases; harnessing new technologies to bring more citizens into the formal economy and to reduce the deadweight loss of collecting and paying taxes; and developing "smart" approaches to taxing capital and wealth that achieve some redistribution at

the top end of the income scale, but without reducing the incentive for work, risk-taking and entrepreneurship. The German G20 Presidency has an opportunity at the July 7–8 G20 Leaders' Summit in Hamburg to set out in more detail this ambitious agenda, so that it can be carried forward over the coming years.

Tax Preparer Beware: Understanding And Avoiding Tax Preparation Liability Penalties

by Mike DeBlis Esq., DeBlis Law

The Big Picture

Broadly speaking, tax professionals in the United States, and indeed elsewhere, are liable for discipline or other penalties if their behavior falls well below the standard of care and their mistakes were material to the procedure. Attorneys aren't necessarily negligent if their clients are found guilty. However, if a criminal lawyer does not call a key alibi witness, and the failure had a substantial bearing on the outcome, the attorney will probably answer to the licensing authority, and perhaps to a civil jury as well.

The same idea applies to paid tax preparers. Mistakes on the return will almost certainly irritate the taxpayer but are no big deal as far as the IRS is concerned. The question is: where does the Service draw the line between understandable error or a rosy interpretation of existing law, and negligence or fraud?

The answer lies partly in the purpose of tax preparer penalties, which is to discourage the aiding and abetting of tax fraud, whether intentional or unintentional.

The Penalties

In 2007, Congress substantially elevated the standard of care regarding paid tax preparers. Now, anyone who accepts anything of value for preparing all or a "substantial portion" of a return (whether or not they sign) may be liable for:

- Substantial understatement of income and other reckless or intentional conduct (Section 6694),[1] or
- Dereliction of duty, such as not giving the taxpayer a copy of the return (Section 6695).[2]

The "substantial portion" element refers not so much to the gross number of lines that the preparer either filled in or helped fill in, but the amount of advice that's relevant to a refund. In-house

tax preparers (*e.g.*, the boss says "get me a coffee with extra cream and fill out the 1040") and most volunteers (especially if they are volunteering on behalf of the IRS) are not paid preparers as a matter of law and therefore are not liable no matter what they do (or don't do).

In either case, the preparer can raise a reasonable cause defense. That's usually not very useful in cut-and-dry Section 6695 actions, because preparers either do everything on the tax preparation checklist or they don't. But Section 6694 actions are a lot more subjective, and also much more common.

Substantial Understatement, *Etc.*

In 2015, Congress substantially increased the penalties for:

- **Understating tax liability:** In addition to understating income, penalties also apply for overstating credits, like the Child Tax Credit or Earned Income Tax Credit.
- **Unreasonable Basis:** The IRS has a number for almost everything, including whether or not there is "substantial authority" to support the claim or deduction. This is a term of art which means, according to a 1999 Joint Committee on Taxation report, that the claim has at least a 40 percent chance [3] of surviving in Tax Court. In contrast, individual taxpayers must have a "reasonable basis", which has a 20 percent chance of success.

The understatement penalty is usually USD1,000 or 50 percent of the preparation fee, whichever is greater. However, if the preparer was reckless, the penalty goes up to USD5,000 or 75 percent; individuals who file Form 8275 disclosure statements nearly always avoid the enhanced penalties.

The Reasonable Cause Defense

Theoretically, the same penalties apply to all tax preparers no matter how much training and experience they have. However, Section 6694(a)(3)[4] does give an accommodation of sorts. Liability does not attach if the understatement:

- Involved a law which is unusually technical or complex,
- Was an isolated, one-off item,
- Resulted from reasonable reliance on the information of others, including taxpayer-provided data,
- Was immaterial, or
- Resulted from industry practices that are generally accepted.

As for the data-reliance element, preparers do not have to ask lots of questions and can usually rely on information from prior returns.

To answer the question posed above, the two key numbers seem to be 40 percent and 8275. To avoid the underlying penalty, one must be able to give a rationale for the return that does not begin with "I thought that …" or, even worse, "I hoped that …". Next, to avoid the enhancements, timely file the disclosure form.

Endnotes

[1] https://www.law.cornell.edu/uscode/text/26/6694

[2] https://www.law.cornell.edu/uscode/text/26/6695

[3] http://www.jct.gov/s-3-99.pdf

[4] *Supra*, note 1.

Between A Rock And A Hard Place – Gibraltar Between The UK And Brexit?

by Stuart Gray, Senior Editor, Global Tax Weekly

As Spain allegedly prepares to reassert its territorial claim over Gibraltar, this article examines what could be at stake for this low-tax financial center, described by its Government as the best business location in the Mediterranean, and considers how this small territory perched on Spain's southern shore could have a major bearing on the upcoming Brexit negotiations.

Introduction

There is a great deal at stake for both the UK and Gibraltar with regards to Brexit. For the former, the issue of Gibraltar's sovereignty, as we shall see, has the potential to become a major stumbling block in the EU withdrawal negotiations. For the latter, which is at risk of losing its vital access to the EU's financial markets, and is facing territorial claims from a Spanish Government determined to neutralize its tax advantages, Brexit could be a matter of economic life and death. And that determination was underlined once again by an ominously worded report by the Spanish Foreign Ministry to the national parliament earlier this month, which suggests that Madrid could make life very difficult for the UK Government's Brexit negotiators over the issue of Gibraltar's sovereignty and the jurisdiction's tax regime.

Gibraltar And The UK

A small peninsula located on the southern coast of Spain, Gibraltar covers a total area of 6.5 square kilometers and is home to around 30,000 people. Nevertheless, sovereignty of the Rock of Gibraltar has long been prized due to its strategic location as the western gateway to the Mediterranean Sea. The territory has for the last 300 years been under British control after the Treaty of Utrecht ceded the territory to Great Britain "for ever." During the 19th century, Gibraltar

developed into an impregnable fortress, and a prosperous society developed within its walls. It remained a key British military and naval outpost until very recently.

Gibraltar's current status is an Overseas Territory of the United Kingdom. It has its own constitution and directly elected parliament, and a large degree of autonomy over its domestic affairs.

Like many small territories under the constitutional wing of the UK, Gibraltar has had a disproportionate influence on the world of finance and investment. As one of the pioneers of the "exempt" company format, the jurisdiction, largely independently from the UK, has built a highly successful financial services industry, initially centered around offshore banking and wealth management, but latterly developing successful e-commerce, investment funds, and insurance sectors. However, its historic links to the UK could now have a major bearing on what happens to the jurisdiction in the future.

Gibraltar's Historic Tax Advantages

The low set-up cost made exempt companies ideal for property and investment holding, international trading, and sales agencies, particularly if trade was being carried on between two high-tax jurisdictions. If a company obtained exempt status, the company was exempt from corporate tax and stamp duty (save in certain specific instances) in Gibraltar under the now repealed Companies (Taxation and Concessions) Act 1983.[1]

Furthermore, a company incorporated in Gibraltar or a registered branch of an overseas company was eligible to apply for Qualifying Company status subject to conditions which were largely the same as those applying to an exempt company. A Qualifying Company paid tax on its profits at a rate agreed with the Financial and Development Secretary and stated on a certificate issued to the company. This agreed rate could have been anywhere between 1 percent and 35 percent, although in practice, most Qualifying Companies agreed to pay between 5 percent and 10 percent tax.

While tax has been key to Gibraltar's growth as a finance center, it has responded to the EU's and the OECD's campaign against "harmful" offshore tax regimes by phasing out offshore company formats. Consequently, the Qualifying Companies regime was dissolved in January 2005 and the Exempt Companies legislation was eventually phased out by January 2011.

After a long and complex series of legal disputes between Gibraltar, Spain, and the European Commission over a replacement corporate tax regime, the Rock eventually settled on a system

similar to those in place in the UK's Crown Dependencies of Guernsey, Jersey, and the Isle of Man, whereby the majority of companies registered in the jurisdiction pay corporate tax at 10 percent under the Income Tax Act 2010.[2] As from January 1, 2011, this rate applies to all companies, except utility companies and companies with a dominant market position, which pay a higher rate of 20 percent.

Gibraltar's e-Commerce And Finance Center

The banking sector is well established in Gibraltar in both the offshore and local market, and most of the banks established in the jurisdiction are branches of major UK, European or US banks. Banking activity is directed to asset management for high-net-worth individuals, not least because Gibraltar has tried hard to attract such people with special tax regimes.

However, Gibraltar's traditional business – that of providing tax minimization structures for wealthy individuals – has diminished somewhat in recent years. But this has been more than compensated for by the rise of offshore e-gaming, and Gibraltar has become one of the most important jurisdictions in the industry thanks to favorable legislation and good telecommunications infrastructure.

By locating websites in Gibraltar to carry out functions previously based in high-tax jurisdictions such as sales and marketing, treasury management, supply of financial services, and most of all, the supply of digital goods such as music, video, training, software *etc.*, businesses can take advantage of low rates of taxation for increasingly substantial parts of their operation. A case in point is the online gaming sector, which had grown to 34 licensed operators by May 31, 2016, including such household names as Ladbrokes, BetVictor, bwin, and 32 Red.

Nevertheless, the regulatory regime for gambling operators is quite strict, and emphasizes quality over quantity. All gambling operations in Gibraltar require licensing under the Gambling Act 2005.[3] Remote Gambling licenses, including for telephone and internet betting, are issued by the Licensing Authority. The Gambling Commissioner, appointed under the provisions of the 2005 Act, is granted powers to ensure that licensees conduct their operations in accordance with their licenses and maintain the good reputation of Gibraltar. What is more, the Licensing Authority will only consider licensing blue chip companies with a proven track record in gambling, licensed in a reputable jurisdiction, of good financial standing, and with a realistic business plan. The 2005 Act requires that the licensee shall at all times be effectively controlled and managed from Gibraltar.

There is a turnover tax for fixed odds betting operations and betting exchanges, which as from April 1, 2005, is levied at 1 percent up to GBP42.5m of annual turnover with the tax capped at GBP425,000 per annum. The minimum annual tax payable is GBP85,000. For internet casinos, gaming tax is currently levied at 1 percent of the gaming yield or gross profit. The maximum and minimum cap is the same as for fixed odds betting.

Besides banking and e-gaming, investment funds and insurance are now important segments of Gibraltar's finance industry.

Asset Management firms wishing to create operations in Gibraltar have the option of establishing themselves as a firm under the Financial Services (Markets in Financial Instruments) Act 2006,[4] or the Financial Services (Alternative Investment Fund Managers) Regulations 2013.[5] Under the former legislation, there are three different categories of authorization by the FSC: unrestricted, money-holders, and arrangers. These categories have different application fees and different minimum regulatory capital requirements.

In 2005, Gibraltar introduced Experienced Investor Funds (EIFs) under the Financial Services (Experienced Investor Funds) Regulations, 2005. These are funds designed for professional, high-net-worth, or experienced investors. EIFs currently established in Gibraltar are a diverse assortment of open-ended and closed-ended funds with asset classes ranging from standard tradable securities to property, private equity, venture capital, fund of funds, and other alternative investment classes.

Gibraltar is well-positioned as an alternative to Dublin and Luxembourg for the establishment and management of hedge funds with the coming into force of the EU's Alternative Investment Fund Managers Directive (AIFMD) in July 2013. The AIFMD affects investment managers, particularly those within the EU, but also those that are external to the EU and who wish to market their funds within the EU. It determines how such investment managers can conduct their marketing activity.

Changes to the territory's funds legislation in 2012, in anticipation of the EU Directive, have enhanced Gibraltar's attractiveness as a domicile for large funds or those seeking to relocate to Europe to comply with the new EU fund sector rules. Consequently, Gibraltar is now specifically targeting New York and Latin American funds and fund managers with its promotional efforts.

Meanwhile, the insurance industry now has developed a substantial presence in Gibraltar, thanks to the combination of favorable tax rules, efficient regulation, and Gibraltar's EU membership,

which provides passporting rights in insurance, insurance mediation and reinsurance across all 31 EU and European Economic Area countries. The predominant class of business is motor insurance, and Gibraltar motor insurers currently write 10 percent of the total UK motor market. Gibraltar also has a growing and diversifying non-life insurance sector, and the Gibraltar Financial Services Commission has authorized Gibraltar insurance companies to write permitted business across all 18 classes of general insurance business.

The first captive insurance company was established over 25 years ago, and Gibraltar was the first EU jurisdiction to offer protected cell companies (PCC) legislation in 2001. PCCs are widely used within insurance company structures writing both general and life insurance business. Household names such as Brit Insurance, Intercontinental Hotels and Tate & Lyle have chosen Gibraltar as a domicile for their EU captives, and the innovative nature of the PCC has led to one insurance manager creating almost 50 cells, with its PCC being the largest in the EU providing solutions for both cell captives and fronting cells.

Gibraltar has strong ambitions to become the Insurance Linked Securities (ILS) jurisdiction of choice within the EU, having entered this segment of the insurance market with the Insurance Companies (Special Purpose Vehicles) Regulations 2009.[6] Financial instruments whose values are driven by insurance loss events, typically hurricanes, windstorms, and earthquakes, ILSs have developed rapidly in recent years because returns are largely uncorrelated with those of the financial markets. By the end of 2016, the global ILS market had reached an all-time high of USD26.82bn.

Gibraltar believes that the EU Solvency II Directive, which came into effect on January 1, 2016, is likely to create greater opportunities for onshore ILS offerings within the EU. This new supervisory framework harmonizes insurance and reinsurance regulations and establishes a single market for the insurance sector in the EU, and Gibraltar aims to provide an alternative domicile for European sponsors that are concerned about establishing offshore SPVs or those who would prefer to structure their ILS offerings within the EU.

The existence of Gibraltar's EU passports in the investment fund, insurance, and other areas suggests therefore that its continued membership of the Single Market is of great importance to survival of the financial center, itself a vital cog of the territory's economy, and the jurisdiction's position with regards the EU is summarized next.

Gibraltar And The European Union

Gibraltar entered the EU along with the UK in 1973, but remained outside the EU's VAT, Common Agricultural Policy, and common external tariff regimes – a state of affairs that endures to this day. Gibraltar has therefore implemented much EU financial legislation and can apply Common European Passport regulations in the insurance, banking, and fund management spheres.

The key pieces of EU financial legislation transposed into Gibraltar law are summarized below.

The Markets in Financial Instruments Directive (MiFID)

MiFID came into effect on November 1, 2007, when it replaced the Investment Services Directive (ISD), introducing more extensive requirements for firms with regards their conduct of business and internal organization. It also expanded the range of "core" investment services and activities that firms can passport. MiFID has been implemented in Gibraltar via the Financial Services (Markets in Financial Instruments) Act, 2006, and the Financial Services (Markets in Financial Instruments) Regulations, 2007.

An updated version of MiFID, known as MiFID II, is due to apply in the EU from January 3, 2018, with member states set a deadline of July 3, 2017, for transposing the new requirements into their domestic legal and regulatory frameworks.

The Alternative Investment Fund Managers Directive (AIFMD)

In the funds sphere, Gibraltar has transposed the AIFMD (Directive 2011/61/EU) via the Financial Services (Alternative Investment Fund Managers) Regulations 2013. With the implementation of the AIFMD, all EU funds will either be UCITS (Undertakings for Collective Investment in Transferable Securities – see below) or Alternative Investment Funds. Consequently, the AIFMD has wide scope, covering a range of Gibraltar fund structures, including Experienced Investor Funds, Authorized Funds, Private Funds, and some Recognized Funds. The AIFMD was introduced to improve oversight of funds marketed to EU consumers and establishes commonality in the requirements that govern the authorization and supervision of AIFM's within the EU.

Undertakings for Collective Investment in Transferable Securities IV (UCITS IV)

The original UCITS Directive aimed to offer greater business and investment opportunities for both industry and investors by integrating the EU market for investment

funds. In so doing, it set out a harmonized regulatory framework for investment funds that invest in certain classes of assets, providing high levels of investor protection and a basis for the cross-border sale of these funds. UCITS IV aims to develop and enhance this framework created for UCITS.

UCITS IV came into effect on July 1, 2011, when it recast the original UCITS Directive 85/611/EEC. UCITS IV has been implemented in Gibraltar via the Financial Services (Collective Investment Schemes) Act 2011 and five sets of regulations.

Solvency II

The Solvency II Directive came into effect on January 1, 2016, introducing a new supervisory framework to harmonize insurance and reinsurance regulations and establish a single market for the insurance sector in the EU. It establishes a revised set of EU-wide capital requirements and risk management standards, which will be consistently applied across the bloc. Solvency II has been transposed into Gibraltar law by the Financial Services (Insurance Companies) (Solvency II Directive) Act, which came into force on January 1, 2016.

The Capital Requirements Directive

Another important piece of EU legislation largely transposed into Gibraltar law is the Capital Requirements Directive. This stipulates the minimum amount of "own funds" that credit institutions and investment firms must have in order to cover the risks to which they are exposed. The aim is to ensure the financial soundness of these institutions, the protection of depositors and clients, and the stability of the financial system.

Significantly, harmonized capital requirements are a key component in the single market in financial services. The mutual recognition of requirements is the basis for banks' and investment firms' "single market passport" allowing them to operate throughout the EU on the basis of approval by the appropriate regulatory authority in their own member state.

The Consumer Credit Directive

Gibraltar has also transposed the EU Consumer Credit Directive (2008/48/EC) into local legislation through the Financial Services (Consumer Credit) Act 2011 with effect

> from June 16, 2011. The purpose of Directive 2008/48/EC is to "harmonize certain aspect of the laws, regulations and administrative provisions of the member states concerning agreements covering credit for consumers."

These passports have helped Gibraltar to thrive. Access to the EU single market in services represents about 10 percent of the territory's financial and other services businesses, and in total, the financial, e-commerce, and e-gaming sectors account for 45 percent of the jurisdiction's GDP. Indeed, in his 2016 Budget speech, delivered on July 5, 2016, Chief Minister Fabian Picardo argued that Gibraltar is now "the most attractive commercial environment in the Mediterranean." [7]

Evidently then, the territory has much to lose from any restrictions on its access to the EU financial markets. And this knowledge doubtless led Gibraltarians to vote almost unanimously in favor of remaining part of the EU when the territory took part in the EU membership referendum alongside the UK in June 2016.

But the UK ultimately voted to leave the EU, so where does this leave Gibraltar? The only answer that can be supplied now is that the jurisdiction is in a very uncertain place.

Given the potential negative impact of Brexit on Gibraltar, the UK House of Commons Foreign Affairs Committee proposed in a report published prior to the referendum that "the UK ought therefore to opt to pursue a bespoke arrangement, including a comprehensive Free Trade Agreement taking into account the interests of Gibraltar, the other Overseas Territories and the Crown Dependencies." [8] The Gibraltar Government also received assurances from the UK Foreign Secretary in meetings leading up to the referendum, with both countries agreeing that "remaining in a reformed European Union would ensure both Gibraltar and the UK were stronger, safer, and better off. It would give Gibraltar and Gibraltarians the best possible chance to continue building their remarkable success story." [9]

In March 2017, Gibraltar's Government gave an upbeat assessment following a recent meeting with UK ministers to discuss the implications of the UK leaving the EU, describing the talks as "positive and constructive," and including a "lengthy and detailed discussion" of the issues.[10]

But can an outcome really be achieved whereby Gibraltar remains, for all intents and purposes, in the EU, but the UK doesn't? Given the democratic will that was expressed by Gibraltar's voters on referendum day, it would seem an injustice if Gibraltar were forced out of the EU against its

will, and an outcome advantageous to both sides would not appear to be out of the question. But the issue is complicated considerably by the presence of a third party in this matter: Spain.

Gibraltar And Spain

Spain's historical claim to the Rock has cast something of a cloud over the jurisdiction, and Gibraltar's constitutional status has been an almost constant source of friction in relations between the UK and Spain. And it is a claim that Spain has pursued aggressively in modern times. Yet, despite various attempts at some kind of agreement acceptable to all three sides, no resolution has been possible.

Importantly, Spain has also challenged Gibraltar's fiscal autonomy on numerous occasions, resentful of the presence of a "tax haven" on its doorstep – it was claimed in 2014 that Spain forgoes EUR1bn (USD1.1bn) in tax revenue each year as a result of Gibraltar's low-tax regime.[11] While Spanish influence in the EU has indirectly brought about changes to Gibraltar's corporate tax system, it has not yet succeeded in neutralizing the jurisdiction's tax advantages; one line of argument that it pursued unsuccessfully was that Gibraltar should form part of the UK for tax purposes, a move that would neutralize many of the territory's tax advantages.

Unsurprisingly, the overwhelming majority of Gibraltar's population wish to retain the constitutional status quo, and a resounding 99 percent of voters rejected a proposal for joint sovereignty with Spain in a referendum staged in 2002. However, since the UK voted narrowly for Brexit on June 23, Spain has apparently been emboldened in pursuing its constitutional claims on the Rock, and has seen an opportunity to dangle the carrot of continued access to the EU single market in return for the transfer of sovereignty from the UK to Spain.

Indeed, a Spanish Government report leaked to *El Pais* in May 2017 suggests that Spain could take a hard line in the upcoming Brexit talks, threatening to veto any Brexit agreement if its demands for joint sovereignty aren't met. The Government complains in the document that Gibraltar has gained a position of "unjustified privilege" since Spain joined the EU in 1986 (when it accepted the Gibraltar situation as a condition of its membership), having "developed its own extremely permissive regime where tax, customs and the establishment of companies are concerned, which in practice has converted it into a tax haven." [12]

Conclusion

The UK Government has indicated that it will fight Gibraltar's corner in the Brexit negotiations, but time is limited; the two-year deadline has already been triggered, with no substantive talks having yet been held. So, can the UK really afford to get caught up in potentially acrimonious discussions with Spain over the future status of Gibraltar? Not that it is being suggested here that the UK would abandon Gibraltar to its fate with Spain, but the issue is one critical to the outcome of the Brexit talks, as well as the future of Gibraltar's finance center.

Endnotes

1 http://www.gibraltarlaws.gov.gi/articles/1983-13o.pdf
2 http://www.gibraltarlaws.gov.gi/articles/2010-21o.pdf
3 http://www.gibraltarlaws.gov.gi/articles/2005-72o.pdf
4 http://www.gibraltarlaws.gov.gi/articles/2006-32o.pdf
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7 https://www.gibraltar.gov.gi/new/sites/default/files/press/2016/Topical%20Speeches/20160705%20BUDGET%202016%20CHECKED.pdf, at p. 2.
8 https://www.publications.parliament.uk/pa/cm201516/cmselect/cmfaff/545/54507.htm, at para. 17.
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11 http://www.thelocal.es/20140820/gibraltar-slams-spains-lost-tax-claims
12 http://politica.elpais.com/politica/2017/05/02/actualidad/1493732282_489108.html (in Spanish).

Topical News Briefing: Accommodating The Unconventional

by the Global Tax Weekly Editorial Team

For far too many decades, some might feel, governments have tried their hardest to fit the smooth round edges of the digital world into the tight squared edges of long established tax laws. And just as they begin to settle into a pattern of normality, along comes another incarnation to test their mettle, the latest being the so-called "sharing economy."

As reported in this week's issue of *Global Tax Weekly*, from June 1, Airbnb will pay to the Mexico City authorities a 3 percent tax on bookings, the first such tax to be agreed for online accommodation brokerage services in Mexico. The move reportedly brings the accommodation service into line with tax rules faced by hoteliers.

This is nothing new for Airbnb, which has already reached similar agreements with other authorities elsewhere in the world.

However, the question arises: is occasionally renting out a room in your home, or your entire home, the same as running a hotel business? Where is the line drawn? And is there a difference if such service is provided independently, or through an organization like Airbnb?

Naturally, where additional income earned is concerned, tax authorities are likely to want their cut, which is only fair within the spirit of most income tax laws. Quite how such income should be treated – personal, business, or otherwise – is another matter.

It is a tax conundrum countries are having to wrestle with. For example, the UK on the one hand has introduced a GBP1,000 annual tax allowance for income derived from property, such as renting out a driveway for commuter car parking services. It has also introduced an additional GBP1,000 annual tax allowance for earnings from small-scale online sales of goods or services, such as via eBay. But on the other hand, another well-known "sharing" business in the rapidly growing gig economy, Uber, has recently come under fire on employment law. Are Uber drivers self-employed, or employees? Similar legal challenges have arisen over courier service drivers.

The employment question is an important one for tax purposes, as what may be regarded as "bogus" employment could be seen as an attempt to avoid employment taxes such as PAYE and

social security tax. But what is truly "bogus," as compared with an individual's lifestyle choice to be their own boss, and to dictate their own hours and terms?

Over in Canada, and Uber has again been targeted by the tax authorities there, over goods and services tax/harmonized sales tax (GST/HST). Self-employed taxi drivers are required to register for, collect and remit GST/HST from their fares, right from the first Canadian dollar. But is Uber a taxi firm, or a technology firm? And should its drivers be classified as employed drivers who charge their fares direct to the firm, or self-employed taxi drivers working via the tech firm and subject to GST/HST in their own right? The Government answered this question by announcing in its 2017 Budget that the rules will be aligned to bring Uber's fares into the GST/HST charge.

These are merely a few of many examples where governments are having to look at the developing digital economies within and outside their borders, and where they fit into their tax rules. The real task, however, is getting the balance right between innovation, healthy competition, and fair taxation. But with so many lines blurred between the digital and "real" business worlds, it remains questionable whether governments are managing to achieve this.

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Mexico: An Attractive Destination For French Companies

by Mario Alberto Gutierrez and Clemence Siavellis, PwC, Mexico

Introduction

Over the last decade, Mexico has attracted interest as an investment destination for French companies. Also, trade exchanges between France and Mexico have been increasing continuously since 2009, and reached a record level in 2015, achieving EUR5.6bn (USD6.08bn), 30 percent more than in 2014.[1]

To date, France is Mexico's fifteenth biggest trading partner and fifth European partner. Around 500 French companies are currently established in Mexico, covering a wide range of industries. The top five sectors in terms of sales are aeronautic, pharmaceutical, communications equipment, cosmetics and perfumes, and electronic components.[2]

Economic developments between the two countries have been greatly facilitated by the entry into force in 2000 of a free trade agreement between Mexico and the European Union (EU), the first of its kind in Latin America, reducing substantially the tariff and non-tariff barriers to free trade between the two regions. Among other developments, this agreement allowed for full trade liberalization for industrial products [3] and liberalization for services (notably for financial services).

Furthermore, the growing interest for Mexico can be also explained by the opening of the Mexican market over the last decade, which has created unprecedented opportunities for foreign companies to invest in Mexico. On top of all of the above, the provisions of the double tax treaty (DTT) signed on November 7, 1991, between France and Mexico creates a favorable tax environment for bilateral investment.

The Opening Of The Mexican Market

Historically, the main focus of foreign investments in Mexico has been the manufacturing industry. In the late 1960s, the Mexican Government adopted a series of tax and customs benefits

favoring the establishment of foreign-owned companies, known as "Maquiladoras," to process and/or assemble imported materials and parts into finished products for re-export to the country of origin or other parts of the world.

Originally established and located by the Mexican border with the United States in the context of the North American Free Trade Agreement, Maquiladoras may now be established anywhere around the country and constitute a key component of the Mexican economy.

Several years ago, the Mexican Government undertook major structural reforms to increase competitiveness in a number of sectors and reduce obstacles to private investment. These reforms encompassed many sectors of the economy with one of the most important related to the energy industry. Indeed, after decades of Government control, the Mexican Constitution was modified to allow wide access to the energy sector to private investors, both local and foreign.

Mexico is now allowed to enter into contracts with private companies for the exploration and production of oil and gas. Also, private companies can now be granted licenses to participate in midstream and downstream hydrocarbon-related activities, as well as electricity generation and its commercialization. In addition, the legal and tax framework have been modified to allow the implementation of these new rules.

It should also be noted that past restrictions on foreign direct investment in the telecommunication sector have been reduced. Indeed, the recent reform authorizes 100 percent direct investment in telecommunication and satellite communications, while radio broadcasting has gone from prior restriction of 0 percent foreign direct investment to a new limit of 49 percent of voting stock.[4] Of course, there are areas that still limit the initial investment of non-Mexicans, for instance law firms, but in most cases, with the proper authorizations, it is feasible to have a majority foreign ownership/investment over time.

An Advantageous Double Tax Treaty In Place With France

Tax treaties are key tools that can provide significant savings in the cost of international transactions. In this regard, the Mexico–France DTT contains several provisions granting a favorable tax treatment for flows between Mexico and France. However, in light of the OECD's BEPS actions, it is obvious that the DTT should apply so long as it is not used to create opportunities for non-taxation or reduced taxation for transactions without proper substance or business purpose.

Capital gains

According to Article 13 of the DTT, capital gains derived from sales of shares (except for real estate companies) are only taxable in the country of residence of the transferor.

These provisions appear very favorable when the transferor is a French resident. Indeed, in such cases, Mexico is not entitled to levy any taxes (which could range from 25 percent on gross proceeds or 35 percent on net gain, to the extent some pre-closing requirements are met) under Mexican domestic law.

Additionally, tax treatment of the gain in France is likely to be favorable when the shares benefit from the participation exemption regime, providing an 88 percent exemption (leading to an effective taxation of 3.99 percent) for transfers of shares held for at least two years and qualifying as controlling shares.

Interest and royalties

The protocol to the DTT contains "most-favored nation" clauses, allowing France to apply the most favorable withholding tax rate granted by Mexico to other OECD members on royalties and interest. In practice, these clauses allow France to benefit from the lowest rates that can apply under the Mexican treaties.

Examples of other DTTs providing for lower rates include the Mexico–Ireland DTT signed in 1998, in which the withholding tax rate on interest can be limited to:

- 5 percent on the gross amount of interest if the effective beneficiary is a bank or an insurance company or if the interest arises from bonds and stocks regularly and substantively negotiated on a regulated exchange;
- 10 percent on the gross amount of interest in any other cases.

For royalties, following the signature of the Mexico–Sweden in 1992, withholding tax rate has been reduced to 10 percent (compared to the 15 percent provided by the Mexico–France DTT).

In addition, in the context of a group, France's "patent box" regime can be taken advantage of, allowing qualified intellectual property (IP) income and capital gains from qualified IP to be taxed at a reduced 15 percent rate of corporate tax (instead of the standard rate of 33.33 percent). This is, however, subject to the "nexus approach" under the BEPS project, whereby the activity related to the development of IP under the regime must predominantly take place in France.

Dividends

Under the Mexican Tax law, the distribution of profits or dividends generated as from 2014 made to a non-Mexican tax resident is in principle subject to a 10 percent withholding tax calculated on the gross amount of the dividends. This tax must be withheld by the company distributing the dividends and is considered to be a definitive tax payment.

However, based on Article 10 of the Mexico–France DTT, no withholding tax applies on dividend distributions when more than 50 percent of the shares of the recipient corporation are owned by residents of France. In the opposite case, the withholding tax should not exceed 5 percent so long as the party receiving the dividend is the effective beneficiary of said dividend.

If the provisions relating to dividends appear less favorable than those provided in other DTTs, the advantage of the Mexico–France DTT lies in its conditions for application.

Indeed, the latter retains the "principal purpose test" anti-abuse rule, which allows in principle the application of the DTT to any residents within the meaning of Article 4.[5] This approach contrasts significantly with DTTs containing a "limitation on benefits" clause, since in these cases the benefit of the DTT is limited to residents fulfilling additional requirements. For example, under the Mexico–US DTT, this clause (Article 17) provides that taxpayers should demonstrate their "qualifying residents" [6] status and that they fulfill some ownership requirements.

Under the Mexico–France DTT, provisions should be denied only when the principal purpose of a transaction or an arrangement is to secure a tax benefit, and obtaining such benefit would be contrary to the object and purpose of the relevant provisions of the treaty.[7] In this sense, Articles 11 (interest) and 12 (royalties) specify expressly that the provisions are not applicable when a transaction or an arrangement is conducted "with the main intention of obtaining benefit from the[se] article[s]."

In the same way, the DTT refers to the "effective beneficiary" [8] concept to prevent an improper use of the tax treaty where the apparent recipient of income is not in fact the effective beneficiary.

The Possible Future Of The Mexico–France Relationship

The attractiveness of Mexico resides in various factors, such as its market size, its wealthy and stable economy, its improvements with regard to trade facilitation, as well as its legal and tax frameworks.

To date, few Latin American countries can claim to offer similar conditions for foreign investors. Therefore, France should continue to explore and exploit the advantages of Mexico, and on this path, the recent opening of new key Mexican sectors to foreign investment can be seen as a source of new opportunities.

Indeed, although the relations between Mexico and France have been growing closer in recent years, they are still far from those developed by other European countries such as Spain or Germany.

In addition to the above, the recent election of Emmanuel Macron to the presidency in France should in principle lead to a more active businesses environment. Macron has presented himself as both pro-European and pro-business. Investment managers have hailed Macron's victory as a boost for European equity and bond markets and a critical vote of confidence in the future of the EU.[9] Let's remember that one of the biggest accomplishments of the 39-year-old former investment banker was reforming France's economy (after zero growth for the past three years) towards more business-friendly policies as well as boosting growth.

Endnotes

1 Source: French Customs Services.

2 Source: Regional Economic service of the French Embassy in Mexico.

3 Removal of trade barriers in 2003 for the EU, and in 2007 for Mexico.

4 Article 7 of the Mexican Law on Foreign Investment.

5 It should be noted that the French approach is selected in the Mexico–France DTT since Mexico generally focuses on "limitation on benefits" for anti-abuse rules.

6 In this respect, Article 17 enumerates each category that could be considered as "qualified resident."

7 As defined in the OECD's final report on BEPS Action 6.

8 The DTT contains provisions according to which the reduced rate of withholding tax, or exoneration, provided for dividend, royalties, and interest should apply only to the "effective beneficiary" of those incomes.

9 https://www.ft.com/content/666a0a02-29b1-11e7-bc4b-5528796fe35c (subscription needed).

Amendment In India's Budget 2017 Relating To Thin Capitalization

by Parul Jolly, S.C. Vasudeva & Co., Independent member of Morison KSi

India, being a member of the G20, is very proactive in adopting the recommendations of the Base Erosion and Profit Shifting (BEPS) initiative. Earlier, some Action Points in the BEPS reports – such as the equalization levy, country-by-country reporting, lower rate of taxation for income from patents were introduced into the statute through the Finance Act 2016. Budget 2017 has taken another step towards implementation of the BEPS recommendations, this time under BEPS Action Plan 4, "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments."

The Finance Bill 2017 has inserted a new section 94B in the Income-tax Act, 1961 ("the Act") in line with the OECD's recommendations under BEPS Action 4, to provide that:

> "(1) Notwithstanding anything contained in this Act, where an Indian company, or a permanent establishment of a foreign company in India, being the borrower, pays interest or similar consideration exceeding one crore rupees which is deductible in computing income chargeable under the head 'Profits and gains of business or profession' in respect of any debt issued by a non-resident, being an associated enterprise of such borrower, the interest shall not be deductible in computation of income under the said head to the extent that it arises from excess interest, as specified in sub-section (2):
>
> Provided that where the debt is issued by a lender which is not associated but an associated enterprise either provides an implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise.
>
> (2) For the purposes of sub-section (1), the excess interest shall mean an amount of total interest paid or payable in excess of 30 percent of earnings before interest, taxes,

depreciation and amortization [EBITDA] of the borrower in the previous year or interest paid or payable to associated enterprises for that previous year, whichever is less.

(3) Nothing contained in sub-section (1) shall apply to an Indian company or a permanent establishment of a foreign company which is engaged in the business of banking or insurance.

(4) Where for any assessment year, the interest expenditure is not wholly deducted against income under the head 'Profits and gains of business or profession', so much of the interest expenditure as has not been so deducted, shall be carried forward to the following assessment year or assessment years, and it shall be allowed as a deduction against the profits and gains, if any, of any business or profession carried on by it and assessable for that assessment year to the extent of maximum allowable interest expenditure in accordance with sub-section (2):

Provided that no interest expenditure shall be carried forward under this sub-section more than eight assessment years immediately succeeding the assessment year for which the excess interest expenditure was first computed."

In view of the above, interest expense claimed by an assesse that is paid to its associated enterprise(s) shall be restricted to 30 percent of EBITDA or interest paid or payable to the associated enterprise, whichever is less.

Example: ABC Ltd, a tax resident in Country A, borrows an amount from XYZ Ltd, a tax resident of Country X. The corporate tax rate in Country A is 35 percent and in Country X is 15 percent. On the interest expenditure, ABC Ltd would be able to claim deduction and reduce tax liability at a rate of 35 percent; however, XYZ Ltd shall pay tax at the rate of 15 percent on the interest income. Hence, the group will be able to save tax of 20 percent on the interest income, thus shifting profits and eroding the base in the form of reduction of tax base in country A.

The rationale behind the amendment is that companies are typically financed through a mix of debt and capital. Dividend paid on equity is not tax deductible, unlike interest on debt. Therefore, debt is often a more tax-efficient method to finance than equity, and multinational groups are

often able to structure their financing arrangements to maximize this benefit. Thus, this amendment aims to control this cross-border shifting of profit through excessive interest payments.

Though the amendment is proposed to protect the country's tax base, section 94B is not very well drafted and could result in litigation and undue disadvantage to the assessees. Some observations in this regard are:

- From the reading of this section, any payment of interest or similar consideration that is deductible under the head "Profits and gains of business or profession" shall be included for determining the interest claim. The term "similar consideration" has not been defined. Hence, it is not clear what expenses are covered by these provisions.
- The section does not give grandfathering provisions for existing debts.
- The provisions include both implicit and explicit guarantees, although insisting on implicit guarantees would unfairly burden a taxpayer's genuine business transactions.
- Allowable interest expenditure based on EBIDTA would impact industries that are cyclical in nature, as well as loss-making start-ups in their initial years.

While these new provisions have been introduced as a first step in tackling the challenge of BEPS, the amendment will likely result in litigation, thus defeating the entire purpose of the amendment. The rule for "limitation on interest deduction" has already been implemented by developed countries such as Australia, China, France, Germany, Japan, the Netherlands, New Zealand, Russia, Sweden, the UK, and the US. Imposing the same rules on a developing nation like India at this stage may be an impediment to growth. Furthermore, it does not take account of certain industries that are financed through debt, such as large infrastructure projects. A distinction should be made between cases where there is an element of profit shifting as compared to genuine cases.

ISSUE 236 | MAY 18, 2017

Non-Resident Minority Shareholder Found To Have De Facto Control Of Corporation

by the Tax Topics Editorial Team

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In the recently decided *Aeronautic Development Corporation v. The Queen*,[1] a Canadian corporation was incorporated by a US resident, and 46 percent of the shares of the Canadian corporation were owned by a US corporation controlled by that US resident. The Canadian corporation entered into a Development Agreement with the US corporation under which the Canadian corporation agreed to provide services necessary to complete the prototyping and certification of an amphibious aircraft.

The Canadian corporation had claimed refundable scientific research and experimental development ("SR&ED") credits in respect of expenditures incurred in relation to that project. Its claim for SR&ED credits was denied on the basis that the taxpayer was not, as required, a Canadian-controlled private corporation.

That conclusion was based on the Minister of National Revenue's view that a non-resident shareholder exercised control in fact (*i.e.*, *de facto* control) over the taxpayer at the relevant times. The taxpayer appealed that assessment, arguing that the provisions of the Income Tax Act dealing with *de facto* control did not apply because the non-resident shareholder did not have any direct or indirect influence that, if exercised, would have resulted in *de facto* control of the taxpayer.

The appeal was dismissed. The Court cited the test formulated by Justice Sexton in *Silicon Graphics* that for there to be a finding of *de facto* control:[2]

> "a person or group of persons must have the clear right and ability to effect a significant change in the board of directors or the powers of the board of directors or to

> influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors."

The respondent in *Aeronautic Development Corp.* had argued that the non-resident individual, directly and through his wholly owned US company, exercised such *de facto* control through economic influence derived from intellectual property ("IP") rights contained in the Development Agreement. The Court held that economic influence was indeed a factor to be considered in a *de facto* control analysis. It further held, however, that in order to reach a conclusion that an entity had *de facto* control, the evidence had to show that the ability of that entity to affect the economic interests of the voting shareholders was such that the Court could discern that it would be unlikely that the shareholders would exercise their voting rights independently of the controller's wishes.

To make that determination, the Court reviewed the circumstances of the parties' dealings with one another. It noted that the appellant corporation had only nominal share capital and that it was consequently dependent on the cash flow provided to it by the non-resident corporate shareholder, which was its sole client.

The terms of the Development Agreement between the parties were dictated by the non-resident individual. In addition, the equipment used by the appellant was owned by the non-resident corporate shareholder and the appellant did not own the rights to the IP resulting from its work. Further, the income arising from the agreement between the parties was the appellant's sole source of revenue.

Overall, the Court concluded that it was unlikely the Canadian resident shareholders would have exercised their voting rights independently of the non-resident individual's wishes and that, conversely, it was likely that the non-resident individual could have imposed his will on the Canadian resident shareholders with respect to the composition of, or a change in, the board of directors of the appellant. The non-resident individual therefore had *de facto* control of the appellant corporation, which was consequently not a Canadian-controlled private corporation.

In relation to the above, in the recent Canadian federal budget, a provision was introduced to allow all factors to be considered in evaluating *de facto* control, rather than looking at whether or not the factor in question is likely to affect the composition of the board, or its powers, or to exercise influence over the shareholders that have that power.[3]

Endnotes

[1] Appeal case heard in the Tax Court of Canada, Montreal, Quebec (2017 TCC 39).

[2] [2002] FCA 260, at para. 67; affirmed in ***Québec Inc. v. Canada***, 2004 FCA 23.

[3] http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf, at p. 200.

Topical News Briefing: Nailing Tax Colors To The Party Mast

by the Global Tax Weekly Editorial Team

Many would be forgiven for thinking that the upcoming UK election is not so much, to coin the now oft-used phrase, about the economy, stupid, as about Brexit. And yet, the economy and Brexit are, of course, intrinsically linked. Both main parties – the Conservatives (better known as the Tories) and Labour – have said Brexit will go ahead; the fight, however, is over the type of Brexit (hard? soft? sunny-side up?) and how the country can forge ahead in a wider, post-EU-membership world.

The Tories' aim is, it appears, not to rock the boat too much. Prime Minister Theresa May had already declared that Brexit will be a hard one, and is sticking by that in her election campaign. In terms of tax policy, so far she has said value-added tax will not rise, but has remained generally low key on announcements regarding personal income tax and National Insurance (social security tax) contributions, which the previous prime minister, David Cameron, and his Chancellor, George Osborne, had legislated not to rise during the then current parliament (until 2020). With a snap election and a new mandate, however, could this law be reversed to create some budgetary wriggle room?

Labour, meantime, had stated no tax rate rises for those earning under GBP80,000 per year; its manifesto launched on May 16 has given further clarity by stating a 45 percent rate from GBP80,000, and 50 percent from GBP123,000. VAT would not increase. The party would also aim to take a softer tone in negotiations with the EU, to keep the UK in the Single Market in some way.

The two parties are clearer when it comes to corporation tax. The Tories will stick with the already legislated rate reductions, from 20 percent to the current 19 percent last April, with further reduction to 17 percent from April 2020. Lower rates have been mooted depending on the type of Brexit achieved.

Labour meanwhile, as reported in this week's issue of *Global Tax Weekly*, has said it would instead gradually increase the standard corporate tax rate to 26 percent from 2020/21, plus surcharges

of up to 5 percent on high salaries, and a financial transactions tax on the financial sector just for good measure.

With the Tories (or rather, Theresa May) still ahead in the polls, the general view might be (when also considering its proposals for nationalizing various industry sectors) that Labour is nailing its former Socialist colors very much to its mast in what it sees as an appealingly populist move – but not without concerns from economists, particularly over the proposed corporate tax increases.

The Institute for Fiscal Studies notes that an initial upswing in revenues of around GBP19bn could be offset in the medium to long term by companies investing abroad. The Institute of Economic Affairs points to the current global trend for cutting corporate tax rates; indeed, recently, when the proposal was first announced, one BBC commentator questioned a Labour spokesperson on how such an increase could sit competitively with a potentially reduced US corporate tax rate of 15 percent under President Trump's plans, and neighboring Ireland's 12.5 percent rate.

Still, just three weeks to go to find out whether the electorate can be swung left to Labour; or whether as predicted a cold, hard Brexit will win the Parliament for the Tories with a larger mandate. Then again, judging by polls in certain other recent elections, don't count all your chickens just yet.

New US Trade Representative To Begin NAFTA Push

With the appointment of Robert Lighthizer as the US Trade Representative (USTR), the United States is to soon engage with Canada and Mexico to renegotiate the North American Free Trade Agreement (NAFTA).

His appointment has set in motion a process that will mean that talks to renegotiate the deal could begin in as few as four months.

Under Trade Promotion Authority, which would enable the Government to submit to Congress an amended NAFTA text for a yes or no vote, Lighthizer must meet with four congressional committees and then formally notify Congress of the Administration's intention to begin talks. There would then be a 90-day consultation period, after which talks with Canada and Mexico could begin.

Mexico Discusses US Trade Deficits Ahead Of NAFTA Review

The Mexican Government has responded to the US's request for comments on its investigation into trade deals wherein the US runs significant trade deficits.

In its response, the Government argued that tariff rates are unlikely to be the reason behind the US running a "moderate" trade deficit under the North America Free Trade Agreement (NAFTA) with Mexico and Canada. It cited a recent article from the Peterson Institute for International Economics which said "tariffs and trade barriers have little or no correlation with trade deficits." It noted fiscal deficits and currency manipulation (to depreciate foreign currencies) have a strong and positive correlation with trade deficits.

Nevertheless, the Mexican Government said that, under NAFTA, US exporters have gained significant tariff preferences. "Without NAFTA," the Mexican Government said, "the average tariff on Mexican exports to the United States under the Most Favored Nation (MFN) treatment would be 3.5 percent, whereas the average tariff on US exports to Mexico would be 7.1 percent. Moreover, Mexico's bound rates under the WTO average 36.2 percent, well above its applied MFN tariffs; while US bound rates average 3.5 percent, virtually the same as its applied MFN tariffs. Therefore, NAFTA not only provides certainty to US exporters regarding applied tariffs, it also protects them from much larger potential tariff increases in Mexico."

Concluding, the Government said NAFTA has fostered a symbiotic relationship, with Mexico enabling the US manufacturing industry,

rather than substituting it. It cited the automotive, electronics, agriculture, and energy industries as examples of where Mexico and the US have developed mutually beneficial supply chains that have boosted both countries' competitiveness.

Canadian Business Council Concerned Over NAFTA

The head of the Business Council of Canada (BCC) has written to Prime Minister Justin Trudeau to express concern over the future of Canada's trading partnership with the US and Mexico.

In his letter, BCC President and CEO John Manley said the prospect of a new round of North American Free Trade Agreement (NAFTA) negotiations "represents both a risk and an opportunity for Canada."

According to Manley, at a minimum, the Canadian Government must seek to "protect the framework of rights, benefits, and privileges that our companies and citizens currently enjoy under NAFTA." He stressed that any agreement "must be based upon reciprocal access and treatment."

Manley said that while the BCC supports the modernization of outdated NAFTA provisions and the application of dispute resolution provisions, it does not support country-specific rules of origin. He added that the BCC is concerned the US could seek to revive or develop new trade enforcement tools "that would authorize the unilateral imposition of duties or trade remedies without resorting to dispute settlement under NAFTA or through the World Trade Organization."

Manley believes that any new trade enforcement measures under consideration by a member of NAFTA should be discussed during the negotiations, and that any new mechanism established must ensure "coordination, consultation, and resolution prior to the imposition of unilateral remedies."

In spite of his reservations, Manley also claimed that there are opportunities in a number of areas to update NAFTA. He said its provisions on labor mobility and customs procedures are outdated and should be amended to reflect current business practices and anticipate future needs.

Moreover, Manley said that progress on regulatory cooperation could result in substantive savings for Canadian and US consumers. He recommended that Canada and the US make the existing Regulatory Cooperation Council a permanent body, which would work closely with industry to identify areas for harmonization.

Airbnb Agrees To Collect Tax In Mexico City

People who use Airbnb to book accommodation in Mexico City will have to pay a 3 percent tax on bookings from June 1, 2017.

The tax is the first of its kind for online accommodation brokerage services in the country, and was agreed between Airbnb and the government of Mexico's capital city.

The move will bring Airbnb's tax treatment more into line with the tax rules that hoteliers face.

Airbnb is an online service that allows homeowners to rent out their properties for short periods by linking them up with potential guests through its website and apps.

Homeowners and guests using the service pay a commission to Airbnb for each booking.

UK Lawmakers Seek Action On 'Gig Economy Tax Dodge'

The UK Government must close the loopholes that are currently allowing "bogus" self-employment, the UK's Work and Pensions Committee (WPC) has said.

The WPC said that under the gig economy, "there is little to stand in the way" of both workers and businesses opting for a self-employed contractor arrangement to benefit from tax advantages.

It said that introducing an assumption of the employment status of "worker" by default, rather than "self-employed" by default, would protect tax revenues.

The WPC also recommended that the incoming government should set out a roadmap for equalizing employee and self-employed National Insurance (NI) contributions, adding that self-employed people and employees receive almost equal access to all of the services funded by NI, but the self-employed contribute far less.

"Companies in the gig economy are free-riding on the welfare state, avoiding all their responsibilities to profit from this bogus 'self-employed' designation while ordinary taxpayers pick up the tab," said Frank Field, Chair of the WPC.

Australian Budget Targets Housing, Tax Compliance

Australian Treasurer Scott Morrison's 2017 Budget focused on measures to cool the housing market and crack down on tax avoidance.

Morrison handed down the Budget on May 9. He said the budget would return to a surplus in 2020/21 and remain in surplus over the medium term.

The Budget included a host of measures intended to tackle the issue of rising housing costs. "There are no silver bullets to making housing more affordable. But by adopting a comprehensive approach, by working together, by understanding the spectrum of housing needs, we can make a difference," Morrison said.

In particular, the Government will introduce a range of new rules for foreign investment in Australian housing. It will prevent foreign and temporary residents from claiming the main residence capital gains tax (CGT) exemption when they sell property in Australia, effective from Budget night. Foreign and temporary tax residents who hold property on Budget night can continue to claim the exemption until June 30, 2019.

The Government will increase the foreign resident CGT withholding rate from 10 percent to 12.5 percent, and reduce the property price threshold for the regime from AUD2m (USD1.5m) to AUD750,000. The changes will apply from July 1, 2017.

Foreign owners of residential property will face an annual charge if the property is not occupied or available to rent for at least six months in each year. The annual vacancy charge will apply to foreign persons who make a foreign investment application for residential property from 19:30 AEST on Budget night. The charge will be equivalent to the foreign investment application fee which was paid at the time of application.

On the housing front, the Government will also:

- Encourage older homeowners to free up housing stock, by allowing "downsizers" over the age of 65 to make a non-concessional contribution of up to AUD300,000 into their superannuation fund from the proceeds of the sale of their principal home;
- Improve the integrity of the negative gearing system by disallowing all travel deductions related to inspecting, maintaining, or collecting rent for rental property from July 1, 2017;
- Increase the CGT discount from 50 percent to 60 percent for resident individuals who invest in qualifying affordable housing, effective January 1, 2018; and

- Allow future voluntary contributions to superannuation made by first-time home buyers from July 1, 2017, to be withdrawn for a first home deposit, along with associated deemed earnings.

The Budget contained the following tax integrity measures, under which the Government will:

- Provide AUD28.2m to the Australian Taxation Office (ATO) to target serious and organized crime in the tax system, thereby extending an existing measure by a further four years to June 30, 2021;
- Tackle hybrid mismatches that occur in cross-border transactions relating to regulatory capital known as Additional Tier 1 (AT1) by: preventing returns on AT1 capital from carrying franking credits where such returns are tax deductible in a foreign jurisdiction; and where the AT1 capital is not wholly used in the offshore operations of the issuer, requiring the franking account of the issuer to be debited as if the returns were franked;
- Extend the taxable payments reporting system (TPRS) to contractors in the courier and cleaning industries from July 1, 2018;
- Provide AUD32m for one year of additional funding for ATO audit and compliance programs to better target black economy risks;
- Prohibit the manufacture, distribution, possession, use or sale of electronic point of sale sales suppression technology and software;
- Extend the Multinational Anti-Avoidance Law to structures involving foreign partnerships or trusts;
- Amend the small business CGT concessions to ensure they can only be accessed in relation to assets used in a small business or ownership interests in a small business; and
- Require purchasers of newly constructed residential properties or new subdivisions to remit the goods and services tax (GST) directly to the ATO as part of settlement.

The Budget also commits the Government to:

- Introduce a new six-basis point levy on the five largest banks with assessed liabilities of AUD100bn or more from July 1, 2017;
- Extend the 2015/16 Budget measure providing an instant asset write-off provision for small businesses, to allow small businesses to immediately deduct the business portion of most assets if they cost less than AUD20,000 and were purchased between 19:30 AEST on May 12, 2015, and June 30, 2018;
- Introduce an annual foreign worker levy of AUD1,200 or AUD1,800 per worker per year on temporary work visas, and a AUD3,000 or AUD5,000 one-off levy for those on a permanent skilled visa;

- Align the GST treatment of digital currency with money from July 1, 2017; and
- Increase the Medicare levy low-income threshold for singles, families, and seniors and pensioners from the 2016/17 income year.

Numerous GST Changes Confirmed In Australian Budget

The Australian Government announced or confirmed numerous changes to the goods and services tax (GST) regime in this year's Budget.

First, from July 1, 2018, the Government will require purchasers of newly constructed residential properties or new subdivisions to remit the GST directly to the Australian Taxation Office (ATO) as part of settlement.

Under the current law (where the GST is included in the purchase price and the developer remits the GST to the ATO), some developers are failing to remit the GST to the ATO despite having claimed GST credits on their construction costs.

Next, the Government has announced that it will align the GST treatment of digital currency (such as Bitcoin) with money from July 1, 2017.

Digital currency is treated under current rules as intangible property for GST purposes. Consequently, consumers who use digital currencies as payment can effectively bear GST twice: once on the purchase of the digital currency, and again on its use in exchange for other goods and services subject to GST.

The measure will ensure that purchases of digital currency are no longer subject to the GST.

The Government said removing double taxation on digital currencies will remove an obstacle for the Financial Technology (Fintech) sector to grow in Australia.

Finally, the Budget confirms that the GST law will be amended to reflect the introduction of a GST reverse charge for those buying gold, silver, and platinum. This requires that the buyer must remit the GST to the tax authority, rather than to the seller, in a move intended to mitigate GST fraud where suppliers collect the GST but fail to pass it on to the ATO.

Australian Banks Criticize New Levy

The Australian Bankers' Association (ABA) has condemned the Government's proposed new bank levy as a "direct attack on jobs and growth."

In his 2017 Budget, Treasurer Scott Morrison announced a six-basis point levy on banks with liabilities of more than AUD100bn (USD73.7bn), noting that "[this] levy will only affect our five largest banks". Customer deposits of less than AUD250,000 and additional

capital requirements imposed on the banks by regulatory authorities will be excluded from their assessed liabilities.

Morrison said: "This represents an additional and fair contribution from our major banks, is similar to measures imposed in other advanced countries, and will even up the playing field for smaller banks."

The levy will enter into force on July 1. The Government expects the measure to raise AUD6.2bn over the forward estimates period.

Responding to the announcement, Anna Bligh, Chief Executive of the ABA, said: "It is a tax that will hit Australians by hurting investment and could have unintended consequences. Contrary to the Government's claim that the tax will only be levied on banking liabilities, the reality is that it will affect the entire banking system."

Bligh added it was disappointing that the Government had not consulted with the industry on the new tax.

According to Bligh, banks are the largest corporate taxpayers in Australia. She said: "In 2016, banks paid around AUD11.5bn of income tax. This new tax represents in the vicinity of a 10 percent increase in tax."

She argued that "banks are not unusually profitable," and said in 2016 the average return on equity of Australia's four major banks was just under 14 percent. This "ranked them around the middle of the returns of the top 50 listed companies," she explained.

Morrison has defended the measure in his post-Budget interviews. Answering questions on WSFM radio on whether the levy would be passed on to customers, he said: "Well this is a very small levy on the banks: its 0.06 of a percent. So if banks are going to go around and hit their customers, then what they'll be doing is what they want to do anyway and I think that would be a very dishonest thing for the banks to do, and I think that would just confirm in everybody's minds why they're so angry at the banks."

UK Labour Would Hike Corporation Tax

The UK opposition Labour Party said it would increase corporation tax to cover higher funding for education if it wins the upcoming election.

The Party said that from next tax year it would increase the headline rate of corporation tax from 19 percent to 21 percent, and again to 24 percent in 2019/20 and 26 percent in 2020/21.

It added that the small profits rate, payable by firms with profits below GBP300,000 (USD388,499), would rise to 20 percent in 2018/19, and 21 percent in 2020/21.

"This will still leave it at the lowest rate in the G7," Labour said.

An early election is set to take place on June 8. Labour is trailing in the polls behind the ruling Conservative Party.

Think Tanks Say UK Corporate Tax Hike Would Be Self-Defeating

Proposals by the UK opposition Labour Party to increase corporation tax would reduce investment from multinational companies, two think tanks have said.

Labour said recently that it would raise the main rate of corporation tax from 19 percent to 26 percent by 2020 – reversing almost all cuts since 2010, when the rate was 28 percent.

The Institute for Fiscal Studies (IFS) said that while the measure could raise around GBP19bn (USD24bn) in the short term, it will raise "substantially less in the medium to long run because companies would respond by investing less in the UK."

The Institute of Economic Affairs (IEA) said the policy would not achieve Labour's aim of rebalancing the tax burden towards the "rich."

"The reality is that everyone benefits when companies are encouraged to invest and create jobs," said Julian Jessop, Chief Economist at the Institute of Economic Affairs. "Indeed, big increases in tax rates rarely translate into big increases in tax revenues, because they undermine growth and incomes for all."

"What's more, with many other countries now planning to cut corporate taxes, Labour would make the UK a much less attractive location for global businesses. This is exactly the wrong signal to send as the economy prepares for Brexit."

Meanwhile, the IEA also questioned Labour's plans to reintroduce a small profits tax for companies with annual profits below GBP300,000

at 20 percent in 2018/19. It would rise to 21 percent in 2020/21.

"The oft-cited justification for having a separate and lower small profits rate is to encourage new business formation and, in particular, entrepreneurship," it said. "However, there is a lack of compelling evidence that levying a lower rate of corporate tax on the basis of companies' profits achieves this aim."

It added that reintroducing the small profits rate would reintroduce unnecessary and unwelcome complexity into the corporation tax system.

Russia Could Hike VAT Rate To 22 Percent By 2019

To fund future tax cuts for companies, the Russian Ministry of Finance has proposed hiking the headline value-added tax (VAT) rate.

Under its newly announced plans, the rate would rise from 18 percent to 22 percent from 2019.

According to the Ministry, revenues from the significant increase would enable Russia to lower social security contributions paid by companies in respect of their employees. The reforms would be revenue-neutral, despite the increase to the VAT rate being 1 percent greater than previously anticipated.

Indian IT Systems Ready For GST

India's Revenue Secretary has said the country's IT systems are ready to properly administer the goods and services tax (GST), to be rolled out across India on July 1.

Hasmukh Adhia said he had been briefed on the Goods and Services Tax Network (GSTN), the central platform for the administration of GST, and about efforts to reach out to Indian firms to educate them on how to comply with the new regime.

According to the Government, of 62,937 tax officials, 24,668 tax officials have been given hands-on training concerning GST registration, payment, and return filing, and the remainder will be trained by June 15, 2017.

Until May 16, the Government is running a pilot with 3,000 taxpayers to test the GSTN system.

According to the Government, so far, as of April 30, 2017, when phase one of enrollment was closed, six million taxpayers out of 8.4 million had enrolled.

Singapore Consults On GST Act Amendments

The Singapore Ministry of Finance has launched a public consultation on draft changes to the Goods and Services Tax (GST) Act, which would be introduced in the GST (Amendment) Bill 2017.

The draft Bill provides for six changes, intended to ease business compliance, clarify existing legislation, or improve tax administration.

First, the changes would extend a GST reverse charge (termed "customer accounting" in Singapore) for GST-registered Real Estate Investment Trusts (REITs) and their Special Purpose Vehicles (SPVs) to movable assets bought together with a non-residential property from

the same seller. The reverse charge switches the obligation to collect and remit GST from the supplier to the recipient, preventing fraudsters from collecting tax on onward supplies and failing to remit such to the tax agency.

Currently, to ease cash flow, customer accounting applies to a GST-registered supplier's sale of non-residential property to a REIT or its SPV. It does not apply to movable assets sold together with the non-residential property. A GST-registered supplier who sells a furnished non-residential property to the REIT or its SPV will have to apportion the selling price into the value of the unfurnished property and that of the movable assets. The change will ease business compliance by dispensing with the need for apportionment.

Second, the GST Act would be amended to provide for basis to implement an "opt-out" approach for digital tax notices, which will be issued as standard.

Third, currently, when Government land is sold with an existing building to be demolished, the GST treatment on whether the supply is exempt or taxable depends on the approved use of the building, which might not reflect the approved use of the land. The change will provide more consistency in tax treatment for this category.

Fourth, the changes would extend the GST reverse charge to prescribed supplies commonly used in fraud schemes. It will be applicable for supplies of mobile phones, memory cards, and off-the-shelf software.

Fifth, the law will be amended to provide for electronic record keeping requirements and an additional requirement for invoice details for selected businesses.

Finally, the law will be amended to provide that the monthly penalty of SGD200 (USD258) for the late submission of GST returns will commence immediately after the filing due date. Currently, a monthly penalty of SGD200 is imposed on outstanding returns starting from one month after the filing due date.

The consultation will run until June 4, 2017.

Hong Kong, Australia Launch Free Trade Pact Talks

Hong Kong and Australia have commenced negotiations on a free trade agreement.

Gregory So, Hong Kong's Secretary for Commerce & Economic Development, said: "Australia is a very important trading partner of Hong Kong. Hong Kong and Australia have respective strengths in different business areas, in which some are complementary to each other. We see tremendous room for us to further our cooperation and deepen our trade and economic liberalization with a view to bringing our economies to new heights."

Hong Kong is inviting input on the terms for the deal, which will include trade tariff reductions, by May 27.

China, Georgia Sign Free Trade Deal

China and Georgia have signed a free trade agreement (FTA), which will remove most tariffs on trade between the two countries.

The FTA was signed on May 14 and is the first FTA signed between China and a Eurasian state. It is anticipated that it will come into effect early next year.

Under the terms of the deal, Georgia will eliminate tariffs on 96.5 percent of tariff lines, and within five years China will remove tariffs on 93.9 percent of tariff lines on products from Georgia.

In 2014, trade volume between the two countries reached USD960m, and Chinese direct non-financial investment in Georgia totaled USD530m. China became the third-largest trade partner and the largest investor in Georgia.

EU, Mexico To Speed Up Free Trade Talks

EU Trade Commissioner Cecilia Malmström has said it should be possible to conclude a modernized trade agreement with Mexico by the end of the year.

Malmström visited Mexico City on May 8–9 for discussions with Mexican Foreign Minister Louis Videgaray and Economy Minister Ildefonso Guajardo.

Following her meeting with Guajardo, Malmström said: "Both sides are committed to concluding these negotiations before the end of the year. This is an ambitious but feasible goal. We want to send a clear signal to the world about the importance of strengthening – not

weakening – the rules that govern international trade."

A fourth negotiating round will take place from June 26 to 30 in Mexico. During the second half of the year, negotiators will meet every month.

The existing trade agreement entered into force in 2000. Since then, trade volumes between the EU and Mexico have tripled. In February 2017, both parties agreed to accelerate the pace of negotiations.

Think Tank Criticizes Canadian Carbon Taxes Implementation

The poor implementation of carbon-pricing schemes by Canada's provincial governments undermines their potential environmental benefits, according to a new report from the Fraser Institute, a think tank.

The Institute said the carbon taxes and cap-and-trade systems introduced in Quebec, Ontario, Alberta, and British Columbia fail to meet the three primary conditions it believes are necessary for such schemes to succeed in reducing greenhouse gas emissions without unduly harming the economy. The conditions are that the system must: replace, and not be in addition to, other emission regulations; be revenue neutral and used to reduce other taxes; and governments cannot subsidize substitutes for carbon-emitting activities.

According to the Institute, "Governments in Canada have shown little intention of implementing carbon taxes under the conditions required to yield efficiency … in short order, carbon pricing has become just another mechanism to fund intrusive and inefficient government manipulation of the economy, while extracting a new revenue stream from our already highly-taxed private sector."

The Institute said the schemes in place in Alberta, Ontario, and Quebec all increase government revenue, and "have been layered on top of existing regulations." All three governments subsidize alternative energy sources. It added that in British Columbia, where the carbon tax is now revenue neutral following a period of net revenue gain for the Government, a range of emissions regulations remain in place.

Report author Kenneth Green, the Institute's senior director of energy and natural resource studies, commented: "Carbon-pricing in Canada doesn't work the way ivory tower economists envision, and has instead become just another tax."

He added: "True carbon-pricing relies on markets – not governments – to identify the best way to manage emissions. As governments in Canada and beyond increasingly tour the benefits of carbon pricing, it is imperative that we understand the practical realities of such systems instead of just discussing the theoretical possibilities."

With the exception of Saskatchewan, Canada's First Ministers agreed last December on a pan-Canadian framework on climate change. In the framework documentation, it is stated that carbon pricing should be one of its central components.

The federal Government has proposed a benchmark for pricing carbon pollution, to be implemented nationwide by 2018. It will permit provinces and territories to implement either a price-based system, or a cap-and-trade system.

OECD Recommends Blueprint For Progressive Carbon Tax

The OECD has published a report that argues that carbon tax schemes, if well-designed, can cut carbon dioxide emissions and also improve the affordability of energy for poor households.

The report proposes that using a third of revenues from well-designed taxes would support low-income families and environmental goals. It noted that carbon taxes are particularly regressive, and therefore they should include provisions to redistribute revenues through subsidies.

The report proposes a best standard that countries considering a carbon tax could adopt to reach environmental goals and lower the cost of energy for low-income households. It proposes increasing taxes on domestic energy use to EUR45 (USD49.8) per tonne of CO2 and EUR1 per gigajoule. This would increase energy prices by 11.4 percent on average for electricity, 15.8 percent for natural gas, and 5.5 percent for heating oil. The report found that transferring a third of the additional revenues resulting from this reform to poor households, by means of an income-tested cash transfer, was sufficient to improve energy affordability across the 20 countries analyzed in the report.

"Energy affordability risk is a serious problem in many OECD countries," said Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration. "Higher energy taxes are a good tool to avert catastrophic climate risks and curb air pollution. Good policy design and the wise use of the additional revenues raised can help improve energy affordability for vulnerable households."

The report will be relevant for South Africa, which is preparing to reintroduce a carbon tax bill that had previously failed to receive support.

Bill To Establish South African Customs Authority Fails Again

Legislation to create a dedicated customs authority in South Africa has again failed to be adopted in Parliament.

Opposition parties reportedly blocked the Border Management Authority Bill because of concerns it would mean the South African Revenue Service would no longer be responsible for the collection of taxes at the border, potentially putting collections in jeopardy.

Although a vote was held in favor of the bill on May 11, there were not enough lawmakers in attendance to seal its passage, after a walkout by opposition parties.

German State Receives 'MaltaLeaks' Data

The German state of North Rhine-Westphalia (NRW) has obtained information which it claims shows how thousands of owners of companies registered in Malta are avoiding German taxes "in a big way."

The state's Finance Department announced on May 10 that it had acquired a flash drive from an anonymous source containing information on 60,000 to 70,000 Maltese companies. It said the structures are linked to individuals living "in almost all countries of the world."

After an initial evaluation of the data, the Department believes that around 1,600 to 1,700 of these companies are connected to taxpayers in Germany.

According to NRW Finance Minister Norbert Walter-Borjans, the information shows that corporations and individuals are using corporate structures registered in Malta "to bypass tax in Germany in a big way."

"Often, these offshore companies are set up to transfer profits or assets abroad … and to hide them in inactive mailbox companies," he continued. "Time and again, the investigators also come across company models that were created with the purpose of bypassing corporate taxes in Germany."

While Malta's headline rate of corporate tax, at 35 percent, is higher than Germany's, foreign investors in Malta can claim a number of tax benefits when locating a holding company there by utilizing the country's large network of double tax avoidance treaties, and its participation exemption and tax imputation regimes.

Under Malta's tax imputation system, when dividends are paid by trading companies to the shareholders, these shareholders are entitled to

claim refunds of 6/7ths of the Malta tax paid by the company, resulting in an effective Maltese tax rate of 5 percent.

According to the NRW Finance Department, tax investigators in the city of Wuppertal will now "systematically evaluate" the data contained in the "Malta list."

Walter-Borjans said that, since 2010, information obtained in electronic format from whistleblowers has resulted in the collection of EUR2.4bn (USD2.6bn) in unpaid taxes in NRW, and EUR7bn for Germany as a whole.

ANDORRA - LATVIA

Negotiations

Andorra and Latvia have begun negotiations on amending their DTA.

BAHRAIN - THAILAND

Signature

Bahrain and Thailand signed a DTA Protocol on April 25, 2017.

BARBADOS - CYPRUS

Signature

Barbados and Cyprus signed a DTA on May 10, 2017.

BRAZIL - VARIOUS

Forwarded

Brazil's Committee on Foreign Relations and National Defense on May 4, 2017, approved a DTA between Brazil and Russia, and a DTA Protocol between Brazil and India.

GHANA - CZECH REPUBLIC

Signature

Ghana and the Czech Republic have signed a DTA.

IRELAND - KAZAKHSTAN

Signature

According to preliminary media reports, Ireland and Kazakhstan signed a DTA on April 27, 2017.

ITALY - BARBADOS

Forwarded

Italy's Chamber of Deputies approved a law to ratify the DTA with Barbados on May 2, 2017.

JAPAN - DENMARK

Negotiations

Japan announced that it had concluded DTA negotiations with Denmark on May 15.

JORDAN - THAILAND

Initialed

Jordan and Thailand agreed the text of a DTA on May 11, 2017.

LATVIA - SINGAPORE

Signature

Latvia and Singapore signed a DTA Protocol on April 20, 2017.

LUXEMBOURG - CYPRUS

Signature

Luxembourg and Cyprus signed a DTA on May 8, 2017.

MEXICO - ARGENTINA

Forwarded

Mexico's Senate on April 27, 2017, approved a DTA and an accompanying Protocol with Argentina.

MEXICO - SPAIN

Signature

Mexico's Senate on April 27, 2017, approved a DTA Protocol with Spain.

PAKISTAN - BULGARIA

Signature

Pakistan and Bulgaria signed a DTA on April 26, 2017.

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

CONFERENCE CALENDAR

THE AMERICAS

STEP Miami 8th Annual Summit

5/19/2017 - 5/19/2017

STEP

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

Key Speakers: Mary A. Akkerman TEP (Lindquist & Vennum LLP), Eduardo Arista TEP (Arista Law), Patricia Arrázola Jaramillo TEP (Akro Legal International), Juan Bonet (Guyer & Regules), among numerous others

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

International Estate & Tax Planning 2017

5/22/2017 - 5/22/2017

Practising Law Institute

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

Chairs: Dean C. Berry (Cadwalader, Wickersham & Taft LLP), Robert Dumont (Principal, Robert Dumont PLLC)

http://www.pli.edu/Content/Seminar/International_Estate_Tax_Planning_2017/_/N-4kZ1z10ox6?ID=289155

The 8th Annual Private Investment Funds Tax Master Class

5/23/2017 - 5/24/2017

Financial Research Associates

Venue: The Princeton Club, 15 West 43rd Street, New York, NY 10036, USA

Key speakers: TBC

https://www.frallc.com/conference.aspx?ccode=B1039

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

Global Transfer Pricing Conference: DC

6/7/2017 - 6/8/2017

Bloomberg BNA

Venue: National Press Club, 529 14th St NW, Washington, DC 20045, USA

Key Speakers:TBC

https://www.bna.com/global-transfer-pricing-dc-2017/

Tax and Immigration Planning and Compliance for High Net Worth Individuals Acquiring US Citizenship, Green Cards and Expatriating

6/12/2017 - 6/12/2017

Bloomberg BNA

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

Key speakers: TBC

https://www.bna.com/expatriation_ny2017/

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

Basics of International Taxation 2017

7/18/2017 - 7/19/2017

Practising Law Institute

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

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), John L. Harrington (Dentons US LLP)

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2017/_/N-4kZ1z10oie?ID=299002

71st Congress of the International Fiscal Association

8/27/2017 - 9/1/2017

IFA

Venue: Winsor Barra da Tijuca, Av. Lúcio Costa, 2630 - Barra da Tijuca, Rio de Janeiro - RJ, 22620-172, Brazil

Key speakers: TBC

http://www.ifa2017rio.com.br/index.php

International Tax Issues 2017

9/11/2017 - 9/11/2017

Practising Law Institute

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

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

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2017/_/N-4kZ1z10p5l?ID=288689

STEP Wyoming Conference 2017

9/15/2017 - 9/16/2017

STEP

Venue: Four Seasons Resort Jackson Hole, Bridger-Teton National Forest, 7680 Granite Rd, Teton Village, WY 83025, USA

Key speakers: Jennifer McCall (Pillsbury Winthrop Shaw Pittman LLP), Simon Beck (Baker & McKenzie LLP), Elizabeth Bawden (Withers Bergman LLP), Michelle Graham (Withers Bergman LLP), among numerous others

http://www.step.org/events/step-wyoming-conference-2017

Basics of International Taxation 2017

9/18/2017 - 9/19/2017

Practising Law Institute

Venue: PLI California Center, 685 Market Street, San Francisco, California 94105, USA

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), John L. Harrington (Dentons US LLP)

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2017/_/N-4kZ1z10oie?ID=299003

Energy Tax Conference: Maximizing Value

9/25/2017 - 9/26/2017

BNA

Venue: Four Seasons Hotel, 1300 Lamar Street, Houston, TX 77010, USA

Key speakers: TBC

https://www.bna.com/energy-tax-conference-2017/

The 24th World Offshore Convention Cuba 2017

10/25/2017 - 10/26/2017

Offshore Investment

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

Key speakers: TBC

http://www.offshoreinvestment.com/event/24th-world-offshore-convention-cuba-2017/

The New Era of Taxation: How to Remain on Top in a World of Constant Evolution

11/30/2017 - 12/1/2017

International Bar Association

Venue: International Bar Association TBC, Buenos Aires, Argentina

Key speakers: TBC

http://www.ibanet.org/Conferences/conf835.aspx

ASIA PACIFIC

The 8th Offshore Investment Conference Hong Kong 2017

6/14/2017 - 6/15/2017

Offshore Investment

Venue: The Conrad Hong Kong, Pacific Place, One Pacific Place, 88 Queensway, Admiralty, Hong Kong

Key speakers: Michael Olesnicky (KPMG), Sharon Ser (Withers)

http://www.offshoreinvestment.com/event/8th-offshore-investment-conference-hong-kong-2017/

STEP Australia Conference 2017

8/2/2017 - 8/4/2017

STEP

Venue: The Langham, 1 Southgate Ave, Southbank VIC 3006, Australia

Chairs: The Hon. Justice Kate McMillan (Supreme Court of Victoria), Professor Rosalind Croucher (Australian Law Reform Commission), Dylan Alcott (Paralympian), The Hon. Tom Gray QC (Retired Justice of the Supreme Court of South Australia)

http://www.step.org/sites/default/files/Australia_2017_Programme_WEB_0.PDF

International Taxation Conference 2017

12/7/2017 - 12/9/2017

IBFD

Venue: ITC Maratha Hotel, Sahar Elevated Rd, Sahar, Airport Area, Andheri East, Mumbai, Maharashtra 400099, India

Chair: Pascal Saint-Amans (OECD)

https://www.ibfd.org/sites/ibfd.org/files/content/pdf/International-Taxation-Conference-2017.pdf

MIDDLE EAST AND AFRICA

IFA – Mauritius 11th Asia/Africa Conference 2017

5/18/2017 - 5/19/2017

International Fiscal Association

Venue: Hotel Sofitel Mauritius L'Impérial Resort & Spa, Wolmar Coastal Rd, Flic en Flac 90517, Mauritius

Chair: Rajesh Ramloll (IFA Mauritius)

http://ifamauritius.org/downloads/Conference%20Programme%202017.pdf

STEP Israel Annual Conference

6/20/2017 - 6/21/2017

STEP

Venue: Dan Tel Aviv Hotel, Ha-Yarkon St 99, Tel Aviv-Yafo, 63432, Israel

Chairs: Meir Linzen (Herzog Fox & Neeman), Dr. Alon Kaplan (Alon Kaplan, Advocate and Notary), Daniel Paserman (Gornitzky & Co.)

http://www.step.org/sites/default/files/STEP%20Annual%20Conference%20program%202017.pdf

WESTERN EUROPE

UK Tax, Trusts & Estates Conference 2017 – Birmingham

5/18/2017 - 5/18/2017

STEP

Venue: Crowne Plaza Birmingham City Centre, Central Square, Birmingham, B1 1HH, UK

Key speakers: Emma Facey (Foot Anstey LLP), Professor Lesley King, Stephen Lawson (Forshaws Davies Ridgway), Denzil Lush, Former Senior Judge of the Court of Protection (England and Wales), Lucy Obrey (Higgs & Sons), Peter Rayney (Peter Rayney Tax Consulting Ltd), Patricia Wass (Foot Anstey), Chris Whitehouse (5 Stone Buildings)

http://www.step.org/tte2017

Non-Dom, Residence & HMRC

6/21/2017 - 6/21/2017

Private Client Tax

Venue: TBC, London, UK

Chair: Jonathan Burt (Harcus Sinclair)

https://finance.knect365.com/non-dom-residence-hmrc/agenda/1

IFRS Foundation Conference: Amsterdam 2017

6/29/2017 - 6/30/2017

IFRS

Venue: Hotel Okura, Ferdinand Bolstraat 333, 1072 LH Amsterdam, Netherlands

Chair: Hans Hoogervorst (IASB)

http://www.ifrs-conference.org/

The 3rd Wealth Planning Conference London 2017

7/5/2017 - 7/6/2017

Offshore Investment

Venue: Marriott County Hall Hotel, London County Hall, Westminster Bridge Rd, Lambeth, London SE1 7PB, UK

Key speakers: TBC

http://www.offshoreinvestment.com/event/3rd-wealth-planning-conference-london-2017/

The 27th Offshore Investment Symposium Oxford 2017

9/3/2017 - 9/9/2017

Offshore Investment

Venue: Jesus College, Oxford, Turl St, Oxford OX1 3DW, UK

Chair: Nigel Goodeve-Docker (Former Solicitor & Former Director at HE Samson Ltd)

http://www.offshoreinvestment.com/event/27th-offshore-investment-symposium-oxford-2017/

International Tax Aspects of Permanent Establishments

9/5/2017 - 9/8/2017

IBFD

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

Key Speakers: Bart Kosters (IBFD)

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

Duets in International Taxation: Single Taxation?

10/5/2017 - 10/6/2017

IBFD

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

Chairs: Prof. Frans Vanistendael (KU Leuven), Prof. Pasquale Pistone (IBFD), Prof. Dennis Weber (ACTL, University of Amsterdam and Loyens & Loeff), Prof. Stef van Weeghel (University of Amsterdam, PWC global thought leader)

https://www.ibfd.org/IBFD-Tax-Portal/Events/Duets-International-Taxation-Single-Taxation#tab_program

ASIA PACIFIC

Australia

In a ruling delivered on April 21, 2017, Australia's Federal Court ruled against Chevron, supporting the Australia Tax Office's assessment of AUD340m (USD256.1m) in taxes and penalties.

A listing of recent key international tax cases.

Chevron had challenged the ATO's assessments for taxes owed in the income years 2004–2008. The assessments relate to interest paid by Chevron Australia Holdings Pty Ltd (CAHPL) to Chevron Texaco Funding Corporation (CFC) under a 2003 agreement. The case had previously been heard in a trial court and a federal court.

As the Full Federal Court ruling explained:

> "Each of the assessments in question was in substance made upon the basis that the interest paid by CAHPL, an Australian company, to its United States subsidy, CFC, was greater than it would have been under an arm's length dealing between independent parties."

CAHPL claimed tax deductions in Australia for the interest it paid to CFC and returned as income the dividends it received from CFC as non-assessable non-exempt income.

The ATO had argued that this internal financing structure resulted in a reduction in CAHPL's Australian taxable income. It had decided to disallow the deductions claimed by Chevron.

In its judgment, the Full Federal Court noted that the trial judge had accepted that "the internal funding arrangements put in place resulted in CAHPL increasing its untaxed dividends from CFC as CAHPL's interest payments to CFC increased whilst CFC would make significant profits from borrowing at 1.2 percent and on-lending at 9 percent which would not be taxed either in the United States or in Australia."

The judgment explained:

> "The economic effects of the internal financing structure put in place, in other words, included CAHPL's Australian taxable income being reduced by the deductions it claimed for the interest payments it made to its United States subsidiary and the receipt by CAHPL of non-taxable income from dividends CFC was able to declare to CAHPL from the interest CFC had derived from CAHPL."

The Full Federal Court also agreed with the trial court's original judgment that CAHPL's debt level of USD2.5bn was chosen by Chevron because "it was the most tax efficient corporate capital structure and gave the best after-tax result for the Chevron group."

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2017/2017fcafc0062

Australia Federal Court: *Chevron Australia Holdings Pty Ltd v. Commissioner of Taxation [2017] FCAFC 62*

India

In a ruling that will impact foreign companies doing business with India, the Indian Supreme Court has held that motor racing events give rise to a permanent establishment (PE) in India and income attributed to such activities is taxable in India.

Formula One World Championship (FOWC), which conducts Formula One car racing events, was appealing against a ruling delivered by the New Delhi High Court last year, in which the court had concluded that FOWC carried on business in India for the duration of the race within the meaning of expression under Article 5(1) of the India–UK double taxation avoidance agreement.

Confirming the High Court's decision, the Supreme Court said the motor racing championship had a PE in India, and income attributable to the PE shall be subject to Indian tax. "We have held that FOWC has PE in India and income that is attributable in India will be taxed. The amount that is to be taxed is to be assessed by an assessing officer," the Court stated.

This judgment was released on April 24, 2017.

https://barandbench.com/wp-content/uploads/2017/04/formula-1-judgment.pdf

India's Supreme Court: *Formula One World Championship Limited v. Commissioner of Income Tax*

European Union (EU)

The European Court of Justice has ruled that the courts of one member state may review the legality of requests for tax information sent by another member state. However, it said that review must be limited to verifying whether the information sought is not — manifestly — devoid of any foreseeable relevance to the tax investigation concerned.

In the course of a review of the tax affairs of French company Cofima, the French tax administration sent to the Luxembourg tax administration in 2014 a request for information concerning Cofima's Luxembourg parent company, Berlioz Investment Fund.

In response to the Luxembourg tax authorities' request, Berlioz provided all the information sought, except for the names and addresses of its members, the amount of capital held by each member, and the percentage of share capital held by each member.

According to Berlioz, that information was not foreseeably relevant to the checks being carried out by the French tax administration.

As a result of Berlioz' refusal to provide that information, in 2015 the Luxembourg tax administration imposed an administrative fine of EUR250,000 (USD277,300). Berlioz applied to the Luxembourg administrative courts for cancellation of the fine and annulment of the "information order" (the decision of the Luxembourg authorities directing Berlioz to provide the information at issue).

At first instance, the Administrative Tribunal of Luxembourg reduced the fine to EUR150,000 but declined to determine whether the information order was well founded. The Tribunal relied in that regard on Luxembourg law, under which it is possible to apply for cancellation or reduction of the fine, but not annulment of the request for the exchange of information or of the information order.

Berlioz then lodged an appeal with the Administrative Court of Luxembourg, arguing that its right to an effective judicial remedy, as guaranteed by the Charter of Fundamental Rights of the EU, had been infringed. The Administrative Court of Luxembourg referred the matter to the Court of Justice for a determination, in particular, as to whether it can examine the validity of the information order and, therefore, of the French tax administration's request for information serving as the basis for the information order.

In its May 16 judgment, the European Court of Justice said, first of all, that the Charter of Fundamental Rights of the EU is applicable, since, by imposing a fine on Berlioz because of its refusal to provide the information sought, the Luxembourg tax authorities implemented the EU directive on administrative cooperation in the field of taxation.

Next, the Court notes that such an information order can be lawful only if the requested information is "foreseeably relevant" for the purposes of the tax investigation in the Member State seeking it. It said the obligation imposed on the tax authorities of one member state to cooperate with the tax authorities of another member state extends only, according to the wording of the directive itself, to the communication of information that is "foreseeably relevant." Accordingly, the Member States are not at liberty to engage in |fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of the taxpayer concerned.

On the checks to be undertaken, the Court said that the authorities of the requested member state (the Luxembourg tax authorities, in this case) must not confine themselves "to a brief and formal verification of the regularity of the request for information but must also satisfy themselves that the information sought is not devoid of any foreseeable relevance for the purposes of the tax investigation, having regard to the identity of the taxpayer under investigation and the purpose of that investigation."

The Court said that the taxpayer must be able to argue against the legality of the information order and therefore the court in the requested State (the Luxembourg court, in this case) must be able to review the legality of the request.

The Court said, however, "it must only verify that the information order is based on a sufficiently reasoned request for information concerning information that is not — manifestly — devoid of any foreseeable relevance to the tax investigation concerned." In addition, it said, "if the court of the requested State is to be able to conduct its judicial review, it must have access to the request for information and to any additional information which the authorities of the requested State may have been able to obtain from the authorities of the requesting State.

The Court of Justice adds that "the person to whom the information order is addressed may, however, be barred from having access to the request for information because it is secret, and that that person does not therefore have a right of access to the whole of that request. Nevertheless, in order to be given a fair hearing, that person must have access to key information in the request

for information (namely the identity of the taxpayer concerned and the tax purpose for which the information is sought), and the court may provide that person with certain other information if it considers that the key information is not sufficient."

This judgment was released on May 16, 2017.

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d65e32621d9bce4694a1eca6a9a69da014.e34KaxiLc3qMb40Rch0SaxyLb3r0?text=&docid=190721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=620091

European Court of Justice: *Berlioz Investment Fund v. Director of the Direct Taxation Administration, Luxembourg (Case C-682/15)*

Luxembourg

The European Court of Justice (ECJ) has ruled that Luxembourg legislation relating to independent groups of persons (IGPs) does not comply with the EU VAT Directive.

The ruling supports both a decision by the European Commission and an opinion of an Advocate General of the ECJ that Luxembourg has transposed EU VAT law too widely in relation to services provided by independent groups to their members.

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

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

Under European law, in order to be exempt from VAT, the services provided by an independent group to its members must be directly required for their non-taxable or exempt activities. Moreover, group members should not be allowed to deduct VAT charged to the group.

In 2014, the Commission decided that arrangements in place in Luxembourg are not compatible with the EU's VAT rules. In addition, it argued that such arrangements would likely produce distortions of competition.

The Commission's decision was largely supported by ECJ Advocate General Kokott in October 2016.

The ECJ stated:

> "It follows that, by providing that the services rendered by an IGP to its members are exempt from VAT where the share of the members' taxed activities does not exceed 30 percent (or even 45 percent) of their annual turnover, Luxembourg has not correctly transposed the VAT Directive."

It continued:

> "In the light of the IGP's independence from its members, the latter may not, contrary to what the Luxembourg [legislation] permits, deduct from the amount of VAT which they are liable to pay the VAT payable or paid in respect of goods or services provided to the IGP (and not to those members directly). It follows that, in this respect also, Luxembourg has not correctly transposed the VAT Directive."

The court additionally found that Luxembourg has failed properly to transpose the VAT Directive "by providing that the transactions carried out by a member in his name but on behalf of the group may fall outside the scope of VAT for the group."

This judgment was released on May 4, 2017.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170046en.pdf

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

United Kingdom

The European Court of Justice (ECJ) has ruled in favor of the taxpayer in a case concerning the value-added tax (VAT) treatment of certain catering and entertainment services provided by a UK college as part of the higher education courses that it provided.

Following court decisions against the UK tax agency, HM Revenue & Customs (HMRC), said it would appeal and released Brief 39 (2014) setting out its position.

The case concerned the VAT liability of restaurant meals provided to the public and charges for concerts and other performances put on by students as part of their further education courses. Both the Upper Tribunal (UT) and the First Tier Tribunal (FTT) ruled in favor of Brockenhurst College.

The FTT had concluded that the supplies in question were exempt as they were closely linked to education because:

- The College was an eligible body and so its principal supplies were exempt supplies of education;
- The supplies were integral and essential to those principal exempt supplies;
- The supplies were made at less than their cost;
- The supplies were not advertised to the general public. Instead, there was a database of local groups and individuals who might wish to attend the restaurant or performances; and
- The supplies were not intended to create an additional source of income for the College.

HMRC disagreed with the conclusion on the basis that the supplies were outside the education exemption because the students were not the beneficiaries of the supplies in question but only benefited from making them as part of their learning.

On appeal, the UT again rejected HMRC's argument and agreed with the FTT. It held that the supplies were closely related to the exempt supplies of education because they enabled the students to enjoy better education. The requirement in the domestic law for the supplies to be for the direct use of a student was met because they were of direct benefit to that student, the UT ruled.

The ECJ agreed that VAT exemption should apply "provided that those services are essential to the students' education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT, which it is for the national court [the Court of Appeal] to determine."

This judgment was released on May 4, 2017.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=190325&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=561635

European Court of Justice: *HMRC v. Brockenhurst College (C-699/15)*

Austria

The European Court of Justice (ECJ) has ruled in favor of Austria in its dispute with Germany relating to the taxation of interest from profit-participation certificates received by an Austrian bank from a German bank.

The case involved the interpretation and application of Article 11 of the 2000 double tax avoidance treaty between Austria and Germany for the purposes of the taxation of interest from "Genussscheine" certificates acquired by UniCredit Bank Austria AG from the Westdeutsche Landesbank Girozentrale Dusseldorf und Munster, now Landesbank NRW.

Austria argued that, as the member state of residence of the beneficial owner of the interest paid, it is entitled to tax that income, pursuant to Article 11(1) of the tax treaty. However, Germany also claimed the right to tax that income, as the member state in which the interest originated, arguing the interest must be classified as "income from rights or debt-claims with participation in profits" within the meaning of Article 11(2) of the treaty.

The conflict of interpretation led to double taxation of the interest received by Bank Austria, which gave rise to the dispute before the ECJ.

In ruling in favor of Austria, the ECJ said the Austria–Germany tax treaty must be "interpreted to mean that it covers income which provides a creditor with a part or a share of the debtor's profits, to the exclusion of income which varies only in the event of losses incurred by that debtor."

This judgment was released on April 27, 2017.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=190173&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=516600

European Court of Justice: *Republic of Austria v. Federal Republic of Germany (C-648/15)*

Dateline May 18, 2017

In the current political climate, with the financial crisis still fresh in the memory (even though the height of the crisis was almost a decade ago), political parties can almost certainly expect to gain some votes with proposals to impose **higher taxes on banks**. At the very least, it's hard to imagine such a policy being a vote loser. But what is politically popular doesn't necessarily equate to effective tax policy.

Some would say that the banking sector got off very lightly for its role in creating the financial mess that still hasn't been fully cleared up. But governments have to be very careful in how they structure additional taxes on banks, because as the **Australian Bankers' Association** (ABA) warned in response to the recent announcement of a new levy on Australia's five largest banks, such measures can have "unintended consequences."

Poland is a good example of a bank tax that went wrong. While the 0.0366 percent levy appears miniscule on the surface, it applies to banks' assets, which economists have warned could reduce credit supply and suppress economic growth. Indeed, such vaunted institutions as the International Monetary Fund and the European Central Bank have lined up to criticize Poland's bank tax, with the latter warning that it could have a negative impact on financial stability.

Australia's bank tax is structured differently, with the levy based on liabilities rather than assets. But problems are still foreseen. Despite the fact that the levy **targets Australia's largest banks**, the nature of the banking business means that it is likely to affect the whole banking system, and it is expected that the **tax will simply be passed on** to borrowers and depositors.

Compounding the issue, the Australian Government appears to be in an **urgent rush** to push the bank tax legislation through. According to the ABA, industry representatives heard about the Government's plans at a meeting with Treasury officials only on May 10, and they were given until midday on May 15 to make submissions on the proposals, two days before the Treasury had planned to release draft legislation. No doubt some midnight oil was burnt as civil servants worked to draft the bill in such a short time frame. And this is hardly ideal preparation for an important piece of legislation. A case perhaps of legislate in haste, repent at leisure.

We've heard a great deal over the past year or so about the **rise of nationalist political causes**, and the rejection by the people of the established political and economic order, which tends to produce identikit centrist politicians. But perhaps the people aren't as angry as is being portrayed by certain political parties and the media. After all, we've only really seen the apple cart upended in two countries, albeit two influential ones, with voters in Britain opting for Brexit, and their counterparts in the United States electing President Trump.

Elsewhere, you could say that it is pretty much business as usual, especially after Austria failed to follow the lead set by Britain and America by electing a nationalist leader, and the anti-immigration vote collapsed in recent German local elections.

France is an interesting case though. That the former National Front leader lost the presidential run-off election was not that surprising. However, the scale of her loss surprised many, especially when her contender was a political novice yet to turn 40, whose sole experience of politics and government was a two-year stint as Economy Minister under President Hollande. And in electing **Emmanuel Macron**, French voters had already discarded mainstream candidates on the center-right and on the left. Indeed, Benoit Hammon, who stood for the ruling Socialist Party, polled barely 6 percent of the vote in the first round — an outcome that must represent a damning indictment of its track record in power.

France, it seems, would prefer Macron and his cabinet of political virgins, rather than the tired old polices of the past. But then Macron himself can hardly be accused of being an anti-establishment rebel himself, given his career background and largely mainstream economic philosophy. Certainly, his rise to power follows the precedents set in the UK and the US, but in a very French kind of way. It will be interesting to see if he can deliver on his promise to **cut corporate and individual income taxes** without the sort of barriers that have prevented President Trump pushing through his economic agenda.

Who'd have thought that on June 24, 2016, the day after the British people took the momentous decision to leave the European Union, that the **Brexit negotiations** could hinge on the ownership of a piece of rock separating Western Europe from North Africa. If a recently leaked report by **Spain's** Foreign Ministry is anything to go by, this might happen. But is it all just bluster?

First of all, I should clarify that the piece of rock in question is the territory of **Gibraltar**, and that the territory of Gibraltar is more than a mere geographical feature, albeit a quite impressive one;

it's an important **European business and finance center**. And despite being closer to Marrakech than to Manchester, this rock is constitutionally and culturally British, and wants to remain so. Even joint sovereignty was rejected almost unanimously in a referendum in 2002.

Given the aggressiveness with which Spain often pursues its territorial claim over Gibraltar, you'd think that the country was almost prepared to fight a war to get it back. But it could be argued that the **controversy** is manufactured somewhat by Spain – a useful distraction when things go badly for the Government of the day on the domestic front.

Spain is also often heard to bemoan Gibraltar's **low-tax regime**, regularly branding the territory a tax haven and a money-launderer's paradise. But it's also worth noting that the same financial center provides employment for thousands of Spaniards living in adjacent regions. Indeed, unemployment in neighboring Andalucia is over 30 percent. Would Spain therefore really be prepared to **crash the economy** of Gibraltar and a large area of southern Spain by effectively liquidating Gibraltar's financial center? It would certainly appear to be a counter-productive policy, to say the least.

Nevertheless, Brexit does provide the perfect opportunity for Spain to **drive a wedge** between the UK, which is withdrawing from the EU, and Gibraltar, which is desperate to remain, given that a great deal of its financial business depends on access to the Single Market. And the report suggests that Spain should exploit this opportunity to the maximum, even calling for the use of its veto in the Brexit negotiations to force the sovereignty issue.

Would Spain really be prepared to go this far just to gain joint sovereignty over Gibraltar – an outcome that Gibraltarians themselves **manifestly don't want**? All things considered, perhaps Spain raising the possibility that it would go so far is just a red herring. But we should be prepared for the possibility that Brexit could get snagged on The Rock.

The Jester