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a closer look

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

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

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

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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The Deep Black Holes In The European Union's Blacklist

by Paul Tadros and Marc Schwartz,
Schwartz International

Introduction

Earlier this year, the European Union ("EU") published a blacklist of several countries, with both the methodology employed and the countries listed causing some controversy. The major reason it provided for pursuing a blacklist is that its member states have lost or could lose tax revenues due to those countries' tax legislation, policies, and administrative practices.

Two very important points to note regarding the aforementioned methodology and reasons are that: (1) the metrics on which the EU based its assessments have not been released; and (2) G20 countries such as Argentina, Brazil, China, India, Russia, Saudi Arabia, South Africa, and Turkey did not make the blacklist, despite arguably demonstrating some of the characteristics for which smaller countries were included. Conversely, the inclusion of jurisdictions such as American Samoa and Guam on the list also lead one to question the rationale and methodology utilized; the magnitude of the tax revenue losses to the EU flowing through American Samoa and Guam must surely not be significant.

Preliminary Observations

While several countries (the US has not and will not, due to the "limitation of benefits" provisions in its treaties) have signed the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (most often referred to as the multilateral instrument, or "MLI"):

1. Several have expressed their reservations on most, if not all, of the provisions; and
2. It recently came to light that the Netherlands is lamenting the extent to which its treaty partners (notably Germany, Italy, and Switzerland) are reluctant to adjust their treaties. The Netherlands now expects only 44 out of 94 of its treaties to be affected.

This article focuses on one country on the EU blacklist: the Republic of Trinidad and Tobago (or "TNT", as it is locally known).

The EU stated that TNT is on the blacklist because it:

1. Failed to sign and ratify the OECD Multilateral Convention on Mutual Administrative Assistance ("MAA");
2. Maintains a harmful and preferential tax regime; and
3. Failed to join the OECD Global Forum on Transparency and Exchange of Information for Tax purposes.

However, it is interesting to observe that, in the recently released Financial Secrecy Index rankings by the Tax Justice Network, all of the G20 countries are in the top 50, *i.e.*, they harbor secrecy the most. And one of the least secretive? TNT, sitting at 107 out of 111.

Based on this information alone, one may well reach an opinion that the EU "cherry-picked" the countries it wanted to target, applying illogical assessments to arrive at contradictory conclusions. Scratch the surface a little more, and such opinion may be vindicated when questioning how TNT could have a harmful and preferential tax regime when it is excluded from another EU list of those facilitating harmful offshore structures; and furthermore that TNT actually meets the minimum BEPS standards (about which more below).

TNT And Its Tax System

Introduction

The larger island, Trinidad, is commercial and industrial, with the energy sector being the economic engine. The first oil well was drilled in 1857, and the first commercial production of oil was in 1908. By using natural gas (which it produces in large quantities) as a feedstock, it produces nitrogen, urea, ammonia, and methanol. It is now the largest exporter of methanol.

Some of the largest players in the energy sector operate in Trinidad, for example BP (formerly Amoco); Air Liquide; BHP Billiton; Methanex; PCS (Potash Corporation of Saskatchewan) Nitrogen; Nutrien; Norsk-Hydro; Baker Hughes; Bechtel; and Halliburton.

The tax system

Taking the below into account, the characterization of TNT as having a preferential and harmful tax regime could be seen as questionable.

First, if a corporation (domestic or foreign) is a tax resident of TNT, it is taxable on its worldwide income. The following taxes are imposed:

1. Income tax:
   (a) On the first TTD1m (approximately USD148,105), the rate is 25 percent. The excess is taxed at 30 percent for corporations not in sectors (b) and (c) below.
   (b) Downstream petrochemicals and related industries (*e.g.*, methanol, urea, *etc.*) are taxed at 35 percent.
   (c) Upstream oil and gas are taxed at 55 percent plus supplemental taxes.
2. The business levy (a gross receipts tax) is imposed at 0.6 percent on gross receipts/sales creditable against the income tax liability. In essence, it acts as a minimum tax if there is, for example, a loss.
3. The green levy (another gross receipts tax) is imposed at 0.3 percent on gross receipts/sales and is due independent of the income tax and business levy.

It is important to note that while TNT may grant tax concessions to certain industries (ownership is not a determining factor), such concessions (say, an income tax holiday) are for a limited duration and come with a price. For example, tax depreciation must be claimed during the holiday period; thus, unless significant additional investments are made in plant and equipment, the undepreciated balances after the holiday expires are not significant.

Also notably, such concessions are covered in most, if not all, of TNT's treaties with European countries via the tax sparing provisions. As these are bilateral negotiated treaties, if this is what the EU now considers to be a preferential or harmful practice or "revenue loss", then the goalposts appear to have been shifted.

In the case of individuals, the income tax rates are 25 percent on the first TTD1m, and 30 percent on the excess. Most tax credits were replaced by a personal allowance of TTD72,000. Unlike corporations, an individual who is a tax resident of TNT but not domiciled therein is taxable only on income from TNT sources and foreign sources remitted to TNT (the carryover of the UK's "non-dom" provision from when it was a British colony).

Other corporate tax features

TNT's corporate tax system contains various other measures and restrictions, including measures that meet the OECD's recommendations under its BEPS project:

1. While net operating losses can be carried forward indefinitely, no carryback is allowed.
2. While long-term capital gains (arising from assets held for more than 12 months) are not taxable, (a) long-term capital losses are not deductible; and (b) short-term capital gains are taxable as ordinary income.
3. Foreign-source dividends are fully taxable with a foreign tax credit allowable under certain conditions.
4. Related party interest is not deductible; any "interest" payments are treated as non-deductible distributions.
5. Convertible debt is automatically treated as equity.
6. Management fees are broadly defined such that their deductibility is limited to 2 percent of total expenses excluding depreciation, amortization, and management fees.

Conclusion

No country is perfect, and TNT's tax administration, as is the case for many countries, may well need an overhaul. But the EU's/OECD's heavy handed approach is not a helpful one, in the authors' opinion.

Given TNT's commercial and industrial economy, and that it is a relatively high-tax country that already has provisions to combat base erosion and profit shifting, one would hope that the EU and the OECD would rather encourage their member countries to enter into bilateral treaties with TNT.

Business Tax Aspects Of The 2018 Canadian Federal Budget

by Stuart Gray, Senior Editor, Global Tax Weekly

On February 27, 2018, Finance Minister Bill Morneau announced the Federal Government's Budget for 2018.[1]

Given the wide-ranging corporate tax reforms that have taken place across the border in the US, businesses and investors in Canada would have been hoping for a Budget that addressed what is being perceived as a growing gap in tax and regulatory competitiveness between the two countries. However, as far as business taxpayers are concerned, Morneau presented a Budget that was heavily focused on strengthening Canada's anti-avoidance defenses, with precious little in the way of tax relief for businesses.

While the Government announced no further changes to corporate tax rates, much of the Budget was given over to clarifying ongoing reforms of the small business tax regime, intended to prevent company structures being used for purposes of claiming the small business tax rate and avoiding higher rates of income tax and other taxes. In particular, the Government says that it has fine tuned proposed measures designed to prevent corporate entities being used to shelter passive income from tax.

The Government has also tightened up various aspects of Canada's international tax regime, particularly with respect to arrangements involving the foreign affiliates of Canadian corporations.

These aspects of the Budget are described in more depth below.

Passive Income

The Government confirmed last October that it would include in Budget 2018 detailed proposals for limiting the tax benefits of investing passively in private corporations, and that it would in the intervening period examine all deferral benefits arising from passive investment.

It did however announce at the time that it would introduce a passive investment threshold of CAD50,000 (USD39,160) per year for future, go-forward investments, which it said is equivalent to CAD1m in savings, based on a nominal 5 percent rate of return, and that there would be no tax increase on investment income below this threshold.

According to Budget documentation, the Government will, as promised, move ahead with its plans, but will do so in a "more targeted and simpler manner."

In the first instance, the Government intends to limit the ability of businesses with significant passive savings to benefit from the small business tax rate. Under the current rules, the small business deduction limit allows for up to CAD500,000 of active business income to be subject to the lower small business tax rate.

The Government said it will phase out access to the lower rate on a "straight-line basis" for associated Canadian-controlled private companies (CCPCs) with between CAD10m and CAD15m of aggregate taxable capital employed in Canada. It said this approach will "reinforce the principle that the small business rate is targeted to support small businesses, which tend to have more difficulty accessing capital, so they can reinvest in their active business, not accumulate a large amount of passive savings."

The Government will seek to introduce an additional eligibility mechanism for the small business deduction, based on the corporation's passive investment income.

If a corporation and its associated corporations earn more than CAD50,000 of passive investment income in a given year, the amount of income eligible for the small business tax rate would be gradually reduced. The small business deduction limit would be reduced by CAD5 for every CAD1 of investment income above the CAD50,000 threshold (equivalent to CAD1m in passive investment assets at a 5 percent return).

As a result, the business limit would be reduced to zero at CAD150,000 of investment income (equivalent to CAD3m in passive investment assets at a 5 percent return).

The tax applicable to investment income would remain unchanged, unlike under the original July 2017 proposal. No existing savings would face any additional tax upon withdrawal. Capital gains realized from the sale of active investments or investment income incidental to the business would not be taken into account for the measurement of passive investment income for the purposes of this measure.

The Government said the new approach would be much simpler to comply with.

According to the Government, as a result of these changes:

- A private corporation with passive investment assets of less than CAD1m at a 5 percent rate of return would be unaffected by the proposal, and could continue to earn up to CAD500,000 in active business income at the small business tax rate.
- A private corporation with passive investment assets of CAD1.4m at a 5 percent rate of return could earn up to CAD400,000 in business income per year without being affected by the proposal.
- A private corporation with passive investment assets of CAD2m at a 5 percent rate of return could earn up to CAD250,000 in business income per year without being affected by the proposal.
- A private corporation with passive investment assets of CAD2.5m at a 5 percent rate of return could earn up to CAD125,000 in business income per year without being affected by the proposal.
- A private corporation with passive investment assets of CAD3m or more at a 5 percent rate of return would pay the general corporate tax rate.

Refundability Of Tax On Investment Income

Under current "refundable dividend tax on hand" (RDTOH) rules, corporations can trigger a refund of taxes paid on investment income, regardless of the source of the dividend (*i.e.*, whether coming from investment income, or lower-taxed active business income). This allows larger corporations to gain an unintended tax advantage since they can choose to pay out dividends from their active business income (which qualify for a higher Dividend Tax Credit), and still benefit from a refund of taxes paid on investment income.

The 2018 Budget proposes to amend the RDTOH regime. Portfolio dividends subject to taxation would be allocated to an eligible RDTOH account, and other investment income that generates RDTOH would be allocated to a non-eligible account. Refunds would be available when both accounts are utilized; however, eligible dividends paid out by a company that has a non-eligible RDTOH account only would not benefit from an RDTOH refund.

According to the Government, the proposed measure will not increase the overall tax burden on investment income, but will place limits on the timing and conditions to receive a refund.

The measure would apply to taxation years that begin after 2018, although transitional rules would apply for tax years commencing before 2019. The Government expects to raise CAD925m a year from this measure.

The Government estimates that less than 3 percent of CCPCs will be affected by these changes – roughly around 50,000 private corporations. It said that more than 90 percent of the tax revenues from the measures would be generated from corporations whose owners' household income is in the top 1 percent of the income distribution.

Clean Energy

Under the capital cost allowance regime, Classes 43.1 and 43.2 of Schedule II to the Income Tax Regulations provide accelerated capital cost allowance rates (30 percent and 50 percent, respectively, on a declining-balance basis) for investments in specified clean energy generation and conservation equipment. Both classes include eligible equipment that generates or conserves energy by:

- Using a renewable energy source (*e.g.*, wind, solar, or small hydro);
- Using a fuel from waste (*e.g.*, landfill gas, wood waste, or manure); or
- Making efficient use of fossil fuels (*e.g.*, high efficiency cogeneration systems, which simultaneously produce electricity and useful heat).

Providing accelerated capital cost allowance is an exception to the general practice of setting capital cost allowance rates based on the useful life of assets. Accelerated capital cost allowance provides a financial benefit by deferring taxation.

Class 43.2 was introduced in 2005 and is currently available in respect of property acquired before 2020. It generally includes property that would otherwise be included in Class 43.1, except that in certain cases Class 43.2 imposes stricter eligibility criteria. Budget 2018 proposes to extend eligibility for Class 43.2 by five years so that it is available in respect of property acquired before 2025.

Cross-border Surplus Stripping Using Partnerships And Trusts

Canada's cross-border anti-surplus stripping rule seeks to prevent non-residents from achieving tax benefits through a transfer of the shares of one corporation resident in Canada, to another such corporation with which the non-resident does not deal at arm's length, in exchange for shares of the Canadian purchaser corporation or other forms of consideration.

The Government says that although this rule partly addresses the use of a partnership as an intermediary, it does not expressly address situations where a non-resident person disposes of an interest in a partnership that owns shares of a Canadian subject corporation. According to the

Government, some taxpayers have attempted to exploit this aspect of the rule by engaging in internal reorganizations that involve a transfer by a non-resident of shares of a Canadian subject corporation to a partnership in exchange for an interest in the partnership. The partnership interest is then transferred to a Canadian purchaser corporation.

To ensure that the underlying purposes of the cross-border anti-surplus stripping rule, and the corresponding corporate immigration rule, cannot be bypassed by transactions involving partnerships or trusts, Budget 2018 proposes to amend these provisions to add comprehensive "look-through" rules for such entities. These rules will allocate the assets, liabilities and transactions of a partnership or trust to its members or beneficiaries, as the case may be, based on the relative fair market value of their interests.

This measure will apply to transactions that occur on or after Budget Day. Transactions that occur before Budget Day may be challenged using the general anti-avoidance rule.

Foreign Affiliates

Budget 2018 proposes modifications to rules for the taxation of Canadian resident shareholders of foreign affiliates as a result of the Government's ongoing monitoring of developments in this area.

Under current rules, the taxpayer's share of the income of a foreign affiliate from an active business is not taxed until such time as it is paid as a dividend by the affiliate to the taxpayer. This dividend can be received tax-free to the extent that it is paid out of the foreign affiliate's exempt surplus. A foreign affiliate will have exempt surplus if it has income from an active business carried on by it in a country with which Canada has a tax treaty or a tax information exchange agreement (TIEA) and it is resident in such a country.

Certain income of a controlled foreign affiliate (*i.e.*, income from property, from a business other than active business and from other specified sources) is taxable in the hands of the taxpayer in the year in which it is earned, whether or not it is distributed, with an offsetting deduction for taxes paid by the affiliate. This income is referred to as foreign accrual property income (FAPI).

Investment business

If the affiliate's investment activities are so significant that they require more than five full-time employees and the other conditions are satisfied, the affiliate's business is treated as an active business and income from that business is excluded from FAPI (the "six employees" test).

According to the Government, certain taxpayers whose foreign investment activities would not warrant more than five full-time employees have engaged in tax planning with other taxpayers in similar circumstances seeking to meet the six employees test. This planning involves grouping their financial assets together in a common foreign affiliate in order to carry on investment activities outside of Canada through that affiliate. While the taxpayers combine their assets in a common affiliate and take the position that the affiliate is carrying on a single business, their respective returns are determined separately by reference to their contributed assets.

To effect this planning, the share, contractual or other rights under these arrangements typically ensure that each taxpayer retains control over its contributed assets and that any returns from those assets accrue to its benefit. This type of planning is sometimes referred to as a "tracking arrangement". In such arrangements, the assets contributed by the (often unrelated) Canadian taxpayers are not truly pooled, as the economic outcome for each taxpayer remains unchanged. The affiliate is essentially used as a conduit entity to shift passive investment income offshore and later repatriate that income to Canada tax free.

To ensure the rules operate as intended, Budget 2018 proposes to introduce a rule for the purposes of the investment business definition so that, where income attributable to specific activities carried out by a foreign affiliate accrues to the benefit of a specific taxpayer under a tracking arrangement, those activities carried out to earn such income will be deemed to be a separate business carried on by the affiliate. Each separate business of the affiliate will therefore need to satisfy each relevant condition in the investment business definition, including the six employees test, in order for the affiliate's income from that business to be excluded from FAPI.

This measure will apply to taxation years of a taxpayer's foreign affiliate that begin on or after Budget Day.

Controlled foreign affiliate status

The FAPI of a foreign affiliate of a taxpayer is included in the taxpayer's income on an accrual basis only where the affiliate is a controlled foreign affiliate of the taxpayer. To avoid such accrual taxation, certain groups of Canadian taxpayers have used tracking arrangements to avoid controlled foreign affiliate status (*i.e.*, the group of taxpayers is sufficiently large that they take the position that they do not have, and do not participate in, a controlling interest in the affiliate). Under the tracking arrangement, each taxpayer retains control over its contributed assets and any returns from those assets accrue to its benefit. This is sometimes effected through the establishment of

separate cells or segregated accounts that track those contributed assets and respective returns. It is not intended that taxpayers avoid controlled foreign affiliate status, and therefore accrual taxation of FAPI, in these circumstances.

To address this concern, Budget 2018 proposes to deem a foreign affiliate of a taxpayer to be a controlled foreign affiliate of the taxpayer if FAPI attributable to activities of the foreign affiliate accrues to the benefit of the taxpayer under a tracking arrangement. This measure is intended to ensure that each taxpayer involved in such a tracking arrangement – no matter how large the group – is subject to accrual taxation in respect of FAPI attributable to that taxpayer.

This measure will apply to taxation years of a taxpayer's foreign affiliate that begin on or after Budget Day.

Trading or dealing in indebtedness

Where the principal purpose of a business carried on by a foreign affiliate of a taxpayer is to derive income from trading or dealing in indebtedness, the income from that business is generally treated as FAPI of the affiliate. Similar rules apply to ensure income from an investment business is generally included in a foreign affiliate's FAPI. Both sets of rules contain exceptions in respect of certain regulated foreign financial institutions.

A condition under the investment business rules requires a taxpayer to satisfy certain minimum capital requirements in order to qualify for the regulated foreign financial institutions exception.

To ensure consistency with the investment business rules, Budget 2018 proposes to add a similar minimum capital requirement to the trading or dealing in indebtedness rules.

This measure will apply to taxation years of a taxpayer's foreign affiliate that begin on or after Budget Day.

Reassessments

For most taxpayers with foreign affiliates, the Canada Revenue Agency (CRA) generally has four years after its initial assessment (the "normal reassessment period") in which to audit and reassess the taxpayer's tax liability, and is generally barred from reassessing beyond that period.

A three-year extended reassessment period currently exists in respect of assessments made as a consequence of a transaction involving a taxpayer and a non-resident with whom the taxpayer

does not deal at arm's length. Although this three-year extension currently applies to many transactions involving foreign affiliates, it does not apply in all relevant circumstances.

Given the complexity of audits that involve foreign affiliates, Budget 2018 proposes to extend the reassessment period for a taxpayer by three years in respect of income arising in connection with a foreign affiliate of the taxpayer.

This measure will apply to taxation years of a taxpayer that begin on or after Budget Day.

Reporting requirements

Under existing rules, a corporate taxpayer is typically required to file its income tax return within six months after the end of its taxation year. However, a taxpayer's information return in respect of its foreign affiliates is not due until 15 months after the end of its taxation year. As a result, much of the information required to evaluate income of a taxpayer arising in connection with its foreign affiliates is not sent to the CRA until up to nine months after the submission of the taxpayer's income tax return, even though the taxpayer must have most of this information before filing its income tax return in order to properly compute its income tax liability.

Budget 2018 proposes to bring the information return deadline in respect of a taxpayer's foreign affiliates in line with the taxpayer's income tax return deadline by requiring the information returns to be filed within six months after the end of the taxpayer's taxation year.

It is intended that this measure will apply to taxation years of a taxpayer that begin after 2019 in order to give taxpayers time to prepare for this change.

Reassessment period – requirements for information and compliance orders

The CRA has broad general information-gathering powers to request information and examine documents during the course of an audit, including the ability to issue requirements for information and, in cases where a taxpayer refuses to comply with an information request, to obtain compliance orders from the courts.

However, contesting requirements for information and compliance orders effectively shortens the period during which the CRA may reassess a taxpayer. As mentioned above, this period is generally limited to three or four years, after which the examination may become statute-barred. This, says the Government, hampers the CRA's ability to reassess in a timely fashion and on the basis of complete information.

Budget 2018 therefore proposes to amend the Income Tax Act to introduce a "stop-the-clock" rule for requirements for information generally and for compliance orders. This rule will extend the reassessment period of a taxpayer by the period of time during which the requirement or compliance order is contested.

The period will generally start, in the case of a requirement for information, at the time the taxpayer makes an application for judicial review of the requirement or, in the case of a compliance order, at the time the taxpayer opposes, generally by way of notice of appearance, the CRA's application for a compliance order. The period will end upon the final disposition of the application (including any appeals).

Related amendments will also be made to conform the rules with respect to requirements for foreign-based information.

Reassessment period – non-resident non-arm's length persons

The CRA's reassessment period can be extended by three years if a taxpayer carried back a loss to deduct against income in a prior tax year. This rule is intended to ensure the carried back loss cannot become statute-barred before the end of the reassessment period for the taxation year in which the loss arose.

However, the loss carry-back reassessment period does not take into account the fact that an extended three-year reassessment period exists in respect of reassessments made as a consequence of a transaction involving a taxpayer and a non-resident person with whom the taxpayer does not deal at arm's length. As a result, for example, there may be situations where the CRA makes a transfer pricing adjustment in respect of a taxation year, but is unable to make a consequential reassessment to a prior taxation year to which the taxpayer has carried back a loss.

Budget 2018 proposes to amend the Income Tax Act to provide the CRA with an additional three years to reassess a prior taxation year of a taxpayer, to the extent the reassessment relates to the adjustment of the loss carryback, where:

- A reassessment of a taxation year is made as a consequence of a transaction involving a taxpayer and a non-resident person with whom the taxpayer does not deal at arm's length;
- The reassessment reduces the taxpayer's loss for the taxation year that is available for carryback; and
- All or any portion of that loss had in fact been carried back to the prior taxation year.

Summary

As can be seen from the above, while the 2018 Budget lacked any headline announcements, there is plenty in the fine print that will affect tax planning for companies both large and small, and especially those with cross-border tax arrangements.

Endnote

1 https://www.budget.gc.ca/2018/docs/speech-discours/2018-03-22-en.pdf

Owe More Than USD50,000 To The IRS? You May Be Risking More Than Just A Good Night's Sleep ...

by Michael DeBlis, DeBlis Law

Hold on to your horses. The IRS recently adopted new procedures required under a 2015 law designed to clamp down on taxpayers with "seriously delinquent tax debts."

On January 16, 2018, the IRS issued Notice 2018-1 – a notice that could wreak havoc on your freedom of movement, which was judicially recognized as a fundamental constitutional right by the United States Supreme Court in the landmark case of *Paul v. Virginia*,[1] 75 US 168 (1869) (I smell a constitutional challenge brewing). Ironically, the Supreme Court[2] did not invest the federal government with the authority to protect freedom of movement, but that is a story for another day.

Notice 2018-1 provides guidance for the implementation of newly enacted IRC section 7345, added by section 32101 of Fixing America's Surface Transportation (FAST) Act. This legislation requires the IRS to notify the Department of State of taxpayers who have "seriously delinquent tax debts."

The purpose of such notification is not so the taxpayer can be entered into a drawing for a three-day cruise aboard the Disney "Magic." On the contrary, receipt of section 7345 certification triggers a parade of horribles. Upon receipt of a section 7345 certification, the State Department is generally required to (1) deny a passport application for taxpayers, (2) revoke an existing passport, or (3) limit passports previously issued to these taxpayers. The notice also describes exceptions to certification and remedies that taxpayers can avail themselves of.

This comes on the heels of a January 10, 2018 "Report of The National Taxpayer Advocate" by Nina Olson imploring the Internal Revenue Service (IRS) not to abuse its new power to revoke the passports of US citizens who owe more than USD50,000.

Now for the nuts and bolts. Let's begin with the definition of the ubiquitous phrase, "seriously delinquent tax debt." Under section 7345(b)(1), a "seriously delinquent tax debt" is an unpaid, legally enforceable, and assessed federal tax liability of an individual, greater than USD50,000, and for which:

- A notice of federal tax lien has been filed under section 6323, and the taxpayer's right to a hearing under section 6320 has been exhausted or lapsed; or
- A levy has been issued under section 6331.

Pursuant to section 7345(f), the USD50,000 amount is adjusted for inflation each calendar year beginning after 2016.

The USD50,000 federal tax liability threshold is calculated by aggregating the total amount of all current tax liabilities for all taxable years and periods meeting the above criteria (including penalties and interest) assessed against an individual.

Just as important as knowing what a seriously delinquent tax debt is, is knowing what a seriously delinquent tax debt isn't. Under section 7345(b)(2), a seriously delinquent tax debt does *not* include the following:

- A debt that is being timely paid under an IRS-approved installment agreement under section 6159;
- A debt that is being timely paid under an offer in compromise accepted by the IRS under section 7122;
- A debt that is being timely paid under the terms of a settlement agreement with the Department of Justice under section 7122;
- A debt in connection with a levy for which collection is suspended because of a request for a due process hearing (or because such a request is pending) under section 6330; and
- A debt for which collection is suspended because the individual made an innocent spouse election (section 6015(b) or (c)) or the individual requested innocent spouse relief (section 6015(f)).

Now for more detail on the procedures. Under section 7345(c)(1), the IRS has certain obligations. First, it must notify the State Department if the Commissioner reverses the certification on account of it being erroneous or if the debt attributable to such certification is fully satisfied, becomes unenforceable, or ceases to be a seriously delinquent tax debt. Upon receipt of a reversal of certification notice from the IRS, the State Department must remove the certification pertaining to that debt from the taxpayer's record at the State Department.

Section 7345(c)(2) includes a timing element when it comes to the IRS notifying the State Department about a *reversal*. In the case of a debt that has been fully satisfied or has become legally unenforceable (such as when the collection statute of limitations has run under section 6502), notification under section 7345(c)(1) must be made no later than the date required for issuing the certificate of release of lien with respect to such debt under section 6325(a) (30 days after the day on which the liability is fully satisfied or legally unenforceable or following acceptance of a bond in full payment of the liability).

If an individual makes an election under section 6015(b) or (c) or requests relief under section 6015(f), notification under section 7345(c)(1) must be made no later than 30 days after such election or request. In the case of an installment agreement under section 6159 or an offer in compromise under section 7122, notification under section 7345(c)(1) must be made no later than 30 days after such agreement is entered into or such offer is accepted by the IRS. Finally, in the case of a certification that is found to be erroneous, notification under section 7345(c)(1) must be made as soon as practicable after such finding. In all other cases, notification must be made as soon as practicable.

On the due process front, taxpayers are entitled to notice that they are the subject of a certification or reversal of a certification. Specifically, section 7345(d) requires the IRS to contemporaneously notify an individual when he or she is the subject of a certification or reversal of a certification. The notice must include a description in simple layman's terms of the right to bring civil suit under section 7345(e). This notice is collectively referred to as Notice CP508C, "Notice of certification of your seriously delinquent federal tax debt to the State Department," or to give it a decidedly "Star Wars" moniker, "C-3PO" for short.

Judicial review is fair game. Section 7345(e) bestows upon taxpayers the right to judicial review on two seminal issues: (1) "Was the certification erroneous?" and (2) "Did the IRS fail to reverse a certification in either United States district court or in the United States Tax Court?" Thankfully, section 7345(e) adds some teeth into a taxpayer-friendly ruling that the certification was erroneous, albeit with a soft bite. To the extent that a court finds the certification to be erroneous, it may order the IRS to notify the Secretary of State that the certification was erroneous. The operable or "feeble" word here is "may."

Section 7345(g) states in no uncertain terms that a certification or reversal of a certification may *only* be delegated by the Commissioner of Internal Revenue to the Deputy Commissioner for Services and Enforcement, or the Commissioner of an operating division, of the IRS.

There is slight relief for taxpayers serving in an area designated as a combat zone or participating in a contingency operation. Section 7508(a)(3) prevents the IRS from certifying a seriously delinquent tax debt under section 7345 while an individual is serving in an area designated as a combat zone or participating in a contingency operation.

In addition to the statutory exceptions set forth in section 7345(b)(2) and section 7508(a), the Internal Revenue Manual (IRM) will be updated to include information about circumstances in which a tax debt is not subject to the certification process. This is the IRS's way of wrapping up this juggernaut in a neat little bow. The IRS will continue to monitor the certification process after implementation and may update the IRM when necessary to meet the requirements of the program.

Despite such a draconian measure, there are ways to stop the IRS dead in its tracks from requesting the State Department to revoke your passport. Consultation with an experienced attorney will help you become aware of your rights.

Endnotes

1 https://en.wikipedia.org/wiki/Paul_v._Virginia

2 https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States

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Topical News Briefing: US Sales Tax – From Quill To Keyboard

by the Global Tax Weekly Editorial Team

As reported in this week's issue of *Global Tax Weekly*, a coalition of 20 public policy groups, including the National Taxpayers Union, is opposing another attempt to give US states powers to tax remote sales. However, events suggest that on this matter, these groups might be swimming against the tide.

As things currently stand, there is something of an uneven sales tax playing field between "virtual" retailers and their physical counterparts. Brick-and-mortar retailers in states that impose sales and/or use taxes are legally obligated to collect these taxes from customers who make purchases in their stores at the point of sale, and remit them to the state tax authority. However, if a resident of the same state chooses to purchase the same item from an online retailer or catalog seller based out-of-state, sales tax usually goes uncollected by the vendor because they don't have a physical presence there, and therefore the state tax authority doesn't have sufficient tax nexus.

It is not just traditional retailers that claim to be suffering as a result of outdated sales tax laws. State and local governments are said to view the taxes they cannot collect on most online sales as lost revenue, and the National Conference of State Legislatures previously calculated that the existing state of affairs costs USD23bn in uncollected taxes each year.

Problematically, the only source of guidance on this issue remains the 1992 US Supreme Court ruling in *Quill*, which established the "physical presence" test for applying existing sales taxes to out-of-state merchants. And since, typically, online retailers have a physical presence in very few states, they tend not to meet the criteria for applying the taxes.

However, the internet as we know it was in its infancy at the time of *Quill*, when there was virtually no e-commerce to speak of. Now, the world is a very different place. And as online retailing takes an ever-larger percentage of overall retail sales in the US every year, many feel a review of the *Quill* decision by the Supreme Court is long overdue.

In the meantime, many states, facing increasing budgetary pressures, have taken matters into their own hands, and have introduced various measures in an attempt to enforce their right to tax

sales from out-of-state online merchants. These range from economic nexus taxes, whereby merchants making sales above certain thresholds are obligated to collect and remit state sales tax, to "click-through nexus" or "Amazon taxes," which use Amazon's sales affiliates program to justify an in-state nexus or physical presence.

The legitimacy of such measures has created a great deal of uncertainty for merchants and taxpayers, and has led to several cases of online sales taxes being contested in the courts. Indeed, by legislating in this way, some states hope to force the courts to make a definitive ruling one way or another. And they may soon get their wish after the Supreme Court finally decided earlier this year to take up one of these cases, which challenges South Dakota's economic nexus tax. A date for oral arguments to be heard has been set as April 17, 2018.

It has been argued that it is ultimately up to Congress to decide this matter. There has been no shortage of legislative proposals made in recent years to put in place an online sales tax framework, including the Remote Transactions Parity Act, the bill to which the aforementioned coalition is opposed. However, it is unclear when, or even if, Congress plans to take up this issue.

Until it does, all eyes are on the Supreme Court.

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The Mandatory Repatriation Tax And Individual US Taxpayers

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With the enactment of the Tax Cuts and Jobs Act in the United States, US Internal Revenue Code ("Code") section 965 imposes a mandatory repatriation tax on US taxpayers that own controlled foreign corporations ("CFCs"). While designed for multinationals, as discussed below, this includes individual US taxpayers who own CFCs. The rules are very complex and the results can be quite punitive. This article addresses some of the key issues in the application of Code section 965 to individual US taxpayers. We conclude with a summary that represents a reasonable approach to dealing with this issue.

Matters To Consider For Individual US Taxpayers (Including Those Resident In Canada)

The mandatory repatriation tax applies to individual US taxpayers who own CFCs

While the application of Code section 965 to individual US taxpayers is not self-evident or necessarily justifiable from a policy perspective, the law is clear that this is the correct interpretation. Put simply, Code section 965 applies to a "US Shareholder" of a CFC. The term "US Shareholder" is a term of art with a specific meaning. Under current law, a US Shareholder with respect to any foreign corporation, is defined as a United States person (so that would include individual US citizens, green card holders, US residents, US trusts, *etc.*) who owns, or is considered to own, 10 percent or more of the total vote of a foreign corporation.[1]

Code section 965 applies to US Shareholders in deferred foreign income corporations ("DFIC"). A DFIC is then defined with respect to any US Shareholder, as any specified foreign corporation of the US Shareholder that has accumulated post-1986 deferred foreign income greater than zero.

A specified foreign corporation is defined under Code section 965(e) to include any Controlled Foreign Corporation. Thus, the mandatory repatriation tax applies to individual US taxpayers who are US Shareholders in a CFC.

All post-1986 earnings and profits are included in income to the individual US Shareholder as a new category of Subpart F income

The additional tax under section 965 is triggered by a one-time inclusion of the Post-1986 Deferred Foreign Income of the applicable corporation in its Subpart F income for the tax year. Put differently, the CFC's post-1986 earnings and profits ("E&P") become a new category of Subpart F income. The US Shareholder then includes this income in their *pro-rata* share of the corporation's Subpart F income on their personal income tax return.

The *pro-rata* share is calculated according to the existing Subpart F rules. Overly simplified, that means that if a US shareholder does not own 100 percent of the value of the CFC, they will not be subject to 100 percent of the income inclusion. Instead, the income inclusion will be pro-rated according to the rules under Code section 951. The amount of the inclusion is more or less the pro-rated post-1986 retained earnings.

From a technical perspective, the term "Post-1986 Deferred Foreign Income" is defined in Code section 965(d)(2) to mean the post-1986 earnings and profits, excluding that which is attributable to effectively connected income of a trade or business within the United States that was already subject to US tax, or that if distributed would be excluded from gross income of the US Shareholder under section 959 (*i.e.*, income that had already been subject to Subpart F inclusion). Post-1986 earnings and profits are currently tracked on Schedule J of IRS Form 5471. Schedule J may thus effectively be a short-hand method for calculating the amount of income that is subject to the 965 inclusion.

Note that post-1986 E&P is calculated as of November 2, 2017 or December 31, 2017 – whichever amount is greater. In short, section 965 creates a new category of Subpart F income that consists of all earnings and profits of a CFC after 1986, measured on November 2, 2017 or December 31, 2017. Note that dividends paid in 2017 do not reduce 2017 E&P because of an express limitation in Code section 965. Further, salary or bonuses paid after November 2, 2017 would not reduce E&P either because post-1986 E&P is measured as of the higher of the November 2, 2017 or December 31, 2017 E&P amounts.

The 965 inclusion tax applies to tax year 2017 for individual US Shareholders

Code section 965 applies to tax years for CFCs that start prior to January 1, 2018. For individuals, this means that the tax applies in tax year 2017. The general rule in Code section 898 suggests that CFCs owned by individual taxpayers should follow a December 31 tax year end since that is the tax year of the majority shareholder (the individual US taxpayer). The IRS has recently issued a notice confirming that Code section 898 applies to determine the applicable tax year for the transition tax although it does not comment on the proposed regulations.[2]

There is a proposed regulation from 1992 that suggests a different year end may be possible if the CFC has no Subpart F income. To our knowledge, these regulations have not been finalized. Generally, the IRS's position as expressed in the Internal Revenue Manual is that a taxpayer cannot rely on proposed regulations unless those regulations expressly state it. There is a line of cases to support the proposition that proposed regulations are not law and are not binding. Thus, the most correct position is that the tax applies to the 2017 tax year for individual US shareholders who own a CFC. This may be beneficial as the tax may actually be higher if triggered in tax year 2018 because the deduction is calculated based on a 21 percent corporate tax rate rather than a 35 percent corporate tax rate. Taken together, our view is that the more correct and more beneficial position is to apply the tax to the 2017 tax year for an individual US shareholder.

The top tax rate is higher than 15.5 percent for individuals

While the mechanics of the calculation of the inclusion are complex, the result is a tax rate that may be higher than 15.5 percent for individuals. Overly simplified, the calculation works as follows.

As discussed above, all post-1986 E&P is included as a new category of Subpart F income to the US Shareholder. Then a deduction is applied to a certain percentage of that inclusion. This deduction is meant to yield an effective tax rate of 15.5 percent for the portion of E&P attributed to cash and cash equivalents, and an 8 percent corporate tax equivalent rate for other assets for a US Shareholder that is a US corporation otherwise subject to an effective corporate tax rate of 35 percent. Individual taxpayers have a higher tax rate than corporate taxpayers, so the net effect of the deduction will be less for them.

For an individual in the top bracket of 39.6 percent, this translates to a tax rate of approximately 17.5 percent for cash and cash equivalents, and approximately 9 percent for other assets. The calculation needs to be done for each taxpayer as it is specific to their individual tax bracket.

The definition of cash assets is quite broad and includes more than just cash

The higher rate is applicable to assets including: (i) cash; (ii) the net accounts receivable of such corporation, and (iii) the fair market value of the following assets held by such corporation: (I) personal property that is of a type that is actively traded and for which there is an established financial market; (II) commercial paper, certificates of deposit, the securities of the US federal government, and of any US state or foreign government; (III) any foreign currency; (IV) any obligation with a term of less than one year; and (V) any asset that the US Treasury Secretary identifies as being economically equivalent to any asset described in section 965(c)(3)(B).

There is a significant double tax risk

Code section 965 imposes tax in the US on the US citizen shareholder in the 2017 tax year. If no Canadian tax is generated to fully offset the US tax, then tax will be owing when the money is paid out in Canada at a later date. This represents a significant double tax risk.

General basket foreign tax credit carry-forwards (and carry-backs) can be used to offset the 965 inclusion

The income generated by the Code section 965 inclusion is foreign source. For Subpart F income, the determination of what foreign tax credit ("FTC") "basket" it falls into is determined by the character of the underlying income.

All income subject to the 965 inclusion should be active business income; otherwise it would have been Subpart F income and taxed in the year earned.[3] Consequently general basket foreign tax credits from the prior ten years can be used to offset any tax generated by the Code section 965 inclusion.

There is no grind down applied to these credit carry-forwards, so they should reduce the tax generated by the Code section 965 inclusion on a dollar for dollar basis.[4] The same is true of tax generated in 2018 and carried back against the 2017 US tax liability.

Any foreign tax credit generated by additional Canadian tax triggered to offset the 965 inclusion should not be ground down

Given the double tax exposure, most individual US taxpayers in Canada will want to generate sufficient Canadian tax to fully offset the Code section 965 inclusion. Our view, expressed in detail elsewhere,[5] is that there is no grind down of foreign tax generated by a subsequent distribution and that the grind down in Code section 965(g) only applies to the indirect credit granted

by Code section 960 which is generally inapplicable to individuals. This means that the Code section 965 inclusion can be offset by a Canadian bonus or dividend paid out at the end of 2017 to eliminate the risk of double tax.

One other idea is to generate Canadian tax in 2018 through a bonus or dividend and carry it back against the 965 inclusion. The downside of carrying back FTCs would be that the taxpayer might owe the tax twice (once to the US in 2017, and once to Canada in 2018) and recovering from the IRS may prove administratively cumbersome if the 2017 tax is paid.[6]

To be clear, if the 965 inclusion is fully covered off by the FTC carry-forwards or carry-backs, no extra Canadian tax is required to be generated. Generating extra Canadian tax is only advisable if there are insufficient carry-forwards.

The anti-avoidance rules should not interfere with using foreign tax credits

There is an anti-abuse rule found in Code section 965(c)(3)(f) that should not deny the ability to use a foreign tax credit. That anti-abuse rule states:

> "If the (US Treasury) Secretary determines that a principal purpose of any transaction was to reduce the aggregate foreign cash position taken into account under this subsection, such transaction shall be disregarded for purposes of this subsection."

As the plain meaning indicates, this anti-abuse rule is primarily concerned with an avoidance motivated transaction that is designed to convert cash and cash equivalent assets, which are subject to a higher repatriation tax rate, into other assets that are subject to a lower repatriation tax rate. What this provision seems to be reasonably aimed at is something like a CFC converting liquid investments into real property investments with no business purpose.

The cash position is determined at year end and not the retained earnings measurement dates. As such, a current-year cash dividend paid prior to the end of 2017 might reduce the cash position.[7] However, a dividend or bonus paid in 2018 and carried back would not reduce the cash position. Regardless, from an overall tax perspective, it should also be apparent that even should a dividend be tax motivated, the motivation is one of preventing double tax, which is a legitimate motivation and the reason why the foreign tax credit and treaty exist.

A Canadian resident with a CFC with large retained earnings would generate FTCs far in excess of what would be required to offset the repatriation tax by distributing all cash and cash-related

assets. Even if the principal purpose was determined to be the reduction of the cash position, the effect would be that "such transaction shall be disregarded for purposes of this subsection" – meaning the calculation of the cash position and not the generation of foreign tax credits that occurs under section 901.

A further anti-avoidance rule is found in Code section 965(*o*)(2). It provides the US Treasury the power to enact "regulations or other guidance to prevent the avoidance of the purposes of this section, including through a reduction in earnings and profits, through changes in entity classification or accounting methods, or otherwise." No regulations have been prescribed yet. The *Conference Report on the Tax Cuts and Jobs Act* indicates the intent of this section is to combat any attempt to reduce the amount of post-1986 earnings and profits.[8] Generating foreign tax credits by way of a bonus or dividend does not reduce the amount of the inclusion under Code section 965.[9] The only effect is to prevent double taxation. That is entirely congruent with US treaty obligations under the Canada–US Tax Treaty.[10] In short, our view is that the anti-avoidance rules in Code section 965 do not limit the applicability of foreign tax credits.

Code section 962 is unlikely to be beneficial

Code section 962 allows an individual US Shareholder to be subject to tax in the same manner as a domestic corporation with respect to Subpart F income.

Since the mandatory repatriation tax is a Subpart F inclusion, it would be eligible for a Code section 962 election. This allows for a slightly lower tax rate under the Code section 965 inclusion and the ability to claim a foreign tax credit for the corporate tax paid by the CFC. The foreign tax credit is limited to years in which there was a 962 election in place.[11] The utility of such foreign tax credits is marginal as they are ground down by Code section 965(g).

Further, when the retained earnings are distributed, they are taxable to the individual US taxpayer to the extent that the distribution exceeds the tax paid with the 962 election in place. While the benefits of a 962 election would have to be evaluated on a case-by-case basis, given the above factors it generally does not appear to be beneficial.

The eight-year extension is not that beneficial

The US tax on the Code section 965 inclusion can be spread out over eight years. But this is of limited benefit where the taxpayer has a double tax risk since all FTCs would have to be generated in 2017.

Under section 965(h)(6)(B), "the term 'net income tax' means the regular tax liability reduced by the credits allowed under subparts A, B, and D of part IV of subchapter A." A foreign tax credit is allowed under section 901 which is found in section 27 in subpart B; therefore, the available FTC is already taken into account when calculating the net income tax liability in year one.

That means that any FTC to offset the 965 inclusion has to be paid out in tax year 2017. That somewhat defeats the purpose of spreading the tax out over eight years and makes that option less attractive since the Canadian tax would have to be paid in 2017 or 2018 to avoid a double tax risk.

The net investment income tax ("NIIT") may apply to equalization dividends

While dividends paid to equalize out the 965 inclusion are exempt from US tax under Code section 959 as previously taxed income, they are not exempt from NIIT. Reg. § 1.1411-10 states that even though the dividend is excluded from gross income under Chapter 1, it is included as a dividend for NIIT purposes if the income related to it was earned after 2013. Since the 965 inclusion applies to all income earned after 1986, not all of the dividend will necessarily be subject to NIIT. Taxpayers may wish to rely on the position that the NIIT does not apply to US citizens resident in Canada.[12]

It is unclear whether there will be future legislation or guidance that will improve the situation

What is clear, however, is that under current law the 965 inclusion is owed in tax year 2017, so waiting for future legislative relief carries a significant double tax risk. Waiting for IRS guidance may be cautious. However, our view is that none will be forthcoming that particularly illuminates the situation for individual taxpayers.

The transition tax was designed to apply to large multinationals. Several pieces of guidance have been issued. The IRS has a tremendous amount of work to do to implement the new US tax reforms as they apply to the majority of US-based taxpayers (pass-through deduction, anti-hybrid rules, GILTI, anti-abuse rules for transition tax, and on and on). US citizens abroad are not the intended targets of the transition tax and the IRS is generally slow to address issues that apply to non-resident US citizens.[13]

Summary

To recap, a reasonable approach to addressing the mandatory repatriation tax may be:

- Identify those CFC owners who have exposure;
- Calculate the post-1986 earnings and profits based on Schedule J of Form 5471;
- Calculate the tax exposure by working through the formula as it applies to individual US citizens based on cash and non-cash assets, keeping in mind the broad definition of cash assets;
- See if the tax exposure is fully offset by general basket foreign tax credit carry-forwards;
- If yes, the taxpayer is in the clear. Note that any Canadian tax generated by paying a dividend or bonus effective December 31, 2017 will act to offset the US tax. If there is insufficient Canadian tax generated in 2017, another possibility is to generate additional Canadian tax in 2018 and then carry back the associated FTC to the 2017 tax year. The downside is that the taxpayer may be exposed to temporary double tax and could face an administrative hurdle in trying to recover from the IRS.

Endnotes

1 The definition of US Shareholder changed to encompass 10 percent or more of the total votes or value of a foreign corporation. However, this change is effective for taxable years of foreign corporations beginning after December 31, 2017, while Code section 965 applies to the last tax year which begins before January 1, 2018, so the old definition is still used for Code section 965 purposes.

2 Rev. Proc. 2018-17.

3 To expand further, CFC income that was not previously includible would generally be either active business income or subject to high tax exclusion. Per Reg. § 1.904-5(d)(2), income subject to the high tax exclusion is, for look-through rule purposes, general basket income.

4 This is confirmed by pages 610 and 620 of the *Conference Report on the Tax Cuts and Jobs Act*. Footnote 1500 on page 610 of the Conference Report reads: "Other foreign tax credits used by a taxpayer against tax liability resulting from the deemed inclusion apply in full." The full report can be found at https://www.gpo.gov/fdsys/pkg/CRPT-115hrpt466/pdf/CRPT-115hrpt466.pdf. In a US Ways and Means Committee report (available online at https://www.congress.gov/congressional-report/115th-congress/house-report/409/1?overview=closed), the Committee notes: "The Committee also understands that the existing … foreign tax credit carry-forward rules may interact with income inclusions arising from section 965 in ways that may not be appropriate and that require additional consideration." This shows limiting the applicability of foreign tax credit carry-forwards was considered, but not applied.

[5] The technical logic for this conclusion can be found in detail at http://www.skltax.com/grind-foreign-tax-credits-code-section-965-inclusion/

[6] It may be possible to carry back the tax credits to 2017 without paying the tax twice. This is alluded to in Publication 514, but it is not clear. Alternatively, a taxpayer could just simply not pay the 2017 US liability and then fully offset it with a 1040X once the 2018 tax is generated. That should wipe out any liability and associated interest.

[7] If the dividend were paid December 31, and the taxpayer took the (reasonable) position that it was paid out after the cash position was calculated, then it would not reduce the cash position and there would be no risk of the application of the anti-avoidance rule.

[8] Rev. Proc. 2018-17 at s. 11.

[9] In the case of a dividend, it would not reduce post-1986 E&P per Code section 965(d)(3)(B). A bonus might reduce E&P as measured at December 31, 2017 if paid prior to that date, but may not meaningfully reduce the post-1986 E&P number as the November 2 measurement date would still be operative. A 2018 bonus or dividend would obviously have no effect on E&P as measured on November 2, 2017 or December 31, 2017.

[10] A discussion of whether there is a treaty override available to ensure double tax relief under the Canada–US Tax Treaty is available online at http://www.skltax.com/grind-foreign-tax-credits-code-section-965-inclusion/

[11] Reg. § 1.962-1(b) indicates that the Code section 962 election is made each year. Reg. § 1.962-1(b)(iii) suggests that there is no carry-back or carry-forward of a credit unless a 962 election is in place for a given year. Thus, the logical conclusion is that the indirect tax credit is limited to years in which there was a 962 election in place (*i.e.*, only tax year 2017).

[12] *See* Kevyn Nightingale, "Americans Living Abroad and the Net Investment Income Tax," *The Tax Adviser*, March 31, 2014, available online at: https://www.thetaxadviser.com/issues/2014/apr/nightingale-april2014.html

[13] For instance, it took many years to clarify the approach to RRSPs – a far more common issue than the applicability of the transition tax to individual US citizens.

Recent Tax Developments In Chile

by Marcos Rivera

In late 2017, the Chilean IRS (*Servicio de Impuestos Internos*, or SII) published its latest Tax Schemes Catalogue" outlining specific sets of tax circumstances that might be subject to review by the tax authority on the grounds that they are abusive or lack substance from a business perspective. The stated aim of the Catalogue is to provide tax and legal certainty to taxpayers by making transparent the scenarios in which Chile's anti-avoidance rule could be applied, as well as those where, in principle, there is no warning of the existence of circumvention.

Such scenarios include:

- Cases in which the tax benefits of the transaction are excessive or out of proportion;
- Cases in which the signature of unusual agreements is required;
- Cases that imply a flow of funds/goods between the same companies without logical explanation, merely for a "tax advantage";
- Cases that imply use of companies in tax havens without personnel or functions located there.

This latest version of the Catalogue includes 15 new schemes. Among the schemes presented in this version, arguably the key schemes to note and avoid from a business perspective are:

- The transfer of profits from a ChileanCo. to a low-tax jurisdiction using an instrumental holding company (ETVE).
- The generation of tax losses through share sales between related parties with the ChileanCo. that reduce the company's taxable net income: originating in the purchase and sale of shares to a foreign related company, acquiring them at a price higher than the market price, and then selling them to another group company at market value.
- The transfer of profits from a Chilean HQ to a tax haven via the use of a hybrid instrument to transfer pending tax profits in the form of capital contributions to a company resident in a low- or no-tax jurisdiction, with the final beneficiary of the funds being the ChileanCo.'s HQ.

Topical News Briefing: BEPS – Where The UK Leads ...

by the Global Tax Weekly Editorial Team

The UK has become something of a trend-setter in the international taxation arena, particularly with its robust responses to the problem of base erosion and profit shifting.

It became the first country to design and legislate for a diverted profits tax, intended to prevent companies from artificially shifting profits from the UK to low-tax jurisdictions, and it was soon joined by Australia, which introduced its version of a DPT in 2017. While the idea hasn't quite caught on worldwide yet, DPTs have been actively under consideration elsewhere, including in New Zealand. Indeed, in 2016, France was in the process of legislating for its own DPT before the proposal was struck down by the country's Constitutional Court.

Now, it seems, withholding taxes on outbound royalty payments are becoming all the rage. And again, the UK appears to have assumed the role of pioneer.

Announced as part of the the 2017 Budget on November 22 last year, the proposal forms part of the UK's wider review of the challenges posed by the digital economy for the corporate tax system. It is designed to tackle arrangements between related entities which reduce exposure to tax on sales generated by the exploitation of intellectual property in the UK. This can occur, says the Government, because the company paying for the rights deducts the payment, and the recipient of the royalty may be located in a low- or no-tax jurisdiction.

Since the UK published further details of this measure in December, the Netherlands has incorporated what looks to be a similar concept into its comprehensive anti-tax avoidance plan, which was announced last month. A new system of withholding taxes will be imposed on outgoing dividend, interest, and royalty payments to discourage the "abusive" shifting of income to low-tax jurisdictions. It is pointed out in the plan that, in a similar vein to the UK proposal, this measure may also require the Government to negotiate changes to some of the Netherlands' tax treaties.

Singapore also looks to have jumped on this particular bandwagon. As reported in this week's issue of *Global Tax Weekly*, the tax authority there recently confirmed that from April 1, 2018, Singapore-based payers will need to withhold tax at the prevailing corporate tax rate of 17 percent

for certain payments of royalties and management fees in respect of related-party services performed in Singapore.

The UK Government justified its proposal by stating its belief in the now widely accepted principle "that a multinational group's profits should be taxed in countries in which it generates value." In other words, this is a BEPS measure, pure and simple. However, the Government also acknowledged that it has specific targets in mind: digital companies. Nevertheless, it also conceded that there could be a certain amount of collateral damage, with taxpayers in other sectors expected to be caught in the net. And, worryingly, a consultation indicated that the Government was unsure how to approach the matter of double taxation, which could apply with respect to payments made to jurisdictions that tax royalties.

The Dutch anti-avoidance package was also drafted very much with BEPS in mind. However, the Dutch withholding tax proposal takes a different approach to the UK by targeting a much broader range of outbound payments. And there remain many questions to be answered about how the measure will apply in practice.

Despite these questions, and the uncertainties they have created for a number of taxpayers, it cannot be ruled out that other jurisdictions will seek to legislate similar measures. Multinational businesses, particularly those with high amounts of intangible income, are going to have to think even harder now to avoid what looks like an increasing number of tax pitfalls.

EU Consults On Tackling E-Commerce VAT Non-Compliance

The European Commission launched a consultation on February 27, 2018, on proposals to enhance the amount of data available to member states and European law enforcement bodies to better combat e-commerce VAT evasion and fraud.

Introducing the consultation, the European Commission said: "Tax administrations have [few] sources of information to identify remote sellers (those situated in another EU country or in countries outside EU) that do not comply with the VAT rules when selling online to final consumers (*i.e.*, no VAT registration, no VAT declaration, no VAT payment)."

"Market intermediaries, such as payment service providers, hold data that may be useful for tax administrations to detect these non-compliant remote sellers and correctly assess the VAT liabilities on e-commerce sales. In fact, these intermediaries are involved in almost all e-commerce sales. In 2014, 94 percent of online payments for cross-border purchases occurred via online payment intermediaries, credit or debit cards, or prepaid cards. Depending on the national legislation, in some member states the tax authorities collect data from payment intermediaries to fight against VAT fraud in the field of e-commerce, while this is not the case in other member states."

The consultation is intended to collect stakeholders's opinions on:

- The problem of VAT fraud in the field of e-commerce and its EU dimension;
- Whether the current EU legal framework to fight VAT fraud provides the tax authorities in EU countries with the proper tools to fight VAT fraud in the field of e-commerce;
- Whether an EU harmonized approach could provide better tools to tax authorities in EU countries to fight the VAT fraud in the field of e-commerce;
- The impact of the different policy options in terms of fighting fraud, regulatory costs, and individuals rights, including issues of privacy and protection of personal data.

Responses to a questionnaire on these four areas are being sought by April 25, 2018.

The initiative is one of the last deliveries of the European Commission's 2016 VAT Action Plan, intended to complement the recently adopted VAT Digital Single Market Package. This latest effort focuses on the development of administrative cooperation tools for the competent tax authorities to detect and control VAT non-compliant sellers trading online.

Improving information exchange processes with regards to VAT, including with third countries, is a key tenet of the EU Commission's ongoing VAT reform efforts, as outlined in greater detail on November 30, 2017.

Its overall work in this area is intended to enable member states to communicate more quickly to challenge fraudsters, as fraud can happen nearly instantaneously. As part of its wider efforts, the Commission will establish an online system for information sharing within Eurofisc, a network that connects anti-fraud experts from the member states. This system would enable member states to process, analyze, and audit data on cross-border activity to make sure that risk can be assessed as quickly and accurately as possible. New powers would also be given to Eurofisc to coordinate cross-border investigations.

The new measures would also open new lines of communication and data exchange between tax authorities and European law enforcement bodies on cross-border activities suspected of leading to VAT fraud: OLAF, Europol, and the newly created European Public Prosecutor Office (EPPO). Cooperation with European bodies would allow for the national information to be cross-checked with criminal records, databases, and other information held by Europol and OLAF, in order to identify the real perpetrators of fraud and their networks.

Recently, to build on these efforts, the EU and Norway signed a new agreement on administrative cooperation on VAT compliance on February 6. It will provide EU member states and Norway with a legal framework for administrative cooperation in the prevention of VAT fraud and for mutual assistance in the recovery of VAT claims. Norway is the first country with which the EU has signed an agreement in this area but the Commission has stated that it wants to secure more agreements mirroring this pact with other countries.

VAT fraud is estimated to cause losses for EU member states of about EUR50bn (USD61bn) each year and there are growing concerns that terrorist organizations are branching out into carrying out value-added tax fraud schemes to fund their activities.

Finland Wary About EU VAT Rate Reforms

The Finnish Government has said that while it supports the general objectives of the European Commission's proposals on EU VAT rates, the plan's details should be subjected to further examination.

According to a statement released by the Finnish Ministry of Finance on March 1, Finland is in favor of bringing the rules on VAT rates up to date. However, it warns that a more flexible position on reduced rates must not impede the

functioning of the single market and increase the VAT compliance burden.

Under plans unveiled by the EC in January 2018, member states would be given greater powers to vary VAT rates and to relax VAT rules for small businesses. The proposals are part of a broader overhaul of the EU's VAT system, which aims at the creation of a single VAT area.

Under the current rules, EU member states can apply a reduced rate of as low as 5 percent to two distinct categories of products in their countries. A number of member states also apply specific derogations for further reduced rates.

The Commission has proposed that, in addition to a standard VAT rate of a minimum 15 percent, member states should be able to put in place:

- Two separate reduced rates of between 5 percent and the standard rate chosen by the member states;
- One exemption from VAT (or "zero rate"); and
- One reduced rate set at between zero percent and the reduced rates.

The current list of goods and services to which reduced rates can be applied would be abolished. It would be replaced by a new list of products to which the standard rate of 15 percent or above would always be applied.

"The danger of the model proposed by the Commission is that it could lead to growing use of reduced rates and a more complex system at EU level," the Ministry stated.

Finland is also opposed to the proposed negative list approach whereby items to which reduced rates do not apply are listed, preferring instead the principle of listing those goods and services to which reduced VAT rates apply.

In a communication to the Finnish Parliament on the matter, the Government warns that the EU proposal could erode domestic tax revenues, distort the internal market, and increase business costs and legal uncertainty, leading to more litigation on cross-border VAT issues.

Austria To Lower VAT On Accommodation

The Austrian Government will reduce the VAT rate on accommodation this year in an attempt to boost the country's tourism sector, Elisabeth Kostinger, Minister for Sustainability, Agriculture, and Tourism, has announced.

Supplies of hotel accommodation in Austria are currently subject to VAT at the reduced rate of 13 percent. Under the Government's plans, approved by the Council of Ministers on February 28, these supplies will be included in the 10 percent lower rate of VAT.

The VAT cut is expected to become effective from November 1, 2018, in order to provide the hotel sector with sufficient time to prepare for the change.

Australia Lists Upcoming GST Guidance

The Australian Taxation Office (ATO) has announced upcoming guidance on the goods and services tax regime.

This month, the ATO expects to release guidance in three areas concerning low value goods [reference code 3829].

The first will explain when a supply of low value imported goods is connected with Australia. The second will provide guidance on GST on supplies made through electronic distribution platforms, including an explanation of the Electronic Distribution Platform (EDP) rules and when an operator of an EDP will be responsible for GST on a supply of offshore low value goods made through their platform. Additional guidance will also be released on when an entity is a redeliverer and when they will be responsible for GST on an offshore supply of low value goods.

In April, it will issue guidance on supplies connected with Australia [3870], following legislative amendments to the GST Act relating to cross-border supplies.

In May, it will release guidance on time limits on entitlements to input tax credits [3869], to explain the Commissioner's views on when an entitlement to an input tax credit does not cease under Division 93 of the GST Act.

It also intends to issue guidance to explain the Commissioner's views on when a supply of goods will be connected with the indirect tax zone. [3852], and to explain the Commissioner's views on when a supply of real property will be connected with the indirect tax zone [3853]. The ATO has yet to schedule the release of these two final guidance notes.

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Israeli Tax Authority Issues Virtual Currency Tax Rules

The Israeli Tax Authority (ITA) has clarified the country's tax rules for cryptocurrencies such as Bitcoin, in a circular issued on February 19.

The ITA confirmed that Bitcoin is to be viewed as property for capital gains tax (CGT) purposes, and that, as such, gains from cryptocurrency trading are liable to tax when the investment is divested. CGT on such gains will be imposed at a rate of 25 percent for individuals, and 47 percent for businesses.

The circular further clarified that those "mining" virtual currencies – the process through which they are first created, by solving algorithms – will be required to charge VAT on the first supply of that bitcoin, but trades thereafter will be outside the scope of VAT. VAT will be applicable in the normal way for goods and services purchased where the consideration provided for such is virtual currency.

Businesses engaged in virtual currency trading will be classified as financial institutions and subject to the tax regime applicable to the industry.

Coinbase To Comply With IRS Tax Summons

Coinbase, a virtual currency wallet and virtual currency exchange service provider, has confirmed it will soon transmit information on the transactions of 13,000 customers to the US Internal Revenue Service (IRS) as a result of an earlier court ruling.

In *IRS v. Coinbase*, Case No. 17-cv-01431-JSC, the US District Court for the Northern District of California ordered Coinbase to provide the taxpayer ID, name, birth date, address, and historical transaction records for certain higher-transacting customers covering the 2013-2015 period.

The case follows a December 2016 summons received by the company from the IRS, which demanded that Coinbase produce a wide range of records relating to approximately 500,000 Coinbase customers. Coinbase fought the summons in court. After a long process, the Court issued an order, which Coinbase said was "a partial, but still significant, victory for Coinbase and its customers," in providing that Coinbase should produce only certain limited categories of information from the accounts of approximately 13,000 customers.

Coinbase has newly sent correspondence to the 13,000 taxpayers concerned, warning them of the upcoming disclosure, which stated: "We are writing to let you know that the above-described court order requires us to produce information specific to your account. If you have concerns about this, we encourage you to seek legal advice from an attorney promptly. Coinbase expects to produce the information covered by the court's order within 21 days."

Germany Clarifies Tax Settings For Virtual Currencies

The German Ministry of Finance has issued a notice clarifying the value-added tax treatment of Bitcoin and other virtual currencies.

The notice, published in German on February 28, clarifies that exchanging virtual currency for conventional currency and vice versa are is exempt from VAT.

Supplies of goods and services for consideration in virtual currencies are treated in same way as transactions carried out in conventional currencies under the notice, and are therefore subject to the same VAT rules.

The notice also confirms that mining for virtual currency – the process through which they are newly created – is not a taxable activity.

The Ministry arrived at this position after discussions with financial authorities. It also largely follows a key ruling on the VAT treatment of Bitcoin (and by extension other virtual currencies) by the European Court of Justice in October 2015, *Skatteverket v. David Hedqvist* (Case C-264/14).

Russia Proposes To Ditch Flat Individual Tax Regime

Legislation has been tabled in Russia's lower house of parliament, the Duma, to introduce a two-rate personal income tax regime, in place of the current flat tax regime.

The bill would create a new rate above the current 13 percent flat rate, of 18 percent for those earning more than RUB24m (USD422,620). The 13 percent rate would continue to apply below this threshold.

Bill No. 384276-7 was tabled in the Duma on February 12, 2018. A consultation is ongoing on the bill and the State Duma Committee on Budget and Taxes is currently reviewing the text. A first reading is expected this month.

Wealthy Flocking To Sign Up To Italy's Flat Tax Scheme

Fabrizio Pagani, Italian Finance Minister Pier Carlo Padoan's Chief of Staff, has said that around 150 wealthy expats have taken up residency in Italy under a recently introduced flat tax scheme intended to attract investors to the country.

Pagani told Bloomberg in an interview published on February 27 that the tax regime, which he said has had a "very good" first year, has attracted millionaires from all parts of the world, including the United States, the United Kingdom, Russia, Switzerland, the Netherlands, and Norway.

Some of these individuals, he said, have wealth in the "hundreds of millions."

Introduced in 2017, the tax regime is available for "newly resident" individuals in Italy, who (regardless of their nationality or domicile) have been non-tax resident in Italy for at least nine years out of the 10 years preceding their transfer to Italy. The incentive regime may be also extended to the family members of these individuals.

High-net-worth individuals transferring their tax residence to Italy can choose to apply a substitute tax to their foreign income and gains, amounting to EUR100,000 (USD123,000) for each fiscal year, as an alternative to the application of ordinary income taxation. The option is valid for a period of 15 years."

The election for the regime may be extended to family members through the payment on their foreign income and gains of a substitute tax amounting to EUR25,000 per member.

Italian-sourced income and gains for individuals opting into the scheme will remain taxable in the normal, progressive way, although there

are also benefits for applicants in terms of gift and succession taxes and tax reporting.

Observers have suggested that the Italian authorities may have their eyes on luring wealthy UK expats post-Brexit.

Gibraltar To Challenge EU's Proposed Brexit Transition Deal

Gibraltar's Government has strongly criticized the draft text of the post-Brexit withdrawal agreement, released by the European Commission, which reportedly gives Spain a veto over Gibraltar's participation in any transitional period and future UK–EU relationship.

It repeats a similar statement in European Council guidelines of April 29, 2017.

While it said it was not surprised, Gibraltar's Government said the Commission's position "constitutes a disgraceful affront to a small British country that voted by 96 percent to remain in the European Union."

Noting that the text is only a draft at this stage, and represents the views of the EU and not the view of the UK or of Gibraltar, Gibraltar's Government says it will strongly urge the UK Parliament, across all the political parties, to resist any withdrawal agreement that excludes Gibraltar.

It says excluding Gibraltar would run contrary to the established policy of the EU, and would mark a degree of political and legal discrimination against a small territory which is unknown in modern European history.

The Government said, to prevent its exclusion, it will mobilize all options available, and has already taken detailed legal advice from top lawyers in the UK.

Hong Kong's New Budget Contains Tax Relief Measures

Hong Kong's new Budget contained a number of new tax perks for individuals and measures to promote the adoption of environmentally friendly technologies, but few measures for businesses.

The key measure, intended to provide one-off relief to a broad range of taxpayers, is a proposal to reduce by 75 percent profits tax, salaries tax, and tax under personal assessment for the year of assessment 2017-18, capped at HKD30,000 (USD3,830) per case. The measure will benefit around 2.02 million taxpayers.

Any overpaid tax that results from legislative delays will be refunded. The proposed tax reduction is not applicable to property tax, although rental income may be eligible under personal assessment.

In addition, in respect of profits tax, the Budget proposes to amend the qualifying debt instrument scheme to expand the types of qualifying instruments. In addition to instruments lodged and cleared by the Central Moneymarkets

Unit of the Hong Kong Monetary Authority, debt securities listed on the Hong Kong Stock Exchange will also become eligible.

The Government will also extend the scope of tax exemption from debt instruments with an original maturity of not less than seven years to instruments of any duration.

The Budget also announces a tax relief intended to support businesses to make investment in green technology. Since the year of assessment 2008-09, to encourage the business community to adopt environmentally friendly machinery and equipment, capital expenditure on such equipment has been fully deductible in the first year of assessment. The deduction period for capital expenditure on renewable energy and energy-efficient building installations was previously shortened from 25 years to 5 years. The Budget proposes to align the two periods, to enable such expenditure to be deducted fully in the first year.

The Budget mainly features personal income tax reform measures, including significant alterations to the personal income tax schedule. The top 17 percent personal income tax rate will remain but it will begin to be chargeable for incomes above HKD200,000, up from HKD135,000. The Budget includes a wide range of tax reliefs for working families and persons with disabilities. It also proposes to allow married couples to elect to file separately.

Greece Publishes List Of Non-Cooperative Territories

Greece has published a list of "non-cooperative" jurisdictions for the 2017 tax year, payments to which may come under greater scrutiny from the Greek tax authority.

Published on February 21, the blacklist comprises 20 jurisdictions, nine fewer than appeared on the list for the previous tax year, published in February 2017.

Under Greek law, payments to parties resident in any of the jurisdictions on the list may not be deductible for tax purposes, and may also be prevented from accessing the participation exemption on dividends received. Furthermore, transactions with listed jurisdictions may attract greater attention from the tax authority with respect to transfer pricing and controlled foreign company rules.

Jurisdictions are included on Greece's blacklist if they fail to meet certain standards on tax transparency and the exchange of information. However, EU member states are excluded.

The 20 jurisdictions are: Antigua and Barbuda, the Bahamas, Bahrain, Brunei, the Cook Islands, Dominica, Grenada, Guatemala, Hong Kong, Lebanon, Liberia, Macedonia, Malaysia, the Marshall Islands, Monaco, Panama, the Philippines, Saint Lucia, the US Virgin Islands, and Vanuatu.

Taxpayer Groups Oppose Internet Sales Tax Bill

A coalition of 20 public policy groups including the National Taxpayers Union (NTU) are opposing the proposed Remote Transactions Parity Act (RTPA), which would grant US states new powers to tax and regulate internet sales made by businesses outside their borders.

H.R. 2193 was introduced in the US House of Representatives in April 2017 by Congresswoman Kristi Noem (R – South Dakota) and is currently being reviewed by the Subcommittee on Regulatory Reform, Commercial And Antitrust Law. It would require all remote sellers using an electronic marketplace in member states to collect and remit sales taxes. In addition, non-digital remote sellers with gross annual receipts exceeding USD10m in year one (falling to USD5m in year two and USD1m in year three) would be covered.

Under current law, a state can require a business to collect its sales tax only if it is physically present within its boundaries. "Dismantling the physical presence protection for remote retail sales could throw open the floodgates for states to aggressively attempt enforcement of not just their sales tax laws, but also business and individual income tax rules, and even activity regulatory obligations on out-of-state entities," said the coalition in an open letter published on February 27.

The letter cited estimates from a November 2017 Government Accountability Office (GAO) report that suggested that potential state revenue from the new sales tax would amount to just 1–1.5 percent of current state revenues. The GAO report also noted that 75–80 percent of this revenue was already collectible under current law.

"States have for years been aggressively moving to expand their tax and regulatory authority across borders, federalism and interstate commerce be damned. The last thing Congress should do is validate their aggression by granting them new powers," said Andrew Moylan, the letter's main author and head of the Interstate Commerce Initiative at the NTU.

The letter was issued ahead of the Supreme Court case of *South Dakota v. Wayfair* coming up in April 2018, which could hand down a new precedent in the debate over how to apply internet sales tax, giving states expanded authority to collect sales tax from remote retailers.

"If the Court acts to dismantle limits on state power, Congress must act to rebuild them. RTPA does the opposite by granting states new tax powers over interstate commerce," said the letter. "This legislation is bad policy, bad politics, and bad precedent."

Singapore Hikes WHT On Certain Related-Party Payments To Non-Residents

With effect from April 1, 2018, Singapore-based payers will need to withhold tax (WHT) at the prevailing corporate tax rate of 17 percent for certain payments of royalties and management fees in respect of related-party services performed in Singapore, if the date of payment falls on or after April 1, 2018.

The services covered are those in Section 12(7)(b) and (c) of the Income Tax Act, namely:

> "(b) any payment for the use of or the right to use scientific, technical, industrial or commercial knowledge or information or for the rendering of assistance or service in connection with the application or use of such knowledge or information;
>
> (c) any payment for the management or assistance in the management of any trade, business, or profession …"

The change is to follow the withdrawal of an administrative concession, which allows companies to apply a lower WHT rate on gross payments made for related-party services performed in Singapore that fall under Section 12(7)(b) and (c) without the need to seek prior approval from IRAS if the following conditions are met:

- The services provided by the non-resident (NR) company to its related parties are not also provided to an unrelated party;
- The services must be routine support services with a mark-up of at least five percent; and
- No disallowable expenses (*e.g.*, fixed assets) are included in the costs incurred by the non-resident company in the provision of the services.

IRAS said that due to low adoption rates it will be withdrawing the administrative concession.

IRAS confirmed that, for the purposes of the change, the date of payment is defined as the earliest of the following dates:

- When the payment is due and payable based on the agreement or contract, or the date of the invoice in the absence of any agreement or contract (credit terms should not be taken into consideration);
- When payment is credited to the account of the non-resident or any other account(s) designated by the non-resident; or
- The date of actual payment.

UK Tables Regulations For Making Tax Digital Initiative

The UK Government has released The Value Added Tax (Amendment) Regulations 2018, which were tabled in the House of Commons on February 28, 2018, to provide for the

introduction of new digital tax administration obligations for value-added tax (VAT) registered persons in the UK, stemming from the Government's Making Tax Digital (MTD) project.

Under MTD, from April 1, 2019, businesses with a turnover above the VAT threshold (currently GBP85,000, or about USD117,000) will have to keep their records digitally (for VAT purposes only), and provide their VAT return information to HM Revenue & Customs (HMRC) through MTD-compatible software. MTD will be available on a voluntary basis to other businesses, for both VAT and income tax.

The second draft of Finance Bill 2017, published on September 8, 2017, included legislation allowing for the introduction of Making Tax Digital for VAT. This primary legislation gave HMRC the powers to introduce regulations for the regime in December 2017, which set out the detailed requirements that businesses will have to meet The Value Added Tax (Amendment) Regulations 2018. These Regulations have now been tabled and forwarded to Parliament for its approval. It has also previously released a draft VAT notice on what Making Tax Digital for tax-registered persons will involve.

FATCA Reporting In Singapore To Start April 16

Financial institutions in Singapore are required to file information required under the US Foreign Account Tax Compliance Act (FATCA) starting April 16 by May 31, 2018.

All reporting Singapore financial institutions (SGFIs) must submit a FATCA Return to IRAS by May 31 setting out the required information in relation to every US reportable account that they maintained in the 2017 calendar year.

"We strongly encourage Reporting SGFIs to submit their FATCA Return by May 15, 2018, to allow sufficient time to resolve any unexpected issues," the Inland Revenue Authority of Singapore said in a March 5 statement.

The agency further noted that enforcement actions would be taken against Reporting SGFIs who do not to submit their FATCA returns on time or who fail to submit FATCA returns.

"Reporting institutions that do not maintain any US Reportable Accounts may continue to submit a Paper Nil Return for Reporting Year 2017. The Paper Nil Return for Reporting Year 2017 will be made available for download by IRAS from April 13, 2018," said IRAS.

Hong Kong Launches CbC Reporting Portal

Hong Kong's Inland Revenue Department on March 5 launched its new Country-by-Country (CbC) Reporting Portal.

Groups can now register to file CbC reports for accounting periods beginning between January 1, 2016, and December 31, 2017, using the online portal.

The CbC report is one element of a new three-tiered standardized approach to transfer pricing documentation, as proposed in Action 13 of the OECD's base erosion and profit shifting (BEPS) project.

CbC reporting requires multinational enterprises to provide aggregate information annually, in each jurisdiction where they do business, relating to the global allocation of income and taxes paid, together with other indicators of the location of economic activity within the MNE group. It also covers information about which entities do business in a particular jurisdiction and the business activities each entity engages in.

The requirement for filing a CbC report in Hong Kong applies to the parent entity of MNE groups whose annual consolidated group

revenues exceeds HKD6.8bn (USD868.3m), and in exceptional circumstances surrogate entities of the group.

UAE Clarifies Tax Rules For Contracts Agreed Prior To VAT

The United Arab Emirates' (UAE's) Federal Tax Authority (FTA) has issued guidance on whether a supplier or consumer is liable for VAT on goods or services for contracts negotiated before VAT was introduced.

In a statement released on March 3, the FTA explained that consumers will be responsible for the payment of VAT where a contract issued before January 1, 2018, states that the amount due is exclusive of tax and the supply takes place on or after January 1.

Suppliers will be liable to pay VAT in two cases, the guidance states: if the contract states that the amount received against the good or service is inclusive of VAT; or if the contract issued to the consumer did not refer to VAT.

In the latter case, the guidance states that if the recipient is registered for tax, the amount due is treated as exclusive of tax. The supplier must then ascertain whether the recipient is registered and whether the recipient is able to recover tax as per Article 70 of the VAT Executive Regulations.

US Threatens New Steel, Aluminum Tariffs

The US will impose new tariffs on steel and aluminum imports, President Trump has announced.

The tariffs will be set at 25 percent for steel imports and 10 percent for aluminum, he said.

Trump met with representatives from the US steel and aluminum industry on March 1. According to Trump, US companies have been "very unfairly treated by bad policy, by bad trade deals, by other countries," and that the aluminum industry in particular "has been decimated."

Trump claimed that "massive amounts of product" had been dumped on the US market, emphasizing that "it just kills – it destroys our companies and our jobs."

"So we're going to build our steel industry back and we're going to build our aluminum industry back," he said.

Trump announced that his administration is "going to be instituting tariffs." He said that he wants "to do some very fast action" and "will probably have everything completed by next week."

He elaborated: "We'll be imposing tariffs on steel imports, and tariffs on aluminum imports. And you're going to see a lot of good things happen. You're going to see expansions of the companies."

When asked by a journalist how long the tariffs would be in place, Trump said: "Unlimited period. Unlimited."

The action follows investigations undertaken between April 2017 and January 2018 by the US Department of Commerce. These investigations concluded that steel and aluminum imports threatened US national security and recommended the imposition of trade restrictions.

EU Preparing Challenge To US Steel, Aluminum Tariff Plans

The EU has said that it will defend its interests in the event that the US imposes new tariffs on steel and aluminum imports.

On March 1, US President Donald Trump said that his administration is "going to be instituting tariffs" of 25 percent on steel imports and 10 percent on aluminum imports, which will be in place for an "unlimited period."

The action follows investigations undertaken between April 2017 and January 2018 by the US Department of Commerce. These investigations concluded that steel and aluminum imports threatened US national security and recommended the imposition of trade restrictions.

Jean-Claude Juncker, the President of the European Commission, said that the EU regrets Trump's action, "which appears to represent a blatant intervention to protect US domestic industry and not to be based on any national security justification."

The Commission believes that any national security justification appears to be very weak. It cited the US Secretary of Defense as stating that US military requirements represent no more than 3 percent of US production and that the Department of Defense is able to acquire the steel and aluminum it needs.

Juncker said that the move will "only aggravate matters" and that the EU "will not sit idly while our industry is hit with unfair measures that put thousands of European jobs at risk."

Juncker explained that the Commission will bring forward a proposal for WTO-compatible countermeasures against the US.

Trade Commissioner Cecilia Malmström added that the EU will also seek dispute settlement consultations with the US at the earliest opportunity.

She warned that US tariffs "will have a negative impact on transatlantic relations and on global markets," and will "raise costs and reduce choice for US consumers of steel and aluminum, including industries that import these commodities."

ARMENIA - IRAQ

Initialed

The Armenian Ministry of Finance said February 22, 2018, that a DTA had been initialed after four days of negotiations with Iraq.

BAHRAIN - PHILIPPINES

Ratified

Bahrain's King Hamad bin Isa Al Khalifa has approved a law ratifying the DTA Protocol signed with the Philippines, state media reported on February 20, 2018.

BANGLADESH - MOROCCO

Signature

Bangladesh and Morocco signed a DTA on March 1, 2018.

BOTSWANA - ZIMBABWE

Signature

The Government of Botswana has announced that the country will sign a DTA Protocol with Zimbabwe by the end of the year.

GUERNSEY - PORTUGAL

Into Force

Guernsey's TIEA with Portugal will enter into force on March 15, 2018, according to a February 20, 2018 update from the Guernsey Government.

HUNGARY - KYRGYZSTAN

Negotiations

Hungary and Kyrgystan have begun DTA negotiations, the Hungarian Ministry of Foreign Affairs and Trade announced on February 28, 2018.

INDIA - KENYA

Ratified

India's Ministry of Finance on February 22, 2018, revealed that an updated DTA between India and Kenya had been published in the Official Gazette, to replace the agreement in place between the two countries since 1985.

IRAN - VARIOUS

Forwarded

According to a statement from the President's office, Iran's Cabinet on February 18, 2018, approved the signing of DTAs with Sweden, Lithuania, and Japan.

JAPAN - SPAIN

Negotiations

Japan and Spain have agreed a DTA in principle to replace their existing pact, the Japanese Ministry of Foreign Affairs announced on February 21, 2018.

LUXEMBOURG - OMAN

Negotiations

The Government of Luxembourg on February 23, 2018, reported that it is pushing for the negotiation of an amended DTA with Oman.

MEXICO - JAMAICA

Into Force

According to a monthly update from the Mexican Government, Mexico's DTA with Jamaica entered into force on February 24, 2018.

MEXICO - SAUDI ARABIA

Into Force

The DTA signed between Mexico and Saudi Arabia entered into force on March 1, 2018, following the publication in Mexico's official gazette of a law ratifying the agreement on February 26, 2018.

PAKISTAN - PHILIPPINES

Negotiations

In meetings over two days which ended on February 28, 2018, representatives from Pakistan and the Philippines agreed to renegotiate their DTA.

PARAGUAY - QATAR

Signature

Paraguay's Government on February 11, 2018, announced the signing of a DTA with Qatar.

SINGAPORE - TUNISIA

Signature

Singapore signed a DTA with Tunisia on February 27, 2018.

SWITZERLAND - VARIOUS

Forwarded

According to preliminary media reports, Switzerland's upper house of Parliament on February 26, 2018, approved laws to ratify the DTAs signed with Kosovo and Pakistan and a Protocol with Latvia.

UNITED KINGDOM - MAURITIUS

Signature

The UK and Mauritius signed a DTA on February 28, 2018.

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

THE AMERICAS

2018 ABA/IPT Advanced Tax Seminars

3/19/2018 - 3/23/2018

American Bar Association

Venue: Ritz-Carlton New Orleans, 921 Canal St New Orleans, LA 70112-2503, USA

Key speakers: Leah Robinson (Mayer Brown), Karen Hawkins (Hawkins Law), Doug Sigel (Ryan Law Firm), Charles Moll III (Winston & Strawn), among numerous others

https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=293261611

14th Annual International Estate Planning Institute

3/22/2018 - 3/23/2018

STEP

Venue: Crowne Plaza Hotel, 1605 Broadway and 49th, New York, NY 10019, USA

Key speakers: Richard Anderson (Wilmer Cutler Pickering Hale and Dorr), Stanley A. Barg (Kozusko Harris Duncan), Leigh-Alexandra Basha (McDermott Will and Emery), Robert Colvin (Robert D. Colvin & Associates), among numerous others

https://www.step.org/ny-institute2018

OffshoreAlert Conference: The Miami Beach Edition

4/15/2018 - 4/17/2018

OffshoreAlert

Venue: The Miami Beach EDITION, 2901 Collins Ave, Miami Beach, FL 33140, USA

Key speakers: Lee Martin (IRS), Warren Gluck (Holland & Knight), Christopher Ehrman (Securities and Exchange Commission), David Marchant (OffshoreAlert), among numerous others

https://www.offshorealert.com/conference/miami/

Trusts: The Ultimate Guide

4/23/2018 - 4/23/2018

National Business Institute

Venue: University of Arkansas RCED – Walton Conference Hub, Donald W. Reynolds Center, Fayetteville, AR 72701, USA

Key speakers: Scott Lar (Quattlebaum, Grooms & Tull), Edwin McClure (Matthews, Campbell, Rhoads, Mcclure & Thompson), Tyler Squires (Allen Squires Law), Michael Collins, among numerous others

https://www.nbi-sems.com/ProductDetails/Trusts-The-Ultimate-Guide/Seminar/80098ER?N=64013%2B4294966381

STEP International Tax & Estate Planning Forum: Around the Globe in 2018

5/3/2018 - 5/4/2018

STEP

Venue: The Surf & Sand Resort, 1555 S Coast Hwy, Laguna Beach, CA 92651, USA

Chairs: Katharine Davidson (Henderson, Caverly & Pum), Lawrence H. Heller (Greenberg Traurig)

https://www.step.org/events/step-international-tax-estate-planning-forum-around-globe-2018-3-4-may-2018-0

STEP CC18 Caribbean Conference

5/7/2018 - 5/9/2018

STEP

Venue: Hilton Barbados, Needham's Point St. Michael, Bridgetown, BB 11000, Barbados

Key speakers: Theo Burrows (Higgs & Johnson), Peter Cotorceanu (G&TCA and Anaford), Eric Dorsch (Kozusko Harris Duncan), Tara Frater (Lex Caribbean), among numerous others

http://www.stepcaribbeanconference.com/

48th Annual Spring Symposium

5/17/2018 - 5/18/2018

National Tax Association

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

Chair: Rosanne Altshuler (National Tax Association)

https://www.ntanet.org/event/2017/12/48th-annual-spring-symposium-2018/

In-Depth HST/GST Course

5/27/2018 - 6/1/2018

CPA

Venue: 48 John Street, Niagara-on-the-Lake, ON LOS 1J0, Canada

Key speakers: David Robertson (CPA), Janice Roper (Deloitte)

https://www.cpacanada.ca/en/career-and-professional-development/courses/core-areas/taxation/indirect-tax/in-depth-hst-gst-course

STEP Canada 20th National Conference

5/28/2018 - 5/29/2018

STEP

Venue: Metro Toronto Convention Centre, 222 Bremner Boulevard, South Building, Toronto, ON, Canada

Speakers: Philip Marcovici, TEP, Hong Kong: Offices of Philip Marcovici, Ed Northwood, JD, TEP, Buffalo: Ed Northwood and Associates, Pamela Cross, LLB, TEP: Ottowa: Borden Ladner Gervais LLP; Deputy Chair, STEP Canada, among numerous others.

http://www.cvent.com/events/step-canada-20th-national-conference/event-summary-3ae3bbc412384eed96b4e18e7df3b266.aspx

Transcontinental Trusts: International Forum 2018

6/3/2018 - 6/5/2018

Informa

Venue: The Hamilton Princess, 76 Pitts Bay Rd, HM08, Bermuda

Key speakers: The Hon. Premier David Burt (Premier, The Goverment of Bermuda), The Hon. Justice Indra Charles (Justice, Supreme Court of The Bahamas), Anthony Poulton (Baker & McKenzie), Jonathan Conder (Macfarlanes), among numerous others

https://finance.knect365.com/transcontinental-trusts-international-forum/

1031 Exchanges

6/6/2018 - 6/6/2018

National Business Institute

Venue: Hotel RL by Red Lion Salt Lake City, 161 West 600 South, Salt Lake City, UT 84101, USA

Key speakers: Michael Anderson (Exchange Services), Adam Dayton (Fabian VanCott), J. Craig Smith (Smith Hartvigsen), Michael Walch (Kirton Mcconkie), among numerous others

https://www.nbi-sems.com/ProductDetails/1031-Exchanges/Seminar/79433ER?N=64013%2B4294966381

Trusts From A to Z

6/7/2018 - 6/7/2018

National Business Institute

Venue: Comfort Inn, 716 New Haven Rd, Naugatuck, CT 06770, USA

Key speakers: Beth Ann Brunalli (Davidson, Dawson & Clark), Michael Clear (Wiggin and Dana), Stephen Keogh (Keogh, Burkhart & Vetter), Katherine Mcallister (Cummings & Lockwood), among numerous others

https://www.nbi-sems.com/ProductDetails/Trusts-From-A-to-Z/Seminar/79049ER?N=64013%2B4294966381

11th Annual US – Latin America Tax Planning Strategies

6/13/2018 - 6/15/2018

American Bar Association

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

Key speakers: TBC

https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=294841319

Family Office & Private Wealth Management Forum

7/16/2018 - 7/18/2018

Opal Group

Venue: Gurney's Newport Resort & Marina, 1 Goat Island, Newport, RI 02840, USA

Key speakers: TBC

http://opalgroup.net/conference/family-office-private-wealth-management-forum-2018/

STEP Global Congress

9/13/2018 - 9/14/2018

STEP

Venue: The Westin Bayshore, 1601 Bayshore Drive, Vancouver, British Columbia, V6G 2VA, Canada

Key speakers: TBC

http://www.stepglobalcongress.com/About-Congress

Family Office & Private Wealth Management Forum West

10/24/2018 - 10/26/2018

Opal Group

Venue: Napa Valley Marriott, 3425 Solano Ave, Napa, CA 94558, USA

Key speakers: TBC

http://opalgroup.net/conference/family-office-private-wealth-management-forum-west-2018/

111th Annual Conference on Taxation

11/15/2018 - 11/17/2018

National Tax Association

Venue: Sheraton New Orleans Hotel, 500 Canal St, New Orleans, LA 70130, USA

Chair: Rosanne Altshuler (National Tax Association)

https://www.ntanet.org/event/2017/12/111th-annual-conference-on-taxation/

ASIA PACIFIC

STEP South Australia – 2018 Trusts Symposium

3/9/2018 - 3/9/2018

STEP

Venue: Hilton Adelaide, 233 Victoria Square, Adelaide SA 5000, Australia

Key speakers: Malcom Blue (Supreme Court of South Australia), John Glover (Owen Dixon Chambers East), Sashi Maharaj (Murray Chambers), David Wright (University of Adelaide Law School), among numerous others

https://www.step.org/events/step-south-australia-2018-trusts-symposium-9-march-2018

The Tax Institute, 33rd National Convention

3/14/2018 - 3/16/2018

The Tax Institute

Venue: Cairns Convention Centre, Sheridan and Wharf Street, Cairns City QLD 4870, Australia

Key speakers: Ken Schurgott (Schurgott & Co Lawyers), Vanessa Priest (Deloitte), Andrew Mills (Australian Taxation Office), Mark Leibler (Arnold Bloch Leibler), among numerous others

https://www.taxinstitute.com.au/professional-development/key-events/national-convention

China Offshore Shenzhen Summit 2018

5/22/2018 - 5/24/2018

China Offshore

Venue: Grand Hyatt Shenzhen, 1881 Baoan Nan Road, Luohu District, Shenzhen, 518001, China

Key speakers: Simon Guo (Five Lakes World Trade Center), Uny Chan (Fidinam Hong Kong), Timothy Zammit (RSM Malta), Till Neumann (Citizen Lane), among numerous others

http://shenzhen.chinaoffshoresummit.com.hk/en/

The 4th Annual Asia Offshore Forum

5/29/2018 - 5/30/2018

Asia Offshore Association

Venue: Renaissance Hong Kong Harbour View Hotel, Hong Kong Convention And Exhibition Centre, 1 Harbour Rd, Wan Chai, Hong Kong

Key speakers: Michael Olesnicky (KPMG), Zarrian Liu (Zhong Zhi Wealth Preservation Holdings), Wilson Cheng (Ernst & Young), Gabriel Hai (Lang Di Fintech), among numerous others

http://asiaoffshoreforum.com/

CENTRAL AND EASTERN EUROPE

Wealth Management & Private Banking Summit – Russia & CIS

4/17/2018 - 4/18/2018

Adam Smith Conferences

Venue: Marriott Grand Hotel, 26/1, Tverskaya Street, Moscow, 125009, Russia

Key speakers: Michael Addison (UBS), Evgenia Tyurikova (Sberbank Private Banking), Katerina Mileeva (Alfa-Bank), Evgeny Sivoushkov (PwC), among numerous others

http://www.russianwealthmanagement.com/

MIDDLE EAST AND AFRICA

5th GCC VAT Forum

4/9/2018 - 4/9/2018

IQPC

Venue: The Meydan Hotel, Meydan Racecourse Al Meydan Road, Nad Al Sheba, Dubai, United Arab Emirates

Key speakers: Rajesh Pareek (Musafir), David Stevens (EY MENA), Lindsay Degouve De Nuncques (ACCA), Jeremy Cape (Squire Patton Boggs), among numerous others

https://gccvat.iqpc.ae/?utm_source=conferencealerts&utm_medium=portal&utm_campaign=-external-diarylisting&utm_term=homepage&utm_content=text&mac=27287.005_confalerts_dl&disc=27287.005_confalerts_dl

Protecting Client Assets in a Volatile and Uncertain World – STEP South Africa Conference

4/23/2018 - 4/24/2018

STEP

Venue: Sandton Convention Centre, 161 Maude St, Sandton, Johannesburg, 2196, South Africa

Key speakers: Assad Abudullatif (Axis Fiduciary Ltd), Nigel Barnes (Henley & Partners), Lester Basson (Department of Justice and Constitutional Development), Rachel Coyle (S-RM), among numerous others

https://www.step.org/sa2018

4th IBFD Africa Tax Symposium

5/9/2018 - 5/11/2018

IBFD

Venue: Sarova Whitesands Beach Resort & Spa, Off Malindi Road, Mombasa County, Mombasa, Kenya

Key speakers: Belema Obuoforibo (IBFD), Emily Muyaa (IBFD), Jan Maarten Slagter (IBFD), Kennedy Munyandi (IBFD), Michael Lennard (FDO, United Nations), and numerous others (TBC)

https://www.ibfd.org/IBFD-Tax-Portal/Events/4th-IBFD-Africa-Tax-Symposium

WESTERN EUROPE

International Trusts & Private Client Forum Guernsey

3/13/2018 - 3/13/2018

Informa

Venue: Old Government House Hotel & Spa Guernsey, Ann's Place, GY1 1JL, Guernsey

Key speakers: Jonathan Conder (Macfarlanes), Dawn Goodman (Withers), David Kilshaw (Ernst Young), Anthony Poulton (Baker & McKenzie), among numerous others

https://finance.knect365.com/international-trust-private-client-guernsey/

IBFD Seminar: The Future of VAT

3/14/2018 - 3/15/2018

IBFD

Venue: TBC

Key speakers: Robert van Brederode (Crowe Horwath), Werner Engelen (LEGO Group), Toon Beljaars (Uber), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/IBFD-Seminar-Future-VAT#tab_program

European Value Added Tax – Selected Issues

3/14/2018 - 3/16/2018

IBFD

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

Instructors: Fabiola Annacondia (IBFD), Wilbert Nieuwenhuizen (VAT adviser), Peter Hughes (independent chartered accountant), Silvia Kotanidis (European Parliament Research Service), Jordi Sol (IBFD)

https://www.ibfd.org/Training/European-Value-Added-Tax-Selected-Issues-1

International Trusts & Private Client Forum Jersey

3/15/2018 - 3/15/2018

Informa

Venue: L'Horizon Beach Hotel and Spa, La Route de la Baie, St Brelades Bay JE3 8EF, Jersey

Key speakers: Geoff Cook (Jersey Finance), Jonathan Conder (Macfarlanes), Dawn Goodman (Withers), David Kilshaw (Ernst Young), among numerous others

https://finance.knect365.com/international-trust-private-client-jersey/

TP Minds International

3/20/2018 - 3/21/2018

Informa

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

Key speakers: Pascal Saint-Amans (OECD), Francois Chadwick (Uber), Karine Halimi-Guez (FedEx), Michael Lennard (United Nations), among numerous others

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

International Tax Planning Association Meeting

3/21/2018 - 3/23/2018

ITPA

Venue: Grand Hotel Kempinski, Quai du Mont-Blanc 19, 1201 Geneva, Switzerland

Chairs: Milton Grundy (Grays Inn Tax Chambers), Paolo Panico (Private Trustees)

https://www.itpa.org/meeting/geneva-march-2018/

Spring Residential Conference 2018

3/23/2018 - 3/25/2018

The Chartered Institute of Taxation

Venue: Queens' College, Silver St, Cambridge CB3 9ET, UK

Key speakers: Lucy Obrey (Higgs & Sons), David Marcussen (Marcussen Consulting), Charlotte Ali (Chartered Institute of Taxation), Susan Ball (Crowe Clark Whitehill), among numerous others

https://www.tax.org.uk/src2018

Transfer Pricing Masterclass

3/28/2018 - 3/29/2018

IBFD

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

Instructors: Rezan Ökten (VEON), Jeroen Kuppens (KPMG Meijburg & Co.), Mark Bonekamp (KPMG Meijburg & Co.), Omar Moerer, CFA (PwC), Önder Albayrak (Genzyme-Sanofi)

https://www.ibfd.org/Training/Transfer-Pricing-Masterclass

Principles of Transfer Pricing

4/9/2018 - 4/13/2018

IBFD

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

Instructors: Eduard Sporken (KPMG Meijburg & Co.), Bo Wingerter (EY), Omar Moerer, CFA (PwC), Anuschka Bakker (IBFD), Brian Mulier (Bird & Bird LLP), and numerous others.

https://www.ibfd.org/Training/Principles-Transfer-Pricing-0

18th Annual US – Europe Tax Planning Strategies Conference

4/11/2018 - 4/13/2018

American Bar Association

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

Co-chairs: Carola van den Bruinhorst (Loyens & Loeff N.V., Amsterdam), Peter H. M. Flipsen (Simmons & Simmons LLP, Amsterdam), Carol P. Tello (Eversheds Sutherland (US) LLP, Washington, DC, USA)

https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=282024878

STEP Malta Conference

4/12/2018 - 4/13/2018

STEP

Venue: Hilton Malta, Vjal Portomaso, St Julian's PTM 01, Malta

Key speakers: Marc Alden (Deloitte), Atiq Anjarwalla (AC& H Legal Consultants), Petra Camilleri (Malta Finance Services Authority), Jonathan Conder (Macfarlanes), among numerous others

https://www.step.org/malta2018

Transcontinental Trusts 2018

4/17/2018 - 4/19/2018

Informa

Venue: Grand Kempinski Hotel, Quai du Mont-Blanc 19, 1201 Geneva, Switzerland

Key speakers: The Honourable Justice David Hayton (The Caribbean Court of Justice), Lewis Baglietto (Hassans), Julia

Abrey (Withers), Marco Cerrato (Maisto E Associati), among numerous others

https://finance.knect365.com/transcontinental-trusts/

Global VAT

4/17/2018 - 4/20/2018

IBFD

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

Instructors: Fabiola Annacondia (IBFD), Wilbert Nieuwenhuizen (VAT adviser), Xiaoqiang Yang (Sun Yat-Sen University), Vanessa Bacchin Cardo (Unilever)

https://www.ibfd.org/Training/Global-VAT

Global Impact Investment Strategy

4/19/2018 - 4/19/2018

ESAFON

Venue: Mövenpick Hotel & Casino Geneva, Route de Pré-Bois 20, 1215 Geneva, Switzerland

Key speakers: Dr. Willem Schramade (NN Investment Partners), Damian Payiatakis (Barclays), Karen Wilson (OECD), Kurt Morriesen (United Nations Principles of Responsible Investments), among numerous others

http://esafon.com/

Global VAT – Specific Countries

4/19/2018 - 4/20/2018

IBFD

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

Instructors: Xiaoqiang Yang (Sun Yat-Sen University), Vanessa Bacchin Cardo (Unilever)

https://www.ibfd.org/Training/Global-VAT-Specific-Countries-1

Private Banking & Wealth Management: Germany 2018 Conference and Awards

4/24/2018 - 4/24/2018

Verdict

Venue: Villa Kennedy, Kennedyallee 70, 60596 Frankfurt am Main, Germany

Key speakers: TBC

https://www.verdict.co.uk/private-banker-international/events/private-banking-germany-2018/

US Corporate Taxation

4/24/2018 - 4/26/2018

IBFD

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

Instructors: John G. Rienstra (IBFD), Paulus Merks (Houthoff Amsterdam)

https://www.ibfd.org/Training/US-Corporate-Taxation-0

Jersey Finance Annual Private Wealth Conference

4/25/2018 - 4/25/2018

Jersey Finance

Venue: 8 Northumberland Avenue, London, UK

Key speakers: Geoff Cook (Jersey Finance), Nick Bostrom (University Of Oxford), Jonathan Evans (Mi5), Andrew Shirley (Knight Frank), among numerous others

https://www.jerseyfinance.je/events/jersey-finance-annual-private-wealth-conference-2018#.WpQ_Oqhl_IU

3rd International Conference on Taxpayer Rights

5/3/2018 - 5/4/2018

IBFD

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

Key speakers: Philip Baker, QC (Field Court Tax Chambers), Kevin M. Brown (PwC), Juliane Kokott (Advocate General, ECJ), Andrew Roberson (McDermitt Will & Emery), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/3rd-International-Conference-Taxpayer-Rights

Tax and Technology

5/3/2018 - 5/4/2018

IBFD

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

Instructors: Bart Janssen (Deloitte), Aleksandra Bal (IBFD), Monica Erasmus-Koen (Tytho), Eliza Alberts-Muller (Tytho)

https://www.ibfd.org/Training/Tax-and-Technology

International Tax, Legal and Commercial Aspects of Mergers & Acquisitions

5/7/2018 - 5/9/2018

IBFD

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

Instructors: Frank de Beijer (Liberty Global), Femke van der Zeijden (PwC), Rens Bondrager (Allen & Overy), Rinze van Minnen (DLA Piper)

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

Guernsey Funds Forum

5/17/2018 - 5/17/2018

Guernsey Finance

Venue: Etc.Venues, Broadgate City of London, 155 Bishopsgate, London, EC2M 3YD, UK

Key speakers: TBC

https://www.weareguernsey.com/events/2018/guernsey-funds-forum-2018/

Transfer Pricing and Intra-Group Financing

5/24/2018 - 5/25/2018

IBFD

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

Instructors: Antonio Russo (Baker & McKenzie), Andre Dekker (Baker & McKenzie), Francesco Iaquinto (Meijburg & Co.), Krzysztof Lukosz (Ernst & Young)

https://www.ibfd.org/Training/Transfer-Pricing-and-Intra-Group-Financing

Introduction to European Value Added Tax

6/5/2018 - 6/8/2018

IBFD

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

Instructors: Fabiola Annacondia (IBFD), Jordi Sol (IBFD), Wilbert Nieuwenhuizen (VAT adviser), Marie Lamensch (Institute for European Studies), Christian Deglas (Deloitte), Zsolt Szatmári (IBFD)

https://www.ibfd.org/Training/Introduction-European-Value-Added-Tax-0

International Tax Planning Association Meeting

6/13/2018 - 6/15/2018

ITPA

Venue: The Ritz Carlton, Schubertring 5, 1010 Wien, Austria

Chairs: Milton Grundy (Grays Inn Tax Chambers), Paolo Panico (Private Trustees)

https://www.itpa.org/meeting/vienna-october-2017/

Recent Case Law of the European Court of Human Rights in Tax Matters

7/2/2018 - 7/6/2018

Academy of European Law

Venue: ERA Conference Center Trier, Metzer Allee 4, Trier, 54295, Germany

Key speakers: TBC

https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=127448

Private Investor Middle East International Conference

9/26/2018 - 9/27/2018

Adam Smith Conferences

Venue: The Montcalm London Marble Arch, 2 Wallenberg Place, London, W1H 7TN, UK

Key speakers: Jeffrey Sacks (Citi Private Bank), Michael Addison (UBS), Paul Stibbard (Rothschild Trust), Ian Barnard (Capital Generation Partners), among numerous others

http://www.privateinvestormiddleeast.com/

International Tax Planning Association Meeting

10/17/2018 - 10/19/2018

ITPA

Venue: Mandarin Oriental Hyde Park, 66 Knightsbridge, London, SW1X 7LA, UK

Chairs: Milton Grundy (Grays Inn Tax Chambers), Paolo Panico (Private Trustees)

https://www.itpa.org/meeting/london/

THE AMERICAS

United States

The US Tax Court has ruled against the taxpayer in a case concerning its ability to claim back legal and administrative costs incurred in chasing the Internal Revenue Service (IRS) regarding a request for tax-exempt status.

A listing of recent key international tax cases.

The case centered around the award of costs after the IRS failed to act on the plaintiff's application for recognition of tax-exempt status. The petitioner filed a petition for a judgment declaring it to be an organization exempt from federal income tax under IRC Section 501(a). The IRS subsequently issued a favorable determination letter and, before even filing an answer, the IRS conceded. The plaintiff moved for an award of reasonable administrative and litigation costs under IRC Section 7430.

Under Section 7430, to recover costs, the taxpayer must establish that: (1) it is the prevailing party, (2) it did not unreasonably protract the proceedings, (3) the amount of the costs requested is reasonable, and (4) it exhausted the administrative remedies available. These requirements are conjunctive, and the failure to satisfy any one of them will preclude an award of costs.

On administrative costs under Section 7430, the Court agreed that an application for tax-exempt status is an administrative proceeding, dismissing an argument to the contrary from the IRS.

The IRS said the taxpayer had satisfied conditions (2) and (4), but disputed that it had satisfied points (1) and (3).

On the first, Section 7430(c)(4)(B)(i) provides that a party shall not be treated as the prevailing party if the US establishes that its position in the proceeding was "substantially justified."

The Court pointed out that, based on earlier case-law, when the Government fails to take a position at all, a taxpayer cannot be the prevailing party.

The IRS pointed to the Court's ruling in *Fla. Country Clubs, Inc.* (122 T.C. 73 (2004)), in which the Court held that identifying the Government's position is a precondition for determining whether the taxpayer is a prevailing party.

The plaintiff instead urged the Court to look to *Reynoso v. United States*, No. 10-00098 (SC), 2011 WL 3473366 (N.D. Cal. Aug. 9, 2011), in which the Government failed to issue refunds of tax overpayments and seized funds despite the taxpayer's repeated refund requests.

When the taxpayer filed suit and the Government conceded, the taxpayer moved to recover costs. The Government contended that it never took a position in the administrative proceeding (and therefore the taxpayer was not the prevailing party, citing *Fla. Country Clubs, Inc.* as support against the awarding of costs). The Court decided in favor of the taxpayer in that case, finding that the failure to respond to the taxpayer's repeated refund requests was tantamount to a denial of those requests.

For similar reasons, the petitioner in the present case contended that it incurred "administrative costs" under Section 7430 even though it never received a notice or letter and also that its administrative costs should cover the period prior to receiving a response.

The Court said:

> "To do so, however, we would have to find an unwritten exception to the statute and hold that the notice or letter requirement is inapposite when the claim for administrative costs rests on the fact that the IRS has failed to act …
>
> We need not reach a decision regarding either of petitioner's contentions [with regards to administrative costs], however, because petitioner has provided evidence only of litigation costs."

The Court said the taxpayer had failed to properly justify the administrative costs it had incurred. The IRS had challenged the content of the invoices, which listed a separate party and were poorly organized, according to the Tax Court. At least some of the administrative costs listed related to the development of a litigation strategy, rather than the filing of the form for tax-exempt status. Further the petitioner had not paid the invoices, and the IRS argued that it never would.

Turning to discuss legal costs, the Tax Court noted that unlike with administrative proceedings, Section 7430 does not specify when the US takes a "position" in a judicial proceeding. Instead,

the Court has held in prior rulings that the Government's position in a judicial proceeding is generally established at the filing of its answer. Some rulings have established that the Government took a position earlier, with *Elder v. Commissioner* finding that counsel established the Government's position in correspondence with the taxpayer; and in *Estate of White v. Commissioner* the Government was said to have established its position in its second motion to extend the time in which to file an answer.

The Tax Court noted that, in the case being discussed, days after the petition was filed, and before filing an answer, the IRS's counsel informed petitioner's counsel that the IRS would concede the case.

On this development, the Court noted that Congress amended Section 7430 to allow for the awarding of costs in declaratory judgment proceedings, but only where the Government's position is not "substantially justified," with the onus placed on the taxpayer to demonstrate it was not.

The Court said in conceding the case, and before agreeing to grant the plaintiff tax-exempt status, the IRS showed that its position in the litigation was "substantially justified" and the petitioner cannot be treated as the prevailing party.

The Court said: "While we recognize that Section 7430 leaves a gap in coverage in circumstances such as this one, it is not our place to provide a remedy." It noted the conclusion in *Pac. Fisheries, Inc. v. United States*, 484 F.3d 1103, 1111 (9th Cir. 2007), wherein it was stated that, "although the IRS's issuance of the administrative summonses forced the taxpayers into litigation, we see no fees remedy for them in the judicial proceeding. We conclude that their case falls into a gap in the statute, but it is not our role to bridge that gap."

Despite expressing sympathy for the petitioner, the Court continued: "In the instant judicial proceeding, because the IRS's counsel promptly conceded the case, the Government's position was substantially justified, and petitioner is not a prevailing party entitled to recover litigation costs."

The Court concluded:

> "Petitioner failed to provide evidence of any reasonable administrative costs incurred in the administrative proceeding and cannot be treated as the prevailing party in the judicial proceeding. The Government's concession within days of the filing of the petition was a substantially justified position in the judicial proceeding, irrespective of its previous actions. Accordingly, petitioner is entitled to neither administrative nor litigation costs."

The total cost listed in the case documentation was USD37,866.

This ruling was filed on February 21, 2018.

https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=11565

US Tax Court: *Friends Of The Benedictines In The Holy Land, Inc. v. Commissioner Of Internal Revenue (150 T.C. No. 5)*

WESTERN EUROPE

Netherlands

The European Court of Justice (ECJ) has issued two rulings on the compatibility of aspects of the Netherlands' fiscal unity tax consolidation regime with EU law, in joined cases concerning an interest deduction limitation and rules on deduction of foreign exchange losses on EU participations.

The first case (Case C-398/16) concerned X BV, a Dutch company which was part of a Swedish group, and which purchased shares in an Italian subsidiary of the group from a third party through a capital contribution in a newly-formed Italian company using funds borrowed from the Swedish parent company.

The case revolved around the disallowance by the Dutch tax authority of an interest deduction claimed by X BV on its tax return for 2004 in respect of interest paid on the loan from the Swedish parent.

The tax authority disallowed the deduction on the basis that under Article 10 of the Dutch Law on corporate tax, interest on loans between related entities cannot be deducted if the loan relates to a capital contribution, in particular in the form of the purchase of shares in a related entity.

Disputing the disallowance of the deduction, X BV argued that the deduction would have been treated differently had the transaction in question taken placed between Dutch resident entities with a Dutch parent under the country's fiscal unity regime. This is because companies which opt for that scheme are taxed jointly at the level of the parent company. Consequently, mutual equity links, such as a capital contribution from a parent company to its subsidiary, become non-existent for the purposes of taxation as a result of consolidation.

X BV argued therefore that this difference in tax treatment constituted an infringement of freedom of establishment under EU law.

The Dutch Government countered, first, that difference in treatment is justified by the need to safeguard the allocation of the power to impose taxes between the member states. Secondly, it said that the denial of the deduction stemmed from the need to ensure the coherence of the Netherlands tax system. And thirdly, it contended that limiting the use of the interest deduction was a tool necessary to combat tax evasion.

However, in its ruling, the ECJ rejected the Government's arguments, concluding that the Dutch tax rules at issue take no account of the place of taxation of the income comprising the interest paid and, therefore, on ascertaining which state benefits from that taxation. On the second point, the ECJ said the Government had not made a strong enough claim that the coherence of the fiscal unity scheme would be jeopardized if the deduction of interest in respect of a loan intended to finance the purchase of shares in a non-resident subsidiary were permitted. The ECJ also said there was no justification for denying the tax deduction on the grounds of preventing tax evasion, since the Government had not attempted to show that the difference in tax treatment was based on an intention to prevent abuse.

The ECJ stated:

> "Articles 49 and 54 TFEU [the Treaty on the Functioning of the European Union] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan taken out with a related company in order to finance a capital contribution to a subsidiary established in another Member State, whereas if the subsidiary were established in the same Member State, the parent company could avail itself of that deduction by forming a tax-integrated entity with it."

In the second case (Case C-399/16), X NV, a company incorporated under Netherlands law, had an indirect subsidiary established in the UK. In its corporation tax returns for 2008 and 2009, X NV sought to deduct as an expense the loss on its shareholdings resulting from fluctuations in the exchange rate. However, the tax authority refused, arguing that under Article 13 of the Dutch Law on corporation tax, neither gains made nor losses incurred by reason of shareholdings are taken into account for the purposes of determining the profit.

In contesting the tax authority's decision, X NV argued that it would have been able to deduct from its profits the currency loss incurred if it had been able to form a single tax entity with its subsidiary. Since Dutch law reserves that right to deduct to resident companies only, X NV claimed that its freedom of establishment had been limited.

However, the ECJ found that the two situations were not objectively comparable, because a Netherlands company would under most circumstances not sustain currency losses on its shareholding in a resident subsidiary.

The ECJ concluded in this case that:

> "Articles 49 and 54 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct from its profits capital losses derived from fluctuations in the exchange rate, in connection with the value of its shares in a subsidiary established in another Member State, where the same legislation does not provide, symmetrically, for tax to be levied on capital gains derived from those fluctuations."

These rulings were delivered on February 22, 2018.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=199570&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=993752

European Court of Justice (First Chamber): *Joined Cases X BV and X NV v. the Dutch Finance Ministry (C-398/16 and C-399/16)*

Portugal

The European Court of Justice (ECJ) has provided a ruling against the Portuguese tax and customs authority in favor of a taxpayer who challenged the authority's decision that it should be retroactively precluded from deducting tax incurred on inputs in relation to a supply of leasing and letting transactions. The tax and customs authority required the taxpayer, Imofloresmira, to make adjustments to VAT deductions on the ground that the properties at issue had been unoccupied for over two years and were therefore regarded as no longer being used for the purposes of its own taxed transactions, even though, during that period, the company always had the intention of letting those properties subject to a liability for VAT and undertook the necessary steps to that end.

The ECJ noted that the VAT Directive provides for the right to deduct input taxes incurred on goods or services used to make taxed transactions. The deduction of input taxes is linked to the collection of output taxes; where goods or services acquired by a taxable person are used for the purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted.

The case concerned the taxation of leasing and letting transactions, which member states may elect to tax under a derogation from the general rule provided in Article 135(1)(l) of the VAT Directive, that such transactions should generally be exempt.

In Portugal, such transactions may be taxable and therefore taxpayers can generally claim input tax credits. When the leases relating to the properties at issue in the main proceedings were concluded, Imofloresmira, a VAT-registered entity, opted for the taxation of the letting of those properties.

The ECJ ruled that, under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct. It said:

"It follows that, once the tax authority has accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred, save in cases of fraud or abuse.

It should be remembered that, according to settled case-law, the right to deduct provided for in Article 167 to 172 of the VAT Directive is an integral part of the VAT scheme and, in principle, may not be limited. It is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.

The deduction arrangement is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT therefore ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT.

It is important to recall also that it is the acquisition of goods or services by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, merely determines

the extent of the initial deduction to which the taxable person is entitled under Article 168 of the VAT Directive and the extent of any adjustments in the course of the following periods.

It follows therefore that the entitlement to a reduction is retained in principle, even if subsequently, by reason of circumstances beyond its control, the taxable person does not make use of those goods and services which gave rise to a deduction in the context of taxed transactions."

It concluded:

> "Therefore, the principle of fiscal neutrality precludes national legislation which, by making the final acceptance of the VAT deductions dependent on the results of the taxable person's economic activity, creates, as regards the tax treatment of identical investment activities, unjustified differences between undertakings with the same profile and carrying on the same activity."

The Court said that conclusion cannot be called into question by the argument of the Portuguese Government that, due to the termination of the leases concluded previously, "some change occurs in the factors used to determine the amount to be deducted," so that it would be necessary to carry out a proportional adjustment of the tax deducted.

The ECJ said the right to deduct may only be challenged in instances of demonstrable fraud.

This ruling was delivered on February 28, 2018.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=199766&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=601228

European Court of Justice (Seventh Chamber): *Imofloresmira v. Portuguese Tax And Customs Authority (Case C-672/16)*

United Kingdom

Food and drinks company Nestlé has failed to challenge a decision from the UK's First-tier Tribunal (FTT) that its fruit-flavored drinks powders should be subject to a zero value-added tax rate, like its chocolate-flavored drinks powder.

The UK's Upper Tribunal (UT) upheld the decision of the FTT, which agreed with HMRC's contention that its strawberry- and banana-flavored drinks are included in the definition of

"powder for the preparation of beverages," which are excluded from the list of foodstuffs that may be zero rated.

The UT decided that that interpretation of the law is correct, despite it leading to what Nestlé argued was a perverse outcome for the products, with the company reasoning that they are seen as largely the same by consumers.

Its chocolate-flavored drinks powder benefits from a zero rate on the basis that its supply achieves a social policy objective of encouraging children to drink milk, which is also zero rated, under the concession for "cocoa, coffee, and chicory and other roasted coffee substitutes, and preparations and extracts thereof," being a "preparation of cocoa."

The UT's judgment was released on February 14, 2018.

https://assets.publishing.service.gov.uk/media/5a8401a340f0b62305b953a4/Nestle_UK_Ltd_v_HMRC_.pdf

UK Upper Tribunal: *Nestlé UK Ltd v. HMRC ([2018] UKUT 0029 (TCC))*

United Kingdom

The Upper Tribunal (Tax and Chancery Chamber) ruled on February 12 that the grant of fractional ownership of suites in a luxury complex in London was not similar in nature to the supply of hotel accommodation, and falls within the exemption provided for the leasing or letting of immovable property.

The appellant, FPSL, a subsidiary company of Marriott Vacations Worldwide Corp., owned a 60-year lease on 47 Park Street in Mayfair, a property which had formerly been a hotel. In 2002, FPSL refurbished the property, creating 49 self-contained apartments, which were sold to buyers on a fractional ownership basis.

Following a challenge to the arrangement by HM Revenue & Customs, the First Tier Tribunal (FTT) decided that the supplies of the fractional interests in principle fell within the exemption from VAT provided for the leasing or letting of immovable property. However, it said that the arrangements should not benefit from the exemption because the grant of the fractional interests was for the provision of relevant accommodation in a similar establishment to a hotel.

The FTT dismissed the taxpayer's argument that, under the principle of fiscal neutrality, the supplies of the fractional interests should be treated in the same way as more traditional timeshare interests (*i.e.*, VAT exempt).

Allowing FPSL's appeal, the Upper Tribunal (UT) held that the grant of the fractional interest was "a right to occupy a residence [to the exclusion of] others", and said the supply should be considered the "letting of immovable property", which is exempt from VAT.

The UT said the FTT erred in law in comparing the arrangement to hotel accommodation by focusing on the duration of the individual stays by a member under the fractional interest acquired from FPSL. "Consequently, the FTT failed to have proper regard to the nature of the supply made by FPSL, which is for a long-term right to occupy a residence rather than for a series of short-term stays," the UT said.

The UT also dismissed the argument that the supply of a fractional interest competes with supplies made in the hotel sector. It stated:

> "It is not material that a member acquiring a fractional interest might otherwise have occupied a hotel room in a particular city or district. The same person might equally have taken a lease of an apartment, or purchased a second home. The acquisition of a fractional interest is no more than one example of the alternative ways in which a person might choose to meet his or her accommodation needs. Those alternatives are not in competition with the provision of short-term accommodation in the hotel sector merely because they enable such a person to be accommodated for a short term otherwise than in an hotel."

This ruling was released on February 12, 2018.

https://assets.publishing.service.gov.uk/media/5a81ba7ced915d74e33ffc44/Fortyseven_Park_Street_Ltd_v_HMRC.pdf

Upper Tribunal (Tax and Chancery Chamber): *Fortyseven Park Street Limited (FPSL) v. HMRC ([2018] UKUT 0041 (TCC))*

Dateline March 8, 2018

Finance Minister Bill Morneau said last month that **Canada** would not be rushed into responding to the US tax reforms until the implications of the measures have been fully worked out. And so it has proved, with a **federal Budget** almost completely devoid of any excitement or razzamatazz, at least not on the tax front.

It is understandable that the Liberal Government has opted to announce a conservative (with a small "c") Budget. Ill-considered knee-jerk responses may be lead to unintended fiscal and economic consequences, and these could ripple out far and wide – marry in haste, repent at leisure and all that.

However, for a business community growing increasingly concerned about what it perceives as a growing gap in competitiveness between Canada and the US, the budget offered nothing much to calm its fears. Indeed, judging by the pre- and post-Budget reaction from businesses of all sizes, the Government couldn't have performed much worse; essentially, it **ignored calls from larger businesses** to begin relieving the tax and regulatory burden, even if only in a small way, and **disregarded pleas from small firms** to put the brakes on complex new anti-avoidance laws. So unfortunately, this looks like yet another blot on Canada's copy book.

Just as water flows downhill, investment has traditionally flowed to those jurisdictions with the lightest taxes. Therefore, we must wait and see whether the trickle of companies announcing new investments in the US becomes a torrent.

Ordinarily, you wouldn't expect to see **companies and investors flow** from a low-tax jurisdiction to a high-tax one (although, in the complex world of international finance, it often does in a roundabout kind of way). But sometimes, water can be seen flowing uphill too. In this case, **from the United Kingdom to Italy**.

The UK isn't exactly a low-tax jurisdiction. But when compared with Italy, it's a fiscal paradise. In the World Bank's ease of doing business index, the UK is positioned 7th out of 190 jurisdictions, with Italy trailing at 46th place. Narrow the comparison down to just tax, and the gap gets significantly wider: the UK is 10th, and Italy is down at 112th. So not exactly the most logical move for a business or investor.

Yet, according to a senior official in the Italian finance ministry, those **from the UK** were represented among the 150 **wealthy people** who decided to **take up residence in Italy** in the past year. But don't worry, there is method behind the madness. This is all because of a **new flat tax scheme** designed to lure exactly the type of people – potential investors – who have shunned Italy's high and complex taxes in the past.

Several other nationalities were among the first-year take-up of the scheme, including Americans, Russians, Dutch, Norwegians, and Swiss. So the UK was far from alone, and in relative terms, the number moving to Italy so far is small.

However, the UK's case is of particular interest, because it would appear to support the view that the **UK's attractiveness** to the global entrepreneurial class **is fading**.

Research by New World Wealth published in January found that there was a **net outflow** of 4,000 high-net-worth individuals from the UK in 2017 alone. In absolute terms, in a country of 65m people, that's a tiny proportion. But considering that a similar number of US passport holders – about 4,500 – left America (population 326m) permanently last year, perhaps the UK does have something of an **HNWI exodus** on its hands.

Many reasons for this have been given, some tax-related. An **important factor**, perhaps, is the ongoing **erosion of the "non-dom" rules**. This archaic principle of UK law allows a select group of largely wealthy foreign individuals to be resident in the UK, but not domiciled there (*i.e.*, retaining strong links with their country of origin), and traditionally this has meant that they do not have to pay **tax on foreign income** as long as it stays offshore. Unsurprisingly, given the public's current mood when it comes to the issue of tax, the non-dom regime has become harder for the Government to justify, even though it is suggested that non-doms have a **net benefit** for the UK economy overall. Hence, successive administrations have legislated to make the non-dom system steadily less attractive.

In addition to **continued uncertainty** about the UK's residency and tax rules, **property taxes** have increased markedly on **high-value real estate** purchases in recent years. These measures are probably designed more to take the heat out of London's sky-high property market rather than to deter rich foreigners from buying property in the UK. But the **rises in Stamp Duty Land Tax** in particular, which can be as high as 15 percent in some cases, have been cited as **another major reason** why HNWIs might be searching for pastures new.

Then, of course, there is the elephant in the room that everybody is talking about: **Brexit**. And it is probably **no coincidence** that Italy has chosen to introduce its flat tax scheme at a time when the UK's future economic relations with the EU remain so uncertain, particularly with respect to access to the single market for **financial services**. It will be interesting therefore, to see if other EU member states eyeing up a slice of London's financial market – France and Germany have shown predatory intentions in this regard – now proceed with similar measures to poach London's bankers and businesspeople.

Perhaps Italy's "non-dom" tax scheme shows that there is a little life yet in the flat tax. For elsewhere, **Russia** is considering whether to **scrap its 13 percent flat tax** in favor of a more progressive system – potentially following several other Eastern European countries that have taken the same path – indicating that flat taxes look to be a dying breed. Now that's something worthy of further study!

It was only just over ten years ago that US President **George W. Bush** was enthusing about the **Estonian economic miracle**, which was largely attributed to its flat, simple tax regime, and suggesting similar tax reforms could benefit America. How quickly attitudes can change in the world of tax!

The Jester