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a closer look

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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a closer look

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US Tax Compliance And Planning For US Executives, Entrepreneurs And Investors Living Outside The US – The Foreign Earned Income Exclusion

by Stephen Flott and Christopher Klug, Flott & Co.

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This is the second article in a series of articles on key US tax compliance and planning issues that should be considered by US executives, entrepreneurs and investors living outside the United States. This second article provides an overview of the Foreign Earned Income Exclusion and Foreign Housing Exclusion.

US Persons[1] living and working abroad experience a different income tax environment than domestic US taxpayers. US Persons living and working abroad are allowed under section 911 of the Internal Revenue Code an annual exclusion from income tax up to USD100,800[2] of foreign source earned income. There are several explanations for why US Persons living abroad are allowed this apparent windfall or tax break, some of which include:

1. Encouraging American businesses abroad;
2. The cost of living overseas is higher for American style amenities;
3. US foreign tax credits do not allow offsets for foreign taxes when foreign governments rely on indirect taxes;
4. US Persons living abroad do not derive the full benefit of public services financed through federal income taxation in the United States; and
5. Tax incentives encourage US Persons to suffer the discomforts of living and working in less developed countries or areas.

Section 911 provides for an income tax exclusion, known as the *Foreign Earned Income Exclusion* ("FEIE"), and housing allowance for US Persons living abroad. Under section 911, a *qualified individual* may elect to exclude *foreign earned income* from income and exempt the *housing cost amount* from taxation for any taxable year.

Earned income includes compensation for personal services such as wages, salaries, tips, bonuses and net earnings from self-employment earnings, as well as similar types of income. Passive income such as interest, dividends, rental income or retirement income is generally not considered earned income.

In order to claim the FEIE and housing cost amount, the US Person's tax home must be in a foreign country and qualify under one of the following requirements:

- A US Person who is a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire tax year;
- A US Person who is physically present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months.

Tax home is defined as the *regular or principle place of business, employment, or post of duty*, which is separate from the US Person's family residence that may still be in the United States.

For a US Person to qualify under the physical presence test, the 330 full days in a foreign country or countries can span into two tax years. Where the 12 consecutive month period used to claim the FEIE spans into two tax years, the exclusion is prorated for the number of days of the 12 consecutive month period that were included in the tax year where the FEIE is claimed. For example, where the 12 consecutive month period started October 16, 2014 and ended October 15, 2015, the FEIE amount of USD99,200 in 2014 will be prorated for the portion of the period that falls in tax year 2014 (October 16, 2014 – December 31, 2014).

The amount of foreign earned income excluded from a US Person's gross income will be used for the purposes of determining the rate of income tax and alternative minimum tax that applies to his or her nonexcluded income. A US Person's tax on any foreign earned income above the FEIE amount, and on any unearned income, is computed as if the FEIE was not claimed. The US Person's tax will be the excess of the tax that would be imposed if his or her taxable income were increased by the amount excluded, and the tax that would be imposed if his or her taxable income were equal to the excluded amount.

Once a US Person elects to exclude foreign earned income and/or housing costs, he or she cannot receive a foreign tax credit or deduction for taxes on income that was excluded under the FEIE or the housing cost amount. It will be important for a US Person to determine whether he or she is in a better position receiving the FEIE, or receiving the foreign tax credit applicable to the foreign earned income.

Once a US Person elects the FEIE for a given year, the election remains in effect for that year and all future years, unless revoked. Once the FEIE election is revoked, the US Person cannot elect the FEIE again for a five-year period without the approval of the IRS.

US Persons may also take the housing exclusion in addition to the FEIE. To be eligible, the US Person must have paid or incurred housing expenses in the foreign country in addition to meeting the conditions required for the requirements to claim the FEIE. Eligible housing expenses include rent, utilities, real and personal property insurance, rental of furniture and accessories, repairs, and residential parking. Housing expenses do not include the costs of purchasing or making improvements to a house, mortgage interest and real estate taxes related to a house the US Person owns, purchased furniture,

television costs, or domestic help. The housing cost amount equals the excess of eligible expenses incurred for the US Person's foreign housing over a stipulated base amount, which is then prorated for the number of qualifying days in the year.

It is important to note that while the FEIE and housing exclusion will reduce a US Person's income subject to income tax, it will not reduce the US Person's income subject to self-employment tax. For example, by claiming the FEIE, a US Person may have no earned income subject to US income tax, but owe self-employment taxes. On another note, since foreign corporations are not subject to payroll taxes in the United States, a US Person working for a foreign corporation is not subject to payroll tax on his or her earned income. In contrast, a US Person who is considered self-employed in a foreign country is subject to US self-employment taxes. The United States has Totalization Agreements (Social Security Agreements) with certain nations that exempt those covered under the agreement from paying into two social security systems.

A key consideration for a US Person living abroad will be to determine whether to elect the FEIE or use foreign tax credits to offset US tax on foreign source income. A US Person who works in a low-tax jurisdiction will benefit from electing the FEIE since he or she will have little to no foreign tax credits to offset US tax on his or her earned income. For US Persons with both foreign source income and US source income, the FEIE could be elected under the right circumstances to reduce their adjusted gross income below the standard/itemized deduction and personal/dependency exemption amounts to remove any US tax liability on their US source income. Whether the US person lives in a high- or low-tax jurisdiction, the US Person will pay the higher tax rate whether it is to the country in which the US Person lives or derives his or her income, or to the US.

Endnotes

1. The term "US Person" as used in these articles includes only US citizens. It should be noted that legal permanent residents (LPRs) and non-citizens who spend more than 182 days in the US during a tax year are US Persons for tax purposes. LPRs cease to be US Persons when they abandon their status. Non-citizens cease to be US Persons as soon as they spend fewer than 183 days in the US during a tax year. The calculation of days present in the US for purposes of determining the substantial presence test includes 1/6 of the days spent in the two years prior to the current tax year, 1/3 of the days spent in the year prior to the current tax year, and all of the days spent in the US during the current tax year. Effectively, non-citizens should not spend more than 122 days a year in the US during any three consecutive year period to avoid being a US Person for US tax purposes.
2. USD100,800 is the Foreign Earned Income Exclusion for tax year 2015. The Foreign Earned Income Exclusion is annually indexed for inflation.

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The Case For A Destination-Based Corporate Tax

by Reuven S. Avi-Yonah

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I would like to thank Mike Devereux, Rita de la Feria and Susie Morse for their helpful comments.

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Introduction

In 1993, I published a paper advocating a destination-based corporate income tax (DBCT).[1] Under DBCT, multinational enterprises (MNEs) would be treated as unitary businesses and taxed based on where they sell their goods or services, *i.e.*, on a destination basis rather than (as in current corporate taxes) primarily on an origin basis. I have subsequently elaborated on this proposal with Kim Clausing and Mike Durst.[2]

In recent years, DBCT has attracted some support from economists, such as Alan Auerbach[3] and Mike Devereux.[4] While the economists tend to advocate a cash-flow DBCT, *i.e.*, a corporate tax that is more consumption based than income based because MNEs will be allowed to expense capital outlays, both types of taxes apply to corporate rents in the same way. Moreover, the economists' proposals raise similar issues as mine, *e.g.*, in regard to compatibility with treaties or with World Trade Organization (WTO) rules.

These proposals have attracted significant critiques, *e.g.*, from Rosanne Altshuler and Harry Grubert,[5] Susan Morse,[6] and more recently from Fleming, Peroni and Shay.[7] I would like to use this opportunity to restate the case for DBCT and reply to some of the common objections to it.

Five Reasons For DBCT

There are five major reasons to adopt DBCT. The first three apply to all unitary tax (UT) proposals: (a) corporate residence is relatively meaningless so that a method is needed to tax MNEs at source; (b) the traditional definitions of source are also meaningless; and (c) the distinction between subsidiaries and branches is artificial and should be discarded. The fourth and fifth reasons support DBCT specifically,

in that it addresses tax competition and tax avoidance in a way that other UT proposals do not.

Corporate Residence Is Meaningless

As Dan Shaviro[8] and others have emphasized, corporate residence is not a very meaningful concept because: (a) corporations are not physically present anywhere; (b) corporations are not meaningfully subject to redistribution because the incidence of the corporate tax is not on them; (c) corporations do not vote; and (d) even the location of corporate headquarters, which is a more meaningful concept than place of incorporation, can be moved. The last point is particularly important in the age of inversions. While the first wave of inversions could be effectively combated by adopting a managed and controlled definition of corporate residency because the top management would not move to Bermuda, this is less effective now that the United Kingdom is an attractive location for headquarters. Thus, it would be preferable to have a way of taxing MNEs that does not depend on the residence of the corporate parent and does not draw an increasingly artificial distinction between US- and foreign-based MNEs, such as UT.

Source Is Meaningless

As many economists and lawyers have pointed out, the source rules developed in the 1920s and 1930s are also meaningless. We no longer believe that income has a single, specific source. Therefore, a system like UT is needed to allocate income by formula among taxing jurisdictions.

Subsidiaries Are Branches

In the age of "check the box," the distinction between subsidiaries and branches is meaningless. Most MNEs are directed from one central location as a unitary business, and it does not make sense to tax them based on treating subsidiaries, but not branches, as separate taxpayers. This undermines the arm's length principle and leads directly to UT.

Tax Competition

Once the necessity of UT is accepted, the argument for DBCT is that the consumer base is less subject to tax competition than either the location of property or of payroll. The property factor is in any case problematic because of the need for valuation and because the most important type of property of a modern MNE is intellectual property, which is just as evanescent as the MNE itself. As for payroll, from a unilateral US perspective it makes no sense to adopt a rule that would encourage shifting more jobs overseas.

Tax Avoidance

As I argue below, the DBCT removes some of the incentives for tax avoidance in preventing most double nontaxation. This is better than the current set of anti-avoidance measures that tend to rapidly become obsolete.

Objections

The following replies to some common objections to DBCT, as summarized for example by Altshuler and Grubert,[9] Morse[10] and Fleming, Peroni and Shay.[11]

Why Not A Value-Added Tax?

One common reaction to DBCT proposals is that it makes no sense to have an income tax based on the location of consumption, whereas a consumption tax like the value-added tax (VAT) should be destination based. Admittedly, the DBCT is not a consumption tax (even the Auerbach/Devereux cash-flow DBCT allows a deduction for wages, so it is not a VAT), but in a unilateral context, there are good reasons for it, as explained below. The fact that the tax base to be apportioned based on sales is a net base and not a gross base (wages are deductible and capital expenditures are not in my version) means that it is still a corporate income tax based on profits and not a consumption tax. As discussed below, it makes more sense to have a balanced formula in a multilateral setting, but from a purely US perspective, the US will gain from DBCT because it imports more than it exports and it does not want incentives to shift real economic activity out of the United States.

Tax Planning

Another common objection is that it is very easy to tax plan around a DBCT by having the MNE sell goods or services to an independent distributor in a tax haven that will then resell at a low profit margin into the United States. This problem does not arise in a credit-invoice type VAT because the full amount is taxed in the country of final destination. But most MNEs would be reluctant to give up control over distribution, and if they do not, the distributor is not independent and can be looked through. Moreover, even with a truly independent distributor, look through can be applied if there is no meaningful change in the goods or services being provided. Similar rules already apply under the base company rule in Subpart F, and both the Avi-Yonah, Clausing and Durst[12] legislative language and the Market Fairness Act include language designed to address this issue. The ultimate destination is determined in most VAT contexts, and it can also be determined in a DBCT.[13]

Fleming, Peroni and Shay[14] argue that DBCT can be defeated for US-based MNEs by using an independent distributor overseas who sells the goods back to the United States. But even they acknowledge that this strategy can be foiled by the IRS applying a presumption that all sales by US-based MNEs are to US customers unless the MNE can prove that the final destination is to a foreign customer.[15] As for foreign-based MNEs, the rule could be that payment for any import into the United States is subject to a 10 percent withholding tax, thereby forcing the seller to file a tax return that could be audited to see whether look-through rules should be applied (a similar rule currently applies to sales of US real estate and stock in US real property holding companies by foreign sellers).[16]

Treaties/Permanent Establishment

DBCT violates the tax treaties because it will tax MNEs who sell into the United States without a permanent establishment (PE). But it is not easy to avoid having a PE, or else e-commerce would have already eliminated source-based corporate tax for sellers into the United States. And if there is a

PE, the residual force of attraction rule can be used to attribute all sales income to the PE. In addition, the Organisation for Economic Co-operation and Development (OECD) is rethinking the PE concept,[17] and it may be time to substitute a numerical threshold for the current PE, even if this requires a treaty override.

World Trade Organization

Another objection is that DBCT violates the WTO rules for export subsidies since direct taxes cannot be border adjusted. The distinction between direct and indirect taxes under WTO rules is not entirely clear; consumption tax proposals in the United States typically argue that they do not violate the rule even if they are not VATs because of the deduction for wages. Nor is it clear why DBCT is objectionable if it applies to all US sales by both domestic and foreign sellers, similarly to a VAT. But assuming DBCT is a WTO violation, it will take many years of litigation to reach the sanctions stage, during which the United States can renegotiate the WTO rules or persuade other countries to accept DBCT. No WTO challenge has been launched against US state DBCTs despite calls to do so, and this issue is ultimately a political question.[18]

Tax Equity

It has also been argued that DBCT discriminates against developing countries that export more than they import and will therefore lose revenue. This is not true overall since the BRICS would benefit from DBCT as they are immense markets, and other developing countries are already impacted by tax competition. In other cases, adjustments can be made, but this is hardly an argument against unilateral US adoption of DBCT.

Double Taxation

Perhaps, the most important debate is about how other countries would adjust to the United States adopting DBCT. Avi-Yonah, Clausing and Durst[19] have argued that there would be a lot of pressure on other countries to follow suit because otherwise their MNEs would move to the United States and export from there. Morse[20] argues that this is not true because they can abolish their corporate tax or at least grant tax holidays. But in that case, there would be no double taxation, and the most cogent argument against DBCT is the concern that both origin and destination countries will tax the same income. In my opinion, it is always better to put the onus of preventing such double taxation on the MNEs themselves; if they do not like it, let them move to the United States or lobby the origin country for a tax holiday (which they do anyway, but under current rules that result in double nontaxation of immense amounts of income – over USD2 trillion for US MNEs alone). If there is to be a single tax on MNEs, from a US perspective, it is better that it be a DBCT one than an origin-based one.

Conclusion

The OECD seems stuck in its opposition to formulary apportionment, even in the context of the arm's length standard (*e.g.*, to allocate residuals within profit split). But if the United States adopted DBCT unilaterally, the result would be a strong

incentive for firms to move real operations to the United States and export from there since they will not bear any US tax burden as a result. This, in turn, will put pressure on other countries to follow the United States' lead. A similar result happened when states in the United States adopted sales-based formulas: other states went along.

The best formula for DBCT is presumably not all sales based since the production factors should also be incorporated in allocating profits. A 50 percent – 50 percent split of sales versus payroll and tangible assets seems fairer and has the support of the European Union Commission (in its common consolidated corporate tax base). But the best way to get there would be unilateral US action to put pressure on the system, and the best formula for the United States is DBCT since it has a huge consumer base. I would suggest, therefore, that this is a good opportunity for what I call "constructive unilateralism," *i.e.*, unilateral US action that exerts pressure on other countries to follow and results in an improved international tax regime.

Endnotes

1 Reuven S. Avi-Yonah, *Slicing the Shadow: A Proposal for Updating US International Taxation*, 56 Tax Notes 1511, March 15, 1993.

2 Reuven S. Avi-Yonah, Kimberly A. Clausing and Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 Fla. Tax Rev. 497 (2009) (hereinafter, "Avi-Yonah, Clausing & Durst, 2009").

3 Alan J. Auerbach, Michael P. Devereux & Helen Simpson, *Taxing Corporate Income*, NBER Working Paper 14494 (2008).

4 Michael P. Devereux and Rita de la Feria, *Designing and Implementing a Destination-Based Corporate Tax*, Oxford Centre For Business Taxation Working Paper 7/14 (2014) (hereinafter, "Devereux & de la Feria, 2014").

5 Rosanne Altshuler and Harry Grubert, *Formula Apportionment: Is it Better than the Current System and are there Better Alternatives?*, 63 Nat'l Tax J. 1145 (2010) (hereinafter, "Altshuler & Grubert, 2010").

6 Susan C. Morse, *Revisiting Global Formulary Apportionment*, 29 Va. Tax Rev. 593 (2010) (hereinafter, "Morse, 2010").

7 J. Clifton Fleming, Robert J. Peroni and Stephen E. Shay, *Formulary Apportionment in the US International Income Tax System: Putting Lipstick on a Pig?*, 36 Mich. J. Int'l L. 1 (2015) (hereinafter, "Fleming, Peroni & Shay, 2015").

8 Daniel N. Shaviro, *The Rising Tax-Electivity of US Corporate Residence*, 64 Tax L. Rev. 377 (2011).

9 Altshuler & Grubert, 2010, *supra* note 5.

10 Morse, 2010, *supra* note 6.

11 Fleming, Peroni & Shay, 2015, *supra* note 7.

12 Avi-Yonah, Clausing & Durst, 2009, *supra* note 2.

13 Devereux & de la Feria, 2014, *supra* note 4.

14 Fleming, Peroni & Shay, 2015, *supra* note 7.

15 *Id.*, at 44.

16 *See* Code Sec. 897.

17 *See* Base Erosion and Profit Shifting (BEPS) Action 1.

18 For EU countries but not the United States, there is also an argument to be made that the introduction of DBCT within the EU would be contrary to the fundamental

freedoms, since it would put national companies (within the DBCT countries) in a competitive advantage, and could therefore amount to a restriction of free movement. However, as Devereux & de la Feria, 2014 (*supra* note 4) argue, any such restriction would be a fully justified one under the EU Treaty.

[19] Avi-Yonah, Clausing & Durst, 2009, *supra* note 2.

[20] Morse, 2010, *supra* note 6.

Topical News Briefing: Talk Is Cheap

by the Global Tax Weekly Editorial Team

"Ease of doing business" is a phrase that we have heard a lot from the Indian Government recently as it continues to try and improve the country's legislative and regulatory framework, especially in the area of tax. And it seems to be going the right way about it.

As reported in this week's issue of *Global Tax Weekly*, the Government announced on October 26 that it has constituted a committee tasked with recommending ways to reduce disputes between corporate taxpayers and the tax authority and improve the overall tax framework, as several high profile disputes simmer away in the background. Then, on October 27, India's Finance Minister Arun Jaitley launched two initiatives aimed at significantly reducing the burden of compliance on taxpayers and enhancing taxpayer satisfaction: the "e-Sahyog" digital project, launched on a pilot basis, is aimed at reducing compliance costs, especially for small taxpayers; and the Government plans to run temporary "camps" to assist taxpayers in remote areas.

Several other initiatives have been announced recently, aimed at rebuilding bridges between the Government and foreign investors. On October 20, senior officials from the Ministry of Finance and the Reserve Bank of India met representatives from more than ten foreign portfolio investors to discuss ways to ease the burden of doing business in India, with the meeting centering on tax issues. Earlier in October, the Chair of India's Central Board of Direct Taxes told a gathering of business leaders that the agency is seeking to facilitate taxpayer compliance and is seeking to simplify India's tax framework and laws. In September, the Ministry of Finance announced that Revenue Secretary Hasmukh Adhia has started holding "detailed" meetings with business associations and representatives of industry on tax policy with a view to improving India's investment environment. The first meeting was held at the Finance Ministry on September 29 with delegations from the Confederation of Indian Industry, and subsequent meetings were held with the Federation of Indian Chambers of Commerce and Industry, the Associated Chambers of Commerce of India, and the PHD Chamber of Commerce.

More recently, Adhia seemed to suggest at a news conference that the Government would bring forward its plans to cut corporate tax to 25 percent, which is intended to take place over a period of four years, and accelerate its roadmap aimed at reducing the number of exemptions in the tax code, provisions which tend to hinder tax compliance, rather than help taxpayers.

However, while these announcements have been welcomed by investors, at some point the Government will have to follow words with deeds and actions if it is to fully regain their trust. And investors will not be heartened by the Government's ongoing struggle

to force the GST reform through Parliament in time for its proposed April 2016 introduction.

The Government was keen to point out recently that it had made some improvement in the World Bank's Doing Business index. Yet, with India still ranked 130th out of almost 200 jurisdictions, and its position in the "paying taxes" section showing a slight decline, there is clearly an awful lot of work still to be done.

What A Thoughtful Gift!

by Mike DeBlis Esq, DeBlis Law

If you receive a check in the mail from a relative in the UK a few days before your birthday, it is fairly easy to deal with the income tax consequences of this transaction.

But let us assume that your more generous and well-heeled Nana from your dad's side of the family, who is an American expat living in Italy, gives you title to a timeshare on the outskirts of Milan; the tax consequences of this transaction are considerably more abstruse. However, your friendly neighborhood revenue agent is here to help, and also claim Uncle Sam's fair share.

Just a few weeks ago, the IRS finally got around to proposing rules[1] mandated by the Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008. That law added two new provisions to the tax code – the new Section 877A imposed an "exit tax" on those renouncing citizenship; and Section 2801 concerned the tax due when expats give to non-expats. Rather unsurprisingly, the IRS was all over Section 877A and issued rules almost immediately. And, also unsurprisingly, the financial interests of expats and their families were placed squarely on the backburner for seven long years. But, I digress.

Before We Begin

The mere fact that you've already read this far strongly suggests that you already know this stuff, so I'll be very brief.

"Expatriates," as the term is generally understood, means birth-citizens of one country that are living in another one while maintaining physical and emotional connections to the Motherland. A recent study suggests that most American expats originally moved abroad because of marriage or employment reasons. The HEART Act adds the further qualification that an "expat" is a person who relinquished citizenship or a green card on or before June 17, 2008.

Politically, expats are something like the also-ran candidates in those pre-debate GOP Presidential candidate forums: almost everyone acknowledges their contributions, but almost no one would be terribly upset if they just went away.

What Gifts Qualify?

Gifts from expats have increased tenfold[2] in the past seven years, so it's high time the IRS told people how to fill out any tax returns that include these items.

First, the donor (person giving the gift) must have had an annual net income of at least USD124,000 for the past five years, a total net worth of at least USD2m, or must qualify under certain other rule-related provisions. Second, the donee (gift recipient) must be a natural person or a trust. For HEART Act purposes, a foreign trust is considered to be a domestic trust in most situations; more on that below. Finally, the taxable value of the property transfer is its fair market value at the time it was actually received.

Calculating The Tax Due

According to the proposed rules, the short answer is that any amount that exceeds the gift floor (USD14,000 in 2015) is subject to "the highest estate or gift tax rate in effect during that calendar year." It is important to note that the gift's value is determined by Section 2512 *et seq.* and not what the donor or donee claims it to be. For now, the tax must be reported in Part IV of Form 3520;[3] start watching your mailbox now for the new and improved Form 708. There is an awfully stiff penalty – 35 percent of the gift's fair market value or USD10,000, whichever is greater – for noncompliance.

Any gift or estate tax paid to any foreign jurisdiction is a credit against the 2801 tax. Gifts are entirely exempt if a US citizen or resident was the donor, and the marital or charitable exemptions would have applied.

The IRS admits that it is "difficult" for donees to determine the fair market value of a gift. But the very next sentence begins with "Nevertheless," so the IRS is clearly not in the mood for excuses. Oh, and in case you didn't already have enough work to do, it's also the taxpayer's burden to determine whether or not the donor was a covered expatriate under the HEART Act. So be sure your thank-you card includes a request for the last five years of tax returns. If the donor is dead or the information is otherwise unavailable, the IRS "may in certain circumstances" disclose the data. How helpful. When in doubt, there is a rebuttable presumption that the donor was a covered expat, so you can probably start from there.

Some Examples

As is often the case, the devil is in the details. While a new Porsche from Aunt Helga in Stuttgart is clearly a gift, what about life insurance proceeds from dearly departed Uncle Vladimir (no, not *that* Vladimir) in St. Petersburg?

If the money came while Uncle Vladimir was alive, be it from a term or whole life policy, the funds are probably not a "gift" for 2801 purposes. However, the proposed rules indicate that proceeds payable upon the covered expat's death may indeed be taxable under the HEART Act.

Earlier, we touched on foreign and domestic trusts as donors and donees. While a foreign trust is

considered a domestic trust for most purposes, there are situations when a foreign trust may elect to be treated as a domestic trust. To make this election, the trustee must:

- Timely file Form 708 and pay any tax due,
- Duly authorize and appoint a US agent,
- Promise to file Form 708 like clockwork, and
- Promptly pay any back taxes.

Any noncompliance with any of these elements effectively kills the election, and it is almost impossible to resuscitate it.

What about pensions and other deferred compensation plans? I'm so glad you asked. As an initial matter, everything is deemed vested for 2801 purposes. Then, there is good news and bad news. While most of these funds are exempt from the market-to-market tax, they may be subject to a 30 percent withholding. As a side note, these funds are typically subject to the exit tax in Section 877A.

The proposed Section 2801 rules are subject to public comment until December 9, 2015; they may become final within a few weeks afterwards. Ho, ho, ho.

Endnotes

1 https://www.federalregister.gov/articles/2015/09/10/2015-22574/guidance-under-section-2801-regarding-the-imposition-of-tax-on-certain-gifts-and-bequests-from?e=rmarini%40taxlaw.ms&j=1469333&jb=0&l46_HTML&mid=1062735&u

2 http://www.dhs.gov/sites/default/files/publications/ois_natz_fr_2013.pdf

3 https://www.irs.gov/pub/irs-pdf/f3520.pdf

From Harper To Trudeau: What's In Store For Canada's Taxpayers?

by Stuart Gray, Senior Editor, Global Tax Weekly

Those with aspirations to reach the highest political office in Canada should prepare themselves for something of a roller coaster ride, for Canadian voters can be an unforgiving lot. The 1993 election was particularly memorable, when the Conservatives were punished, to say the least, by the electorate and left with just two seats in the House of Commons, to the Liberals' 177. The 2015 election, held on October 19, wasn't quite as decisive, but it resulted in a dramatic reversal in fortunes for the Liberals, who won just 34 seats in the previous poll staged in 2011, but were swept to power this time with 184 seats (and a 54 percent share of the vote) to the Conservatives' 99 (from a 29 percent share).

Obviously, a number of factors besides taxation are placed in the mix when voters decide how to cast their votes. However, given the Conservatives' economic and fiscal track record in their near ten years in power – Canada was the only major economy to weather the financial crisis relatively unscathed, and now has a budget surplus while many of its peers continue to battle deficits – the result seems a little harsh on outgoing Prime Minister Stephen Harper. Therefore, this article looks at what the youthful Liberal leader Justin Trudeau is offering Canadian taxpayers, and attempts to assess how the Canadian tax environment might change during the Liberals' four-year mandate.

Fiscal And Economic Background

Although the Canadian economy suffered to a much lesser extent than other developed nations as a result of the financial crisis, it didn't escape completely undamaged. About three-quarters of its exports flow to the US; thus, the fortunes of Canada's economy are inextricably linked to the economic well-being of the US. Inevitably, the Canadian economy dipped into recession in 2008, and in 2009 the federal Government posted its first deficit in 12 years. However, the key to Canada's swift recovery and its underlying strength in the post-financial crisis period was that its banks, prudent, well capitalized, and adequately regulated, didn't need bailing out as they did in the US, the UK, and other major economies. This allowed the Government sufficient fiscal space to provide a short-term economic stimulus while delivering on its long-term plan to reduce corporate tax, with the headline rate now 15 percent, the lowest in the G20. What's more, public debt, including the net debt of the federal, provincial/territorial and local governments, as well as the net assets held in the Canada Pension Plan, stood at just under 40 percent of

gross domestic product (GDP) in 2014, against a G7 average of over 80 percent.[1]

After the Conservative Government wound down the post-crisis fiscal stimulus program, it set about attempting to achieve a balanced budget, and in September 2015, the Finance Department announced a surplus of CAD1.9bn (USD1.4bn) for the 2014/15 fiscal year, a result driven largely by rising tax revenues, which increased 3.9 percent on 2013/14.[2] The surplus exceeded the fiscal projection presented in the 2015 Budget, which actually forecast a deficit of CAD2bn for the year that ended on March 31, 2015. Revenues totaled CAD283.3bn, up CAD10.7bn on 2013/14 and CAD3bn higher than expected. According to the Finance Department, this reflected gains in personal and corporate income tax revenues. Personal income tax revenues rose by 3.8 percent year-on-year, and corporate income tax revenues increased by 7.8 percent. Goods and services tax revenues grew by 1.1 percent.

Commenting on the fiscal results, Harper stated that:

> "The protection of our economy is our number one priority. Amid increasing instability in the global economy, our Conservative Government's Economic Action Plan is working; delivering new jobs and economic growth through lower taxes and a balanced budget. … Now is not the time for long-term deficits or higher taxes. Only our Conservative Government has a plan to protect Canada's economy by ensuring our budget remains balanced and lowering taxes to create new jobs and make life more affordable for Canadian families and seniors."

Evidently, judging by the emphatic nature of the Liberal Party's election victory, the electorate disagreed with Harper's vision.

The Liberals' Fiscal Plan

So what does Trudeau's victory mean for taxpayers and investors in Canada? The party's Fiscal Plan[3] suggests that if you are a "middle class" resident of Canada, you will probably see a tax cut, provided the new Prime Minister is true to his word. Indeed, the plan appears to hinge largely on improving the lot of middle-income earners, with its introductory commentary stating:

> "When you have an economy that works for the middle class, you have a country that works for everyone. The middle class is the heart of the Canadian economy. That is why, when we strengthen our middle class and grow our economy, we build a Canada where people who work hard can look forward to a good standard of living, a secure retirement, and better prospects for their kids. It also means we ensure that government has the resources it needs to invest in research and innovation, lift the vulnerable out of poverty, and provide economic security to all Canadians."

Under the current system, tax is paid at 15 percent on the first CAD44,700 (USD33,785) of

taxable income, 22 percent on the portion between CAD44,701 and CAD89,401, and 26 percent on the portion between CAD89,401 and CAD138,586. The Liberal Party has said that it will reduce the tax rate on incomes between CAD44,700 and CAD89,401 from 22 percent to 20.5 percent.

Small business owners could also be in line for a tax cut, as the Party has pledged to reduce the small business tax rate from 11 percent to 9 percent, matching a commitment made by the Conservatives at the 2015 Budget. However, just what the Liberals have in store for larger corporations is less clear, as wider corporate tax policy barely receives a mention in the Party's fiscal plan. This suggests that the corporate tax *status quo* will be maintained, although this is not an assumption that can be completely relied upon.

Trudeau has also emphasized the importance of protecting the poorest and most vulnerable sections of society. The incoming Government intends to create a new Canada Child Benefit, a scheme the Party describes as a "bigger, fair, tax-free, automatic monthly check that puts more money back in the pockets of Canadian families who need it most." This, according to the Liberal Party, would lift 315,000 children out of poverty.

However, in order to make the tax system fairer and provide additional support for the low-paid, those considered to be on high incomes – at least CAD200,000 per year, according to the Liberals – can expect their income tax liability to rise; the Liberals plan to introduce a new tax bracket of 33 percent for incomes over CAD200,000.

In order to maintain tax fairness, it is also going to make it more difficult for people to avoid tax. So in anticipation that those affected by the new top rate could use tax planning strategies to avoid it, the Canada Revenue Agency (CRA) will receive a boost to its enforcement budget to ensure tax payable is collected.

The party will also review tax expenditures to "look for opportunities to reduce tax benefits that unfairly help those with individual incomes in excess of CAD200,000 per year." For instance, it would cap the amount that can be claimed through the stock option deduction. Trudeau also suggested earlier this year that "income splitting," introduced under the Conservatives to allow a higher income spouse to effectively transfer up to CAD50,000 of their taxable income to a spouse in a lower tax bracket for federal tax purposes, would be jettisoned, describing the measure as a CAD2bn tax break "that favors the wealthy." [4] Furthermore, the Liberals have proposed to take steps to ensure that the Canadian-Controlled Private Corporation status is not used to reduce personal income tax obligations for high-income earners. In addition, a Liberal Government would instruct the CRA to conduct an analysis of, and crack down on, the "tax gap."

Another key break from past Conservative policy is that the Liberals intend to borrow to invest in an attempt to lift the economy, although this will require

the new Government to run "modest" deficits for the next four years. The Fiscal Plan envisages the federal government operating a short-term deficit of less than CAD10bn in each of the next two fiscal years. The plan is that the deficit will then decline and a balanced budget will be restored in 2019/20. All this, of course, depends on the Liberals' economic assumptions holding true in a period of increasing anxiety about the state of the global economy.

Harper Pays The Price For Fiscal Conservatism?

Ultimately, the Liberal tax platform – tax cuts for low- and middle-income earners, tax hikes for the wealthy, and increased welfare spending – are fairly standard fare for a party positioned on the center-left of the political spectrum. Hardly radical stuff. Yet this fairly low-risk strategy resulted in a surprisingly impressive victory for the Liberals, and an equally spectacular defeat for Harper. So what was responsible for this reversal in fortunes? As far as the Liberals are concerned, their unashamed courting of the middle class vote, that most fertile of electoral ground, doubtless played a major role in its crushing victory. It is certainly worthy of note that the party's fiscal plan, entitled "Growth for the Middle Class," mentions the phrase "middle class" almost 20 times across its 15 pages.

Equally, and at the same time quite ironically, the Conservatives might have been the architects of their own undoing by being too, well, conservative on tax. In his determination to be fiscally prudent, Harper perhaps missed an opportunity to improve the tax system for individuals in particular, and also for business taxpayers. Indeed, numerous recent studies have concluded that, overall, the Canadian tax system is not the easiest to interact with, with the tax burden on individuals quite high relative to peer economies, such as the US.

In 2015, a report by the Fraser Institute revealed that the average Canadian family spends more on taxes than food, clothing and shelter combined. Its study, "Canadian Consumer Index," [5] showed that, in 2014, the average Canadian family earned CAD79,010, paid CAD33,272 in total taxes, and CAD28,887 on food, clothing and shelter. On average, therefore, 42.1 percent of income was spent on taxes and 36.6 percent on basic necessities. Charles Lammam, Director of Fiscal Studies at the Fraser Institute and co-author of the study, observed that: "With growth in the total tax bill outpacing the cost of basic necessities, taxes now eat up more family income, so families have less money available to spend, save or pay down household debt. While taxes help fund important government services, the issue is the amount of taxes that governments take compared to what we get in return. With 42 percent of income going to taxes, Canadians might wonder whether they're getting the best value for their tax dollars."

The welcome message to the Prime Minister-designate by the Canadian Council of Chief Executives seems to suggest that Harper was, to a certain extent, guilty of neglect in his failure to improve the tax system. John Manley, Chief Executive of the CEO

Council, writes in his letter: "Against a backdrop of accelerating global change and disruption, Canadians are looking to you and your team for solutions to a broad range of social and economic challenges. Satisfying these expectations will not be easy." [6]

Manley added that Canada "needs a tax system for the 21st century, one that reduces compliance costs and increases transparency while promoting growth, investment, entrepreneurship, and job creation." He warned that higher marginal rates ultimately encourage tax avoidance and undermine the country's international competitiveness, and recommended that the goal of tax reform should be to achieve the broadest base possible. Manley added that the corporate tax system is equally in need of simplification. "A smarter approach would be to reward companies that expand, create jobs, and increase Canada's trade with the world," he explained.

Manley's concerns echo those of Dr. Jack Mintz, the President's Fellow at the University of Calgary's School of Public Policy, in a paper published in September 2015.[7] In his report, Mintz pointed out that if the Government's plans are implemented, the small business rate will be six percentage points lower than the general rate. He argued that the federal government should make the corporate tax structure more neutral by broadening the base. Meanwhile, he argued that provinces should reduce tax preferences, including those for small businesses, and recommended that the provinces should be required to adopt uniform corporate tax rates. Mintz said that, if tax preferences are removed, the provinces can lower their rates to 10 percent, down from the current average of almost 12 percent. He also suggested that provincial sales taxes should be harmonized with the federal goods and services tax in the provinces that do not already operate a harmonized sales tax system (British Columbia, Saskatchewan, and Manitoba).

According to Mintz, "lower corporate taxes should go hand-in-hand with a drive to make the tax system more neutral among business activities and among small and large firms. Tax neutrality puts the decisions on which projects offer the best return into the hands of business rather than governments, which are too often swayed by non-economic considerations."

Conclusion

The Conservatives might have given Canada the lowest headline rate of corporate tax in the G8, but it is people who vote, not companies. And the people appeared to speak decisively on October 19. So what does the future hold for taxpayers in Canada now the baton has been passed to Trudeau and the Liberals? By combining fiscal prudence with investments in economic growth, Trudeau hopes to be able to reduce Canada's debt while stimulating growth. However, that is going to be a difficult balancing act to achieve, and recent experience tells us that not many governments manage it.

With regards to taxation, as business leaders and academics have pointed out, there is certainly a lot that the new Government can do to improve the tax system, to make it less complex and more efficient. But judging by the measures outlined above, we are unlikely to see any revolution in tax policy. Indeed, the immediate outlook feels quite uncertain due to the lack of detail in the Liberals' tax plans, especially in the area of corporate tax. Nevertheless, Trudeau's more expansionary fiscal vision does mark something of a change with what we've been used to under Harper, and if nothing else the Liberals' heavy emphasis on tax "fairness" probably means that wealthier taxpayers and larger companies can expect to see their taxes rise.

Endnotes

1. http://www.budget.gc.ca/2015/docs/plan/anx2-eng.html
2. http://www.fin.gc.ca/n15/15-078-eng.asp
3. https://www.liberal.ca/files/2015/09/The-Liberal-fiscal-plan-and-costing.pdf
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Recent Developments In Transfer Pricing: Making Sense Of The Final Releases Of The OECD BEPS Project

by Mark Bronson, Managing Director, Transfer Pricing, Duff & Phelps

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On October 5, 2015, the OECD released its final BEPS deliverables. This article focuses specifically on two final reports: Action Item 4 (Limiting Base Erosion Involving Interest Deductions and Other Financial Payments) and Action Items 8–10 (Aligning Transfer Pricing Outcomes with Value Creation). Given that these final reports totaled nearly 300 pages, this article cannot provide an exhaustive summary of the content in those reports.

Instead we will focus on the most material changes relative to discussion drafts released largely at the end of 2014. Many of the changes were made in response to the public written commentary received following the issuance of the draft and the public consultations, both of which Duff & Phelps participated in actively.

Action Item 4: Limiting Base Erosion Involving Interest Deductions And Other Payments

Even though the final report on Action Item 4 will not change the related transfer pricing guidance, it is nonetheless transfer pricing-related because it may limit the deductibility of interest payments. While the discussion draft included several potential approaches that might be applicable to limit BEPS opportunities through interest deductions, the final report identifies a single "recommended approach" (also referred to as the "best practice approach"), centering on a fixed ratio rule. The rule caps an entity's net deductions for interest and financial equivalents at a percentage of EBITDA (earnings before interest, tax, depreciation, and amortization). The implementing country would choose a point in the range of 10.0 percent to 30.0 percent of net interest/EBITDA. Note that the rule would apply to both intra-group and third-party interest.

The final report gives countries the option to supplement this fixed ratio rule with a group ratio rule, inclusion of which would allow an entity to exceed the limit set by the fixed ratio in certain limited circumstances. For example, an entity with a net interest/EBITDA above the target could deduct net interest up to the net interest/EBITDA ratio of the

worldwide group (in cases where the group's ratio is greater than that of the specific entity). An earnings-based group ratio rule can be replaced by an alternative such as the "equity escape" rule, which is based on assets.

The recommended approach also includes the optional inclusion of (1) a *de minimis* monetary threshold to prevent overburdening low risk entities; and (2) the ability to carry forward disallowed interest expense or unused interest capacity from year to year. The approach can be buttressed by targeted rules to address specific risks (*i.e.*, protect fixed ratio and group ratio rules from aggressive planning initiatives).

The final report notes that additional Action 4 work is needed to develop suitable and specific rules for the banking and insurance sectors, and flesh out details on implementation. Also, the final report recommends limiting the amount of interest payable to group companies lacking economic substance to no more than a risk-free return on funding provided, and notes more generally that further work on transfer pricing issues of financial transactions is needed and will be undertaken in 2016 and 2017.

Action Items 8–10: Aligning Transfer Pricing Outcomes With Value Creation

This report includes substantially all of the revisions to transfer pricing guidance that came out of the BEPS project. Changes were fragmented into several discussion drafts on various topics during the commentary process, and that fragmentation is followed in the discussion below. The final deliverables associated with all items were collapsed into a single document, now called "Aligning Transfer Pricing Outcomes with Value Creation."

Risk, Recharacterization And Special Measures

The discussion draft on Risk, Recharacterization and Special Measures generated perhaps the largest and most vocal response of all the transfer pricing related BEPS discussion drafts. This is because, under the language of that discussion draft, it appeared as though:

- Tax authorities could assert entity characterizations that yielded inappropriate risk and residual profit allocations due to the vague nature of the associated guidance.
- Governments could routinely alter the transactions as structured by the taxpayer based on a vague moral hazard framework to inform whether third parties with adverse interest would enter into certain types of transactions.
- Contracts might be ignored, even where those contracts had substance.
- "Special measures" might be imposed that would, in certain instances, override or replace the application of the arm's length standard.

The final deliverable addresses many of the more problematic aspects of the discussion draft. In particular:

- The final report is more specific about what is necessary for risk allocations to be respected, and adopts language that is consistent with the framework contained in the business restructuring guidelines (Chapter IX), but more detailed. Under the final guidance, parties assuming the

risk must have control, and they must have the financial capacity to bear the risk in order for that risk assumption to be respected.

- The special measures have been discarded.
- The moral hazard framework has been discarded.
- Contracts are recognized as the starting point to understanding the assumption of risk. Contracts that are clear in fully characterizing the assumptions of relevant risks will be helpful to taxpayers so long as their conduct is consistent with the contract (and the parties have the financial capacity to bear the risks they are being assigned by the contract and also control those risks).

The final deliverable repeatedly stresses that recharacterization should be rare, and that transactions that have substance should not be recharacterized simply because they are hard to price. Unfortunately, there are still a few areas where the guidelines are vague enough to create concerns about potential abuse by tax administrations and/or potential double taxation that could be difficult to resolve. In particular, it is still the case that:

- The final deliverable stresses that mere capability does not equate to the control of risk without the actual performance. It also notes that more than one entity might be found to control a risk, but that the party which assumes the risk under contractual arrangements will be assigned that risk so long as it has the financial capacity, and actually exercises its control (at least in part) over that risk. With that said, at other points in the final chapters (including the portions of the final report addressing profit splits), parties controlling the risks may still be profit split participants even if they are not assigned the risk for transfer pricing purposes. Consequently, companies with highly decentralized decision-making structures may be particularly exposed to potential misapplications of profit splits and double tax cases under this interpretation.
- Even though the discussion on recharacterization repeatedly stresses that non-recognition should be a rare exception rather than the rule, the vague language around recharacterization in the final draft could still leave the door open for inappropriate non-recognition by aggressive tax administrations. In particular, the guidelines state: "The key question … is whether the actual transaction possesses the commercial rationality of arrangements that would be agreed between unrelated parties under comparable circumstances." We have some concerns that the final guidance on non-recognition is still open to potential misapplication.

Note that the changes to Chapter I would likely substantially limit the tax benefits associated with cash boxes or minimally functional entities if adopted in domestic transfer pricing regulations.

Correlative Adjustments To Chapter VI

When the Action Item 8 report was released in September 2014, a substantial number of final revisions were made to the guidance on intangible transfer pricing in Chapter VI. At that time, the changes made reflected the partial culmination of a project on intangibles that began in 2012. That release

also included several sections left in draft that were integrally related to the work being done around risk and recharacterization. The revised guidance in Chapter I establishes the appropriate delineation of the transaction, including the identification of the parties assuming risk in controlled transactions.

That delineation process has necessary repercussions for which entities will be entitled to intangible-related profits (or losses). The new final portions of Chapter VI (relative to the September 2014 release) largely focus on coordinating the intangible guidance with the concepts reflected in the final risk draft. The Chapter VI revisions also include guidance related to hard-to-value intangibles, which was the subject of a separate discussion draft and consultation.

Hard-to-Value Intangibles (HTVIs)

The final guidance on HTVIs retained clauses stating that tax administrations be permitted to apply a behavioral standard to HTVI transactions, imposing contingent payment mechanisms when they determine that independent enterprises would have agreed on the inclusion of such a mechanism to address the high uncertainty in similar circumstances. This behavioral standard may be hard to conclusively assess, and could lead to double tax cases that are difficult to resolve.

The HTVIs sections of the final report adopted several changes requested by public commentators as they relate to the application of a pricing adjustment for HTVIs based on *ex-post* results. Specifically, the "exemption" clauses are clarified below:

- More detail provided surrounding the types of information taxpayers should be able to supply to tax authorities with regard to their projections if they want to qualify for an exemption from *ex-post* adjustment.
- The exemption for "unforeseeable events" has been expanded to include exemptions for situations in which the difference between actual and expected outcomes is due to the playing out of the probabilistic occurrence of foreseeable outcomes, where the probabilities were not significantly overestimated or underestimated at the time of the transaction.
- Exemptions will apply if the pricing consequences of projected *versus* actual results are within some boundary, or once they are within those boundaries for a five-year period after commercialization, or when the HTVI transfer is covered in an advance pricing agreement.

Cost Contributions Arrangements (CCAs)

The final guidance on the appropriate delineation of transactions and the allocation of risk in those transactions has consequences for CCAs associated with the development of intangibles. Specifically, in order to be consistent, a CCA participant that is purported to be bearing the risk of intangible development must have the financial capacity to bear that risk, and also needs to control the risks associated with the intangible development activity being undertaken under the CCA in the manner set forth in Chapter I. Otherwise, they cannot be considered a participant to the CCA. Similarly, the guidance on HTVIs has obvious

repercussions for intangible development CCAs that include the contribution of pre-existing HTVIs to the arrangement. HTVI constructs for adjustments when actual results are substantially different than projections are also applied to enable adjustments to cost contribution shares unless exemptions similar to those in the HTVI guidance apply. In addition to provisions related to these coordinating provisions, the changes reflected in the final CCA guidance:

- Modified the discussion draft provision that "outcomes for transfer pricing purposes for CCA participants should be consistent with those which would have arisen if the parties made similar contributions on similar terms outside of a CCA" to instead read that the streamlining of flows under a CCA does not affect the appropriate valuation of contributions; and
- Explain that ongoing performance of the activities covered by the CCA may be valued at cost so long as the opportunity cost of the pre-existing resources performing those activities (*e.g.*, an R&D workforce) are recognized as a contribution to the CCA and appropriately valued, and paid for, on that basis. However, the contributions of pre-existing contributions generally cannot be measured on a cost basis.

Transactional Profit Splits

The discussion draft on profit splits did not contain substantive new proposed guidance, but rather asked a series of questions around a series of examples that delegates had seen tax administrations apply in order to solicit commentary on the appropriateness of the transactional profit split as a reliable method for analyzing the examples.

The profit split material included in the BEPS release similarly does not provide substantive revisions to the current profit split guidelines. Rather, the OECD will be publishing draft guidance in 2016, with expected finalization in the first half of 2017. A public consultation on the draft guidance is expected to be held in May 2016. Consequently, the discussion on profit splits in the final BEPS release is described as a "scope of work for guidance on the transactional profit split method" rather than actual guidance.

Within this scope of work, the OECD provides a brief discussion, referencing profit splits that are elsewhere in the guidelines, noting in particular that the guidance suggests that profit splits may be appropriate when:

- Important functions are outsourced and Comparable Uncontrolled Transactions (CUTs) are not available to appropriately price the performance of that important function; or
- No CUTs are available for analyzing the transfer of an intangible.

The statement of work also suggests that the revisions to Chapter I may prompt consideration of profit splits when multiple parties control economically significant risks in a transaction or when multiple parties contribute to group synergies through deliberate, concerted action. The remainder of the statement of work highlights other areas for further development based on the first public consultation.

Commodity Transactions

The final changes to Chapter II regarding application of the Comparable Uncontrolled Price (CUP) method for commodities pricing largely adopted several proposals in the discussion draft, including:

- A clear statement that the CUP method would generally be an appropriate transfer pricing method for commodities;
- Clarification that quoted prices may form the basis of an application of the CUP method for commodities so long as the source of quoted prices is routinely used in the ordinary course of business to negotiate prices for uncontrolled transactions;
- Reasonably accurate comparability adjustments should be made, when needed, to ensure that the economically relevant characteristics of the controlled and uncontrolled transactions are sufficiently comparable. Characteristics requiring adjustments might include differences between the tested and comparable transaction related to physical features and quality of the commodity, volumes traded, shipping cost differences, insurance and currency terms;
- The pricing date will be determined by reference to the pricing date actually agreed by the parties where that date can be reliably determined, and so long as the conduct of the parties was consistent with whatever evidence was used to establish the pricing date. If the conduct of the parties was inconsistent with the evidence of the pricing date, tax administrations may determine a pricing date consistent with the facts and with what independent enterprises would have agreed to under comparable circumstances. If there is no reliable evidence of the pricing date, tax administrations may deem the pricing date on the basis of the available evidence.

Low-Value Services

The OECD's final release of Action 10 includes a few key changes to its draft release of low value-adding services in 2014. These are highlighted below:

- The OECD specifies that the activities listed as excluded from applying the simplified approach do not imply they are high-value in nature. Instead, a comparable analysis is required to justify the profit mark-up applied to the excluded activity;
- The draft release in 2014 introduced a range of profit mark-ups of 2–5 percent when applying the simplified approach. The OECD removed the range in its final release and specified that a 5 percent mark-up be applied;
- The final release introduced support for a threshold that could be adopted by tax administrations (which could, for example, be based on the ratio of intercompany service charges to total costs or turnover), above which a simplified approach cannot be applied and full functional and comparable analysis be used to support the intra-group service charge;
- A new section recommends tax administrations apply withholding tax only to the profit element of the service charge when withholding taxes are being applied.

Global VAT Guide: Cross-Border Supplies Of Intangible Services

by Richard Woolich, Matthew Cridland and Daan Arends, DLA Piper

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This is the fourth in a series of articles examining the VAT rules and treatment for VAT purposes of cross-border supplies of intangible services, rights and digital content in a number of key jurisdictions around the world.

Brazil

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Local name for VAT

Social contributions on gross receipts on imports (PIS/PASEP & COFINS on Imports) – Federal level.

Applicable rates for e-commerce services

Standard rate: PIS/PASEP – Import: 1.65 percent; COFINS – Import: 7.6 percent.

Note that these taxes are not typical VAT because the offset/recoverability of these taxes will depend on the type of activity and essentiality of the IP imported for the business activity of the Brazilian entity.

Depending on the type of transaction, other taxes may apply, such as: withholding income tax (15 or 25 percent); CIDE (contribution for intervention on economic domain: 10 percent); and Service Tax (ISSQN: 2–5 percent).

In addition, tax on financial transactions (IOF), including exchanges and currency conversions, applies at 0.38 percent or 6.38 percent, depending on the type of transaction involved.

Registration requirements

Mandatory: As a general rule, entities performing habitually industrial, commercial and professional activities are obliged to be registered before the tax authorities for the legal entity national registry and to obtain a tax ID number (CNPJ), which is necessary to collect PIS/PASEP and COFINS.

Registration for municipal tax (ISSQN) is required for certain cross-border transactions involving importations of services.

Place of supply for cross-border supplies of intangibles to local consumers (B2C)

The Brazilian government holds studies to charge taxes over these transactions. At the moment, only IOF is charged currently at 6.38 percent over a payment abroad with international credit cards.

Place of supply for cross-border supplies of intangibles to business customers (B2B)

If it is an importation of services or any type of transaction payment abroad, it will be necessary to pay all applicable Brazilian taxes. The type of transaction is necessary to define which taxes apply.

Do you require evidence of a customer's VAT number to treat a supply as B2B?

Yes, it is necessary to hold a CNPJ and a municipal tax registration to be able to make payment in a B2B context.

Can prices be displayed on a tax exclusive basis?

It will depend on the taxes applicable.

China

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Local name for VAT

China implements a dual system of indirect taxes:

- VAT: applicable to most services and the provision of digital content and intellectual property rights; and
- Business Tax: applicable to entertainment, construction, financial and insurance services.

For the purposes of this Guide, we will focus on VAT.

Applicable rates for e-commerce services

Standard rate: 17 percent (leasing of movable property and provision of digital content); 11 percent (transportation services, postal services and basic telecommunications services); 6 percent (other services, provision of intellectual property rights).

Special rate: 3 percent (for taxpayers recognized as small-scale taxpayers, including individuals and taxpayers whose annual turnover is less than RMB5m or who do not keep sound accounting records).

Registration requirements

Mandatory: All entities registered in China and individuals conducting VAT taxable activities are subject to VAT registration. VAT taxpayers are registered as either general taxpayers or small-scale taxpayers; each category is subject to different tax treatment. General taxpayers apply standard tax rates and can claim input VAT credit. Small-scale taxpayers apply special levy rates without being allowed to deduct input VAT paid for purchases. Individuals can only be registered as small-scale taxpayers.

Optional: Foreign entities without a business registration within China, but which derive VAT taxable income, are not required to be VAT registered. Their VAT liabilities are settled by appointed agents inside China or through withholding by payers making payment in China.

Place of supply for cross-border supplies of intangibles to local consumers (B2C)

China has not adopted the "destination principle" from the OECD VAT Guidelines.

Chinese VAT laws do not differentiate the place of taxation for B2B and B2C cross-border supplies of services and intangibles. VAT is payable on supplies of intellectual property rights and certain services if either the supplier or the recipient is inside China. China does not have specific tax rules dealing with cross-border supplies of digital content. Thus the competent tax authorities normally make reference to the tax treatment in relation to the provision of intellectual property rights in this regard.

China allows VAT exemptions, or grants VAT refunds, for the exportation of certain intangible supplies if relevant conditions are satisfied. For importation of intangible supplies, the Chinese tax laws require Chinese importers (recipients of the supplies) to withhold VAT and settle tax payments with local tax authorities. VAT gross-up clauses are allowed to be included in cross-border contracts for supplies of intangibles.

In practice, the above withholding rules are not strictly enforced against individual importers who do not maintain VAT registration in China.

Place of supply for cross-border supplies of intangibles to business customers (B2B)

The place of supply rules in B2B transactions are the same as those set out above in the B2C context. However, the withholding rules as set out in the above section are strictly enforced in the case of importation of intangibles in a B2B context where the importers are corporations rather than individuals.

Do you require evidence of a customer's VAT number to treat a supply as B2B?

Chinese VAT laws do not differentiate between the place of taxation for B2B and B2C cross-border supplies of services and intangibles.

For the exportation of intangibles that are eligible for VAT exemption, tax laws may require customers outside China to provide documentation evidencing its foreign business or tax registration. This tax treatment will not change regardless of whether the customer is an individual or a business.

For the importation of intangibles, the importer, irrespective of whether it is an individual or a business, is required to withhold the relevant VAT from the gross payment. However, note that in the B2B context, the importer can claim VAT credit for the VAT withheld based on its general taxpayer registration number only if it is a general taxpayer (as opposed to small-scale payer).

Can prices be displayed on a tax exclusive basis?

Yes. Chinese tax laws do not have specific restrictions on price display in cross-border supplies of intangibles.

Russia

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Local name for VAT

VAT

Applicable rates for e-commerce services

Standard rate: 18 percent.

Special rate: N/A.

Registration requirements

Mandatory: There is no separate VAT registration available in Russia. A foreign company carrying out its activity in Russia for a period of time exceeding one month shall be tax registered in Russia. Once tax registered in Russia, the foreign entity becomes registered for all applicable local taxes, including VAT.

Optional: N/A.

Place of supply for cross-border supplies of intangibles to local consumers (B2C)

There are no specific VAT place of supply rules established for e-commerce services. The place of supply for transfer (provision) of patents, licenses, trademarks, copyrights and other similar rights shall be determined as the place where the consumer resides. However, there is no VAT payment mechanism established for B2C supplies unless the foreign supplier is tax registered in Russia.

Place of supply for cross-border supplies of intangibles to business customers (B2B)

As for B2C supplies, there are no specific VAT place of supply rules established for e-commerce services. The place of supply for transfer (provision) of patents, licenses, trademarks, copyrights and other similar rights shall be determined as the place where the service recipient performs its activity. A reverse charge VAT payment mechanism functions in relation to B2B supplies if the foreign supplier is not tax registered in Russia.

There is also a VAT exemption available for provision of exclusive rights for inventions, utility and design models, ECM software, databases, integrated circuit layouts, know-how as well as rights to use such intangibles under a license agreement.

Do you require evidence of a customer's VAT number to treat a supply as B2B?

No.

Can prices be displayed on a tax exclusive basis?

B2B transactions: Yes, prices can be displayed on a VAT exclusive basis for B2B transactions. However, in practice a VAT gross-up clause would normally be introduced into the contract in such case.

B2C transactions: No, prices should be displayed on a VAT inclusive basis.

South Africa

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Local name for VAT

Value-added tax, or VAT

Applicable rates for e-commerce services

Standard rate: 14 percent is applicable if the supply is subject to South African VAT. The zero rate may apply if the supply is rendered by a South African VAT vendor to a non-resident in certain circumstances.

Special rate: N/A.

Registration requirements

Mandatory: Registration is mandatory where the value of taxable supplies has exceeded ZAR50,000 at the end of any month. In respect of electronic services, where the person or businesses outside South Africa supplies electronic services to clients in South Africa, they will need to register and account for VAT to the South African Revenue Services ("SARS") should their supplies exceed the compulsory registration threshold.

Optional: Where it is anticipated that the value of the taxable supplies will exceed ZAR50,000 within 12 months from the date of registration.

Place of supply for cross-border supplies of intangibles to local consumers (B2C)

South Africa does not have explicit place of supply rules. Any person or business that supplies "electronic services" as defined from a place outside South Africa to a resident in South Africa, or where any payment made to that person or business in respect of such electronic services originates from a bank in South Africa, is regarded as carrying on an "enterprise" in South Africa. Registration is mandatory if the value of the supplies made through the enterprise exceeds the registration threshold (see above).

Where the foreign person or business is not required to register for VAT in South Africa, the recipient of the services is obliged to account for VAT to SARS in terms of the reverse-charge mechanism within 30 days of the import, and a VAT 215 form must be completed and submitted to SARS by the recipient.

Place of supply for cross-border supplies of intangibles to business customers (B2B)

As noted above, South Africa does not have explicit place of supply rules. While the definition of what constitutes "electronic services" will in most instances exclude B2B e-commerce transactions, there is no explicit exclusion of B2B transactions.

It is apparent that in respect of electronic services relating to B2B supplies, a policy decision was made not to tax B2B transactions at this time. However, B2B services could still fall within the general VAT rules if the service is an imported service. VAT is levied on "imported services" as defined, being services supplied by a supplier who is a non-resident or carries on business outside South Africa to a recipient who is a South African resident, to the extent that services are not used in South Africa for the purposes of making a taxable supply. In respect of an "imported service," the recipient would need to account for VAT to SARS. Where the foreign supplier is registered or required to register as a VAT vendor, the foreign supplier must charge VAT on the supplies made.

Do you require evidence of a customer's VAT number to treat a supply as B2B?

The general VAT rules require the VAT number to be displayed on an invoice if the person or business is a VAT registered vendor.

Can prices be displayed on a tax exclusive basis?

Yes, provided the amount of VAT is also displayed on the "tax invoice." Usual practice in South Africa is to display the price on a tax exclusive basis, with the applicable VAT and total consideration indicated separately. Prices may be displayed on a VAT inclusive basis, but a statement that the consideration is VAT inclusive and the applicable VAT rate must also be included on the tax invoice.

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Topical News Briefing: The Savings Directive Is Dead! Long Live The Savings Directive!

by the Global Tax Weekly Editorial Team

The European Savings Tax Directive is a piece of tax legislation that we tend to hear little about these days. But it *is* still alive – or, at least, it's trying to kick – as the enhanced savings tax deal with Switzerland, endorsed recently by members of the European Parliament, shows.

The Savings Directive went into effect on July 1, 2005. As originally drafted, the Directive aimed at installing a uniform "information exchange" regime across the EU, with all but a few countries agreeing to report interest on savings paid to the citizens of other member states to those states' tax authorities.

Certain member states with strong traditions of banking secrecy were allowed to instead levy a withholding tax in lieu of information exchange. Many of the UK's offshore financial centers were also coerced into participating in the Directive, along with the former Dutch Caribbean territories and some European centers (Andorra, Monaco, Liechtenstein, San Marino, and Switzerland). Most of these places took the withholding tax route, as did Switzerland.

The Savings Tax Directive was probably the first multilateral tax information exchange initiative, and has helped pave the way for more comprehensive exchange of information initiatives at global level. However, from the very beginning, there were widespread doubts about the effectiveness of the legislation, and given the relatively puny returns for EU governments relative to the amount of work put in to make the Directive work, the doubters have largely been proven correct.

The major flaw in the legislation is that its scope is too narrow. Savings income is essentially interest earned on bank deposits, interest or proceeds from the sale or redemption of certain bonds, and income from some types of investment funds. However, corporate entities were excluded from the Directive, and therefore it has been relatively easy for savers to circumvent it. Furthermore, studies suggest that the Directive has been expensive for revenue authorities and banks to implement, and that information exchange is a cumbersome tool to enforce tax law in practice. The same studies conclude that in those cases where withholding tax was applied, revenue was raised much more efficiently.

Well aware of the Directive's flaws, the European Commission quickly set about gathering support for new proposals designed to make the legislation more watertight. But it is unclear whether the EU has learned the lessons of the first iteration's shortcomings. The replacement was agreed in March 2014, following six years of negotiations between member states. It is expected to be adopted by the Council in November 2015, and will become operational as from January 1, 2016. It provides for the automatic exchange of financial account

information between member states, and includes the income categories contained in the original savings directive. Similarly, under the agreement between the EU and Switzerland, endorsed by MEPs on October 27, information on the financial accounts of each other's residents will be automatically exchanged from 2018, although the deal includes the existing withholding tax exemption for cross-border payments of dividends, interest and royalties between related entities.

Time will tell how effective the upgraded Directive is at preventing cross-border tax avoidance and evasion by EU savers and investors. But despite the energy expended by the Commission and the member states to come up with an alternative solution, the irony is that the Directive's importance has probably been downgraded as the new global reporting standard (the Common Reporting Standard) comes on stream, with both systems essentially trying to achieve the same outcomes.

India May Accelerate Corporate Tax Cut

Indian Revenue Secretary Hasmukh Adhia revealed on November 2 that the Government is considering bringing forward its plans to reduce the rate of corporate tax and repeal some tax exemptions.

Fielding questions from the media, Adhia said that the roadmap for the phasing out of tax exemptions will be unveiled "soon," and hinted that the proposals might be presented before the end of 2015. He also suggested that the timetable for the proposed corporate tax cut might be shortened, as part of wider efforts to simplify the tax code and attract more foreign investors.

In his 2015 Budget speech, India's Finance Minister, Arun Jaitley, set out his roadmap for accelerating growth and enhancing prospects for investment, including plans for a 5 percent cut to the corporate income tax rate. The tax cut, which would lower the rate to 25 percent within four years, would be funded in part by a review of various tax exemptions and incentives.

In his speech, Jaitley said that while there had been a feeling of "doom and gloom" ahead of his Government taking office, India now has "reason to feel optimistic," with real gross domestic product growth thought to have reached 7.4 percent in 2014/15, and with projections that growth will rise to between 8 and 8.5 percent in 2015/16.

In a report published on October 29, the World Bank agreed with the Government's optimistic assessment of the economy, stating: "There are good reasons for confidence in India's near-term prospects."

However, the World Bank said that the Government must implement economic and tax reforms to lay the foundation for sustainable growth, including the proposed goods and services tax (GST), which remains becalmed in Parliament.

"While progress is visible in several areas, including improvements in the [GST], can be a potential game changer for India," said Onno Ruhl, World Bank Country Director in India.

India Sets Up Tax Simplification Panel

The Government of India announced on October 26 that it has constituted a committee tasked with recommending ways to reduce disputes between corporate taxpayers and the tax authority, and to improve the overall tax framework.

The ten-member committee is chaired by former Delhi High Court judge R.V. Easwar, and includes experts from the legal, tax and finance professions. Under its terms of reference, the committee is charged with identifying provisions and phrases in the Income-tax Act 1961 that are leading to litigation due to differing interpretations. It will also propose changes aimed at simplifying tax compliance and bringing about more legal certainty, but

without "substantially" impacting on the tax base or tax revenue.

The Government has requested that the committee deliver its first batch of recommendations by January 31, 2016. Legislative amendments based on these recommendations could then be announced in next year's annual Budget.

The new committee is just one of a number of initiatives launched by the Government to improve the tax environment and win back the trust of investors following a series of high-profile disputes between the tax authorities and multinational taxpayers. Earlier this month, senior officials from the Ministry of Finance and the Reserve Bank of India met representatives from more than ten foreign portfolio investors to discuss ways to ease the burden of doing business in India. And in September, Revenue Secretary Hasmukh Adhia began a series of "detailed" meetings with business associations and representatives of industry on tax policy.

India Plans Flight Ticket Tax, Aviation VAT Concessions

The Indian Government is planning to introduce a tax on airline tickets to help fund improvements to India's aviation infrastructure.

The proposed tax is part of a much-anticipated new aviation policy, which was released by the Ministry of Civil Aviation on October 30. The 2 percent levy would be imposed on the majority of tickets for domestic and international travel, and the proceeds used to fund a regional connectivity scheme (RCS). Under this scheme, it is envisaged that hundreds of under-utilized and redundant airstrips will be upgraded for use by scheduled services, and a series of "no-frills" airports will be constructed to foster a low-cost domestic flight network, at an estimated cost of INR500m (USD7.6m).

Additional tax concessions will also be granted to certain services under the proposed aviation policy. For example, tickets for flights on scheduled commuter airlines (SCAs) will be exempt from service tax, and aviation fuel used by SCAs will be exempt from excise duty. It is also proposed that state governments reduce value-added tax to 1 percent or less on aviation fuel used in RCS airports.

India also has aspirations to become a regional maintenance, repair and overhaul (MRO) hub in Asia, and further tax breaks are recommended in the draft policy to encourage the development of MRO operations. These proposals include zero-rating output services for service tax purposes, exempting aircraft maintenance tools and tool-kits from customs duty, and allowing spare parts imported by MRO operations to be stored tax-free for three years. The ministry also hopes to "persuade" state governments to zero-rate MRO activities for VAT purposes.

Russia Adds UK, 78 Others To CFC 'Blacklist'

On October 26, 2015, Russia's Federal Tax Service published a draft list of 137 "non-cooperative" foreign tax jurisdictions for the purposes of applying the nation's controlled foreign corporation (CFC) rules.

The list includes 119 countries and 18 territories that have not signed a double taxation avoidance agreement or a tax information exchange agreement with Russia, or if signed, have failed to share tax information with Russia. The updated list features countries including Austria, Brazil, China, Liechtenstein, Mauritius, Switzerland, and the UK.

Effective January 2015, Russia enacted CFC rules to prevent companies from using "low-tax jurisdictions" to obtain unjustified tax benefits, and allow for the taxation of the undistributed profits of CFCs. Under Article 25.13-1 of the Tax Code, profits of a foreign company managed and controlled by a Russian tax resident are not taxed in Russia if, among other things, it is situated in a country with which Russia has signed a double tax treaty, provided that country also exchanges tax information on request.

The draft list is subject to a public consultation until November 6, 2015. The new regulations are intended to take effect from January 1, 2016.

Once implemented, the new regime would subject companies managed and controlled by Russian tax residents and located in countries featured in the list to Russia's newly enacted CFC legislation.

Firms Surveyed On Attitudes To Tax Planning

Nearly three quarters of companies surveyed by legal practice Allen & Overy said that their approach to tax planning either sometimes or often conflicts with the domestic tax authority's expectations.

FT Remark questioned 350 senior-level executives operating in a range of jurisdictions on behalf of Allen & Overy about their tax strategy. Of the respondents, 77 percent said their investors have had an increased influence on their tax strategy, with many demanding more access to data and financial savings; and 88 percent said their board's expectations of a tax director's role has evolved over the past five years, with the role now seen as more strategic than technical. Two-thirds said that tax issues are discussed every quarter at board meetings, while 60 percent explained that, five years ago, tax was only discussed every half year.

Lydia Challen, Tax Partner at Allen & Overy, commented: "Businesses have to consider a range of often conflicting factors – including fiduciary duty to shareholders, social responsibility and what the law allows – when setting their tax strategies. Governments may need to start thinking about how to sell the idea of tax 'fairness' to investors if they want to see a sea-change in corporate tax behavior."

Gottfried Breuninger, Tax Partner at Allen & Overy, added: "As tax becomes an increasingly high profile issue, corporates need to focus on how it fits into their overall business strategy and how they communicate tax plans to their various stakeholders, be it shareholders, employees or the communities they operate in. Tax teams can't operate in isolation when the impact of tax plans can have such wide-reaching effects on the rest of the business."

Respondents were also asked to comment on the broader impact of the UK Government's introduction of a Diverted Profits Tax (DPT). This charge applies to multinationals that enter into "contrived" arrangements to divert profits from the UK by artificially avoiding establishing a permanent UK base or by inflating expenses paid by their UK operations. The DPT is set at 25 percent of the diverted profits.

When asked how a UK-style DPT would affect their business, 52 percent of respondents said they would consider changing their tax strategy if a similar proposal were introduced in their region.

Challen said: "The DPT was a clever political move by the Chancellor of the Exchequer, but it remains to be seen whether it has adverse effects on inward investment and UK jobs. We can understand corporates' concerns about it being replicated elsewhere because under the proposals there is a real risk of double taxation. Businesses are trying to find their feet in this new landscape."

Pfizer, Allergan Proposed Merger May Be An 'Inversion'

Two of the world's largest pharmaceutical companies, US-based Pfizer Inc. and Ireland-based Allergan Plc, have disclosed they are in merger talks to form what could be the largest-ever US corporate tax inversion, with a probable value of more than USD100bn.

Inversion techniques are being used by some US multinationals to move their tax residences abroad – away from the high 35 percent US headline federal corporate tax rate – and to unlock their unrepatriated earnings held offshore.

In an announcement on October 29, Pfizer confirmed that it is now in preliminary friendly discussions with Allergan in relation to a potential merger, in which it may move its corporate headquarters from New York to Dublin.

This followed an official statement by Allergan under Irish takeover rules in which it disclosed that it had been approached by Pfizer.

Ireland Legislates For CbC Reporting, New Patent Box

Ireland recently published legislative provisions in the 2015 Finance Bill that respond to specific elements of the OECD's base erosion and profit shifting project, on country-by-country (CbC) reporting (Action 13) and on harmful tax regimes (Action 5).

On CbC reporting, section 31 of the Finance Bill will insert a new section 891H into Part 38 of the Taxes Consolidation Act 1997 (TCA 1997). This new section requires an Irish resident parent company of a large multinational enterprise (MNE) group to provide annually, and for each tax jurisdiction in which they do business, a CbC report to the Revenue Commissioners. The requirement begins for fiscal years commencing on or after January 1, 2016.

The report is required to contain details of the MNE group's revenue, profit before income tax, and income tax paid and accrued. It also requires MNEs to report their number of employees, stated capital, retained earnings, and tangible assets in each tax jurisdiction. Finally, it requires MNEs to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in.

The CbC report is based on guidance published by the OECD on October 5, 2015. Section 31 enables the Revenue Commissioners to make regulations to give effect to the manner and form in which a CbC report is to be provided. The section also enables the Commissioners to make regulations providing for an MNE to nominate an Irish group entity as a surrogate parent entity to file the report. The Commissioners will be able to make regulations to require a constituent entity of an MNE group, other than the ultimate parent entity, to file the report. In such circumstances, the Commissioners may amend the information to be included in the CbC report.

Meanwhile, in another amendment relevant to MNE groups, section 32 of the Finance Bill will amend section 831 of the TCA 1997 to implement Council Directive No. 90/435/EEC, concerning the common system of taxation applicable in the case of parent companies and subsidiaries of different member states (commonly known as the Parent-Subsidiary Directive (PSD)).

The new provision, *inter alia*, transposes Council Directive No. 2015/121, which amended the PSD to include a general anti-avoidance rule. This rule requires member states to refrain from granting the benefits of the PSD to arrangements that are not genuine, *i.e.*, that have been put in place to obtain a tax advantage without reflecting economic reality, and defeat the object or purpose of the Directive.

Finally, section 30 of the Bill legislates for Ireland's new "patent box" regime – the Knowledge Development Box (KDB). The KDB will provide that profits from patented inventions and copyrighted software (qualifying assets) earned by an Irish company can, to the extent it relates to research and development (R&D) undertaken by that company, be effectively taxed at a rate of 6.25 per cent instead of the standard corporate tax rate of 12.5 percent. The relief is available to companies for accounting periods beginning on or after January 1, 2016, and before December 31, 2020.

According to an explanatory memorandum released alongside the Bill, the amount of the profits arising from the qualifying assets that can avail

of the relief will be determined by the proportion that the Irish company's R&D costs (qualifying expenditure) bear to the total R&D costs (overall expenditure) incurred on the qualifying assets. The overall expenditure could also include expenditure on R&D performed by other group companies (related parties) or amounts paid to acquire intellectual property (IP).

The qualifying expenditure includes the cost of R&D that is outsourced to unrelated parties, but excludes expenditure on R&D performed by related parties and the cost of acquired IP. To take account of this excluded expenditure, an additional "uplift" provides that qualifying expenditure may be increased by the lower of either 30 percent of qualifying expenditure or the aggregate of amounts paid to related parties and to acquire IP.

After January 1, 2016, detailed records are required to be maintained to verify a company's entitlement to the relief, and transitional arrangements are in place for qualifying expenditure incurred before January 1, 2016.

According to the memorandum, this section further provides that:

- Each qualifying asset is to be treated separately for the purposes of the KDB. However, if a number of qualifying assets are so interlinked that it would be impossible to apply the relief on that basis, provision is made for using a "family of assets".
- Provision is made to ensure that a company that claims the payable R&D tax credit will not receive a larger payable tax credit because of the operation of the relief in this section.
- Large companies must apply transfer pricing rules from Part 35A of the TCA 1997 to determine the overall income that qualifies, to any intercompany transactions that are relevant to the relief and also to any apportionments required between that company's normal trading activities and the activities that qualify for the relief rate. Smaller companies that are not subject to Part 35A must apportion income, where required, on a "just and reasonable" basis.
- Where a company incurs a loss on the activities that qualify for the relief, these losses are available for relief on a value basis against other profits. Power is given to the Revenue Commissioners to consult with experts in relation to specific aspects of the regime. A right of appeal has been provided if disclosure to an expert would be prejudicial to a company's trade or business.

MEPs Endorse Swiss Deal To Replace Savings Tax Directive

Members of the European Parliament (MEPs) have approved an agreement under which the EU and Switzerland will automatically exchange information on the financial accounts of each other's residents from 2018.

The agreement with Switzerland was signed on May 27, 2015. It provides that the parties will receive, on an annual basis, the names, addresses, tax identification numbers, and date of birth of their residents with accounts, along with other financial and account balance information.

The agreement will replace the EU–Switzerland taxation of savings agreement which has been in force since 2005. It includes the existing withholding tax exemption for cross-border payments of dividends, interest and royalties between related entities.

MEPs voted in favor of a resolution approving the deal by 593 votes to 37, with 58 abstentions. The European Parliament said that, under the agreement, tax administrations in the EU and Switzerland will be able to identify correctly the taxpayers concerned, administer and enforce their tax laws in cross-border situations, and avoid unnecessary further investigations.

Parliament said that the agreement must now be concluded in time for its intended entry into force on January 1, 2017.

EU, Liechtenstein Commit To Enhanced Savings Tax Deal

The EU and Liechtenstein have reached an agreement that will see them automatically exchange information on their residents' financial accounts from 2017.

The agreement was signed on October 28. It upgrades a 2004 agreement under which Liechtenstein is required to apply measures equivalent to those in the EU's directive on the taxation of savings income in the form of interest payments. It will enter into force on January 1, 2016, and the first information exchanges will take place in 2017.

Under the new agreement, the parties will receive the names, addresses, tax identification numbers, and dates of birth of their residents with accounts in the other state, along with other financial and account balance information.

The European Council said that tax administrations in the EU and Liechtenstein will be able to identify taxpayers more effectively, administer and enforce their tax laws in cross-border situations, and avoid unnecessary further investigations.

The agreement contains provisions intended to limit the opportunities for taxpayers to avoid being reported to the tax authorities by shifting assets or investing in products that are outside the scope of the agreement.

EU member states have also committed "to analyze the situation of Liechtenstein in the light of the measures provided for in this agreement and to take account of this agreement in their bilateral relations with Liechtenstein."

Pierre Gramegna, the President of the European Council, signed the agreement on behalf of the EU. He said: "I am glad that this agreement could be reached between the [EU] and Liechtenstein, as it constitutes an important step towards a level playing field and greater tax transparency in Europe and beyond."

Tax Commissioner Pierre Moscovici added: "Today the EU and Liechtenstein are sending out a clear message: we are partners in the international campaign for greater tax transparency. We are pulling in the same direction to create more openness and cooperation between tax authorities and to thwart those who seek to evade paying their fair share of tax."

Liechtenstein Prime Minister Adrian Hasler said: "The agreement signed today marks an important milestone in the implementation of the Government's financial center and tax strategy. Liechtenstein herewith fulfills its political commitment as a so-called early-adopter to start exchanging tax information automatically with appropriate states as from 2017."

DTAs Key For Hong Kong's Fund Sector: Report

Hong Kong needs more double tax agreements to grow its exchanged-traded funds (ETFs) market, according to a new report from the Financial Services Development Council (FSDC).

Although there are currently over 100 ETFs listed in Hong Kong, the territory has been overtaken in Asia by Tokyo and Shanghai.

The report recommends that the Government promote the use of ETFs in the Mandatory Provident Fund platform, nurture local expertise and talent, and broaden Hong Kong's ETF product range by way of ETF cross-listing.

The report also points out that "tax efficiency and the tax treatment of distribution affect the yield of investment products." While Hong Kong currently has concluded double taxation agreements (DTAs) with around 30 jurisdictions, its tax treaty network is relatively small compared with other major financial centers. The FSDC has therefore recommended that Hong Kong expedite the conclusion of DTAs with other jurisdictions.

It encouraged the Government "to develop a strategy or set clearer priorities as to the specific jurisdictions [with which] it would like to get DTAs signed in order to benefit listed ETFs in Hong Kong." DTAs should be concluded with countries hosting significant stock exchanges, it suggested.

Obama Signs Two-Year Budget Bill

On November 2, President Barack Obama signed the Bipartisan Budget Bill of 2015, which includes increased appropriated spending for the 2016 and 2017 fiscal years, a suspension of the US debt limit until March 2017, and revenue provisions related to tax compliance.

The tax compliance provisions confirm a change to the rules for auditing large partnerships, including private equity and hedge funds, by the Internal Revenue Service (IRS). These measures are intended to raise additional revenue of USD11bn to fund part of the total budgetary cost of USD86bn over the next ten years.

The IRS has previously experienced serious difficulties in auditing large partnerships – those with 100 or more partners and assets exceeding USD100m – largely because of their structural complexity. In 2011, nearly two-thirds had more than 1,000 direct or indirect partners and six or more tiers.

Currently, all partnerships are taxed on a pass-through basis, with income reported on partners' income tax returns. Under the new legislation, partnership audit rules would be streamlined into a single set of rules for auditing partnerships and their partners at the partnership level.

Under this streamlined audit approach, the IRS would examine the partnership's items of income, gain, loss, deduction, credit, and partners' distributive shares for a particular year of the partnership.

On October 30, after hearing that the bipartisan bill had passed through Congress, President Obama had applauded the budget deal that "locks in two years of funding," adding that "it is paid for in a responsible, balanced way – in part with a measure to ensure that partnerships like hedge funds pay what they owe in taxes just like everybody else."

US Court Allows Case Against Tax Preparer Program

The US Court of Appeals for the District of Columbia Circuit decided on October 30 that the American Institute of Certified Public Accountants (AICPA) may pursue its legal challenge to the Internal Revenue Service's (IRS's) voluntary tax return preparer regulatory program.

In the wake of a ruling against the IRS's attempts to regulate tax preparers, which had been said to be an overreach of the agency's statutory power by the US courts in February last year, the IRS announced in July 2014 that it would introduce a voluntary Annual Filing Season Program (AFSP) for the 2015 filing season.

Certification is offered to unenrolled preparers who complete a required amount of continuing education, including a course in basic tax filing issues and updates, and ethics, among other federal tax law courses. They receive a Record of Completion and

are included in an IRS website database, which is available "to help taxpayers determine return preparer qualifications."

The IRS database also contains information about practitioners who already have recognized credentials and higher levels of qualification and practice rights. These include attorneys, certified public accountants (CPAs), enrolled agents, enrolled retirement plan agents (ERPAs), and enrolled actuaries who are registered with the IRS.

Currently, anyone who prepares a federal tax return for compensation is required to obtain a preparer tax identification number (PTIN). The IRS has explained that those tax return preparers with a valid PTIN who do not obtain a Record of Completion as part of the AFSP, or are not an attorney, CPA, enrolled agent, ERPA or enrolled actuary, may still prepare tax returns, but they may not be included in the public directory.

On launching its legal challenge last year, the AICPA stated its belief that, while purporting to implement a "voluntary" program, the AFSP is "mandatory in effect," and is a mere "end-run" around the previous federal court ruling. In reply, the IRS confirmed that it is certain it has the authority to implement a voluntary continuing education program for tax return preparers, and that the new program does not violate previous court decisions.

In October last year, the District Court ruled that AICPA's members would suffer no actual or imminent harm from the AFSP and that, therefore, it had no standing to sue. Following an AICPA appeal, the Court of Appeals has now decided that the lower court was wrong, and that the AICPA has "adequately alleged the program will subject its members to an actual or imminent increase in competition."

The Appeals Court found that "participating unenrolled preparers will gain a credential and a listing in the government directory. … We see nothing at all speculative or attenuated about the [AICPA's] contention that 'unenrolled preparers with government-backed credentials will be better able to compete against other credentialed preparers, and especially against uncredentialed employees of [AICPA] members.'"

The Appeals Court also disagreed with the IRS contention that, because AFSP participants cannot use the words "certified," "enrolled," or "licensed," there is not a competition problem.

"Participating preparers remain free to tell potential clients that they have a Record of Completion demonstrating that they satisfied the Program's educational requirements and passed the test," the Appeals Court continued. "Moreover, participating preparers' names will appear in the Directory of Federal Tax Return Preparers alongside the names of CPAs and other credentialed preparers."

The Court also noted a statement by IRS Commissioner John Koskinen that the AFSP allows

participants "to stand out from the competition by giving them a recognizable Record of Completion that they can show to their clients."

Record Number Of US Expats Giving Up Passports, Green Cards

A record 1,426 US taxpayers gave up their passports or their green cards in the third quarter of 2015, according to Treasury Department statistics published in the Federal Register.

The previous record was in the first quarter of this year, which saw a total of 1,335. The second quarter saw just 460 citizens relinquish their passports or green cards.

The acceleration in the number of individuals giving up their citizenship has coincided with increased actions by the US Treasury and Internal Revenue Service to trace American undeclared assets and income held abroad, particularly by enforcing the Foreign Account Tax Compliance Act (FATCA) and the requirement to file a Report of Foreign Bank and Financial Accounts.

According to representative bodies, Americans living abroad are becoming increasingly aware of their US tax reporting obligations. In particular, US citizens are finding it increasingly more difficult to bank in foreign territories as a result of FATCA.

So far this year, the US Treasury Department has said 3,221 taxpayers have relinquished their citizenship – just below the 3,415 that did so in the full year 2014.

The Treasury is required by statute to publish a quarterly list including the name of each individual who has lost or renounced US citizenship during the period. For the purposes of this listing, long-term residents or green card holders are treated as if they were citizens of the US who lost citizenship.

EU Issues Guidance On Immovable Property VAT Rules From 2017

The Directorate General for Taxation and Customs Union of the European Commission (DG TAXUD) has released in-depth guidance on rules that will enter into force in 2017 regarding the place of supply of services connected with immovable property.

Although not legally binding, the newly released explanatory notes have been prepared by the DG TAXUD after extensive consultation with EU member states and business representatives, to provide taxpayers with a better understanding of European legislation.

At EU level, services connected with immovable property are taxed under the destination principle. This will continue after 2017; at international level, it has been commonly agreed that using the location of an immovable property as a proxy for determining the place of taxation may lead to a fair allocation of taxable rights among tax jurisdictions. However, the Commission is aiming to install more consistent rules across EU member states.

In general, under Article 47 of the VAT Directive, when services qualify as services connected with immovable property, the place of their supply is the place where the immovable property is located. To be considered as connected with immovable property, a service needs to have a sufficiently direct connection with immovable property.

On October 7, 2013, the Commission issued Council Implementing Regulation (EU) No. 1042/2013. This Implementing Regulation, effective from 2017, will amend Implementing Regulation (EU) No. 282/2011 as regards the place of supply of services, adding Articles 13b, 31a, and 31b, which will define what has to be regarded as immovable property and which services have a sufficiently direct connection with immovable property to be covered by that special rule, and which have not.

The release of the explanatory notes – later than previously expected – is intended to allow businesses and tax authorities more than a year to prepare for the changes.

IMF Urges Further Japanese Sales Tax Rises

The International Monetary Fund (IMF) has recommended that more consumption tax rate hikes will be necessary, over and above that already planned, to support "a concrete and credible medium-term fiscal consolidation framework" in Japan.

In a recent report, which called for the further rebalancing of G20 economies to obtain more economic growth, IMF staff noted that "fiscal imbalances continue to threaten long-term economic stability in Japan."

"Despite some narrowing in the fiscal deficit since 2013 on the back of recovering economic growth, it remains high," the IMF continued. "In order to reduce fiscal imbalances, a credible medium-term fiscal consolidation framework must be put in place with specific revenue measures."

Japan plans to raise the consumption tax rate from 8 percent to 10 percent in April 2017, following a hike from 5 percent in April 2014. However, with "additional consolidation measures" being needed (totaling around 4.5 percent of Japan's gross domestic product over the next decade, according to staff estimates), the IMF concluded that future policies should include additional consumption rate hikes "to be implemented gradually." Previously, it had been suggested that Japan would need to install a rate of at least 15 percent, despite anxiety surrounding the next increase to 10 percent.

New Zealand, EU To Launch Free Trade Talks

The EU and New Zealand have said they will launch negotiations toward a free trade agreement (FTA).

The commitment was made in a joint statement issued following a meeting between European Commission President Jean-Claude Juncker, President of the European Council Donald Tusk, and New Zealand Prime Minister John Key. They said: "Today we committed to start the process for negotiations to achieve swiftly a deep and comprehensive high-quality free trade agreement. Discussions to define the scope and overall approach to the negotiations should start as soon as possible."

For New Zealand, Key said: "I am pleased that we are able to announce a critical first step towards an FTA that should provide greater access to European markets, and make it easier for Kiwi and EU companies to do business with one another."

New Zealand's commitment to progress FTA talks with the EU follows the successful conclusion of the South Korea FTA and Trans-Pacific Partnership negotiations. "These agreements are part of the Government's wider plan to diversify the economy by building strong trade, investment and economic ties around the world," Key said.

"The EU is a key trading partner for New Zealand with two-way trade totaling over NZD19bn (USD12.8bn). It is also our second-largest investment source, as well as our largest research and development partner," the Prime Minister said. "We look forward to working with the EU and its member states on next steps and to starting formal negotiations as soon as possible."

China, South Korea Pledge To Speed Up FTA Ratification

At their meeting on October 31, South Korean President Park Geun-hye and China's Premier Li Keqiang agreed to pursue the parliamentary ratification of the free trade agreement (FTA) between their two countries.

Negotiations on the FTA only began in May 2012, but were completed by November last year. The agreement was signed on June 1, 2015, and it is now hoped that it will be operational by the end of this year.

Within the FTA, China and South Korea have agreed to eliminate import tariffs on over 90 percent of all products traded between them and over 85 percent of their annual trade by value. Import duties on non-sensitive products will be cancelled either immediately or within ten years, and those on sensitive products will be abolished within 10–20 years of the FTA becoming effective.

The two sides were able to reach the agreement by excluding certain ultra-sensitive items from the arrangement. For example, South Korea has only

agreed to a part-opening of its agricultural sector, while continuing to exclude such products as rice, pork and beef, while trade barriers for both countries' automotive industries have been maintained.

China is already South Korea's primary trading partner, receiving over a quarter of its exports, and South Korea is China's third-largest trading partner. In remarks made during his visit, Li said that the total value of trade between the two countries is expected to reach USD300bn this year.

Brazil Exempts Electric Cars, Fuel Cells From Import Duty

Brazil's Chamber of Foreign Trade (CAMEX) announced on October 27, 2015, that import duty on electric cars and fuel cells has been reduced from 35 percent to zero.

The measure is intended to encourage the use of energy efficient and environmentally friendly automotive technologies.

CAMEX also said that the 35 percent import duty will be reduced for hybrid cars with a cylinder capacity between 1,000 cc and 3,000 cc and a transport capacity of up to six people, including the driver. The new rates for these vehicles will be in the range of zero to 7 percent, depending on factors such as energy efficiency.

In a separate statement on October 27, CAMEX said that the 4 percent import duty on p-Xylene will be eliminated for 180 days from November 26, with a quota of 90,000 tons. p-Xylene is used to create polyethylene terephthalate, which is widely used in beverage packaging.

Malaysia Hikes Personal Income Tax In 2016 Budget

Malaysia's Prime Minister and Minister of Finance, Datuk Seri Najib Razak, has announced in the 2016 Budget new rates of tax on those receiving high incomes and new tax measures designed to boost private investment.

Under existing tax rules, resident taxpayers in Malaysia are taxed on a sliding scale from 0 percent on the first MYR5,000 (USD1,170) of taxable income, up to 25 percent for income exceeding MYR400,000. Budget 2016 introduces two new rates as follows: 26 percent for income between MYR600,001 to MYR1m; and 28 percent for income exceeding MYR1m.

In a measure designed to boost innovation and entrepreneurship, small and medium-sized enterprises that incur expenditure on research and development projects up to MYR50,000 will be eligible for an automatic double tax deduction for year of assessment 2016 to 2018.

In order to stimulate Malaysia's capital market, the Budget also introduces a tax deduction for the issuance of "Sustainable and Responsible Investments" sukuk (a form of Islamic finance bond) and exempts, from the 20 percent stamp duty, Shariah-compliant loan instruments used to finance the purchase of houses.

In addition, to promote Malaysia's tourism industry, the 100 percent income tax deduction for tour operators will be extended from year of assessment 2016 to 2018. Tax incentives will also be extended for the food production sector until 2020, and the scope of the incentive widened to include rearing deer, honey production, and cultivating mushrooms, coconuts, seaweed, and animal feed crops.

Budget 2016 additionally seeks to improve the goods and services tax (GST) regime by zero-rating all types of controlled medicines and certain food items.

Introduced on April 1, 2015, the GST replaced the sales and services tax and is intended to support exporters' competitiveness while improving the efficiency of the tax system. According to Najib, almost 400,000 companies have registered for GST, with more than 90 percent of these firms having submitted GST returns.

Sri Lankan Lawmakers Approve Numerous One-Off Levies

On October 20, 2015, Sri Lanka's Government passed several amendments to implement tax proposals announced in the 2015 Interim Budget.

Under the changes, a new 25 percent "super gains tax" (SGT) will be imposed on companies and individuals whose book profits for the assessment year 2013/14 exceeds LKR2bn (USD14m), or where the book profits of all subsidiaries and holding companies

of every company in a group of companies exceeds LKR2bn in the assessment year 2013/14. The SGT is a one-off tax and must be paid in three equal installments on or before October 31, 2015, November 30, 2015, and December 31, 2015.

The amendment sets out definitions of group of companies, holding company, and subsidiary for SGT purposes, which are not the same as those contained in the Inland Revenue Act. It also clarifies that SGT paid can be recognized as expenditure (after making the payment) in the company's financial statement for the 2013/14 assessment year; however, it cannot be allowed as expenditure for the purpose of taxation in a given assessment year, or as tax credit against any tax liability except SGT.

A further amendment imposes a one-off LKR1bn Casino Industry Levy payable on or before November 15, 2015, by persons (including companies) engaged in a casino business as at January 29, 2015.

Subject to stipulated exceptions, a Motor Vehicle Importers Licence fee of LKR1.5m will be levied with effect from January 1, 2016, on import of motor vehicles for commercial use. Also, licensed mobile telecom operators will be required to pay, on or before November 15, 2015, a fee of LKR250m towards a Mobile Telephone Operator Levy.

The amendments impose several other fixed, one-off levies, including a Bars and Tavern Levy of LKR250,000, payable on November 15, 2015; a Satellite Location Levy, for satellite operators; a Dedicated Sports Channel Levy; a Mansion Tax on new constructions from April 1, 2015, of LKR1m; and a Migrating Tax of 20 percent of the foreign exchange funds taken out of the country, from November 1, 2015.

Finance Minister Ravi Karunanayake is due to announce the country's 2016 Budget on November 20, 2015. Speaking at a pre-budget meeting with business representatives in Colombo on October 23, he promised a revolutionary Budget, which will provide increased opportunities for the private sector to compete in previously blocked industries with public sector organizations.

BARBADOS - SLOVAKIA

Signature

Barbados and Slovakia signed a DTA on October 28, 2015.

CANADA - SPAIN

Into Force

A DTA Protocol between Canada and Spain will enter into force on December 12, 2015.

CHILE - JAPAN

Draft

Chile and Japan have agreed the wording for a new DTA, it was announced on October 19, 2015.

ETHIOPIA - SWITZERLAND

Negotiations

The Ethiopian Government announced on October 27, 2015, that it has agreed with the Swiss authorities to expedite negotiations towards a DTA.

GERMANY - CHINA

Forwarded

Germany's upper house of Parliament approved draft law 396/15 on October 16, 2015, which will ratify the pending DTA signed with China.

GERMANY - JERSEY

Forwarded

Germany's upper house of Parliament approved a DTA with Jersey on October 16, 2015.

GUERNSEY - CAYMAN ISLANDS

Signature

Guernsey and the Cayman Islands completed the signing of a Protocol to their TIEA on October 8, 2015.

HONG KONG - CHINA

Ratified

Hong Kong issued an Order to ratify the DTA signed with Mainland China on October 2, 2015.

HONG KONG - ITALY

Into Force

The DTA between Hong Kong and Italy will become effective in Hong Kong for years of assessment beginning on or after April 1, 2016, Hong Kong's Inland Revenue Department has announced.

HONG KONG - VARIOUS

Ratified

Hong Kong issued six Orders ratifying TIEAs with the Nordic countries –Denmark, the Faroe Islands, Greenland, Iceland, Norway, and Sweden – on October 2, 2015.

IRELAND - VARIOUS

Effective

The Irish tax authority has announced that Ireland's new DTAs with Ukraine and Thailand will enter into force on January 1, 2016.

ITALY - CHILE

Signature

Italy and Chile signed a DTA on October 23, 2015.

JAPAN - CHILE

Negotiations

Japan announced that it completed negotiations with Chile on a DTA on October 19, 2015.

MAURITIUS - SUDAN

Negotiations

According to preliminary media reports, Mauritius has recently indicated that it is negotiating a DTA with North Sudan.

NETHERLANDS - GERMANY

Ratified

The Netherlands and Germany completed their domestic ratification procedures on October 20, 2015, in respect of a new DTA that will enter into force on December 1, 2015.

QATAR - LATVIA

Ratified

Qatar ratified the pending DTA with Latvia on October 27, 2015.

SOUTH AFRICA - CYPRUS

Ratified

South Africa published a notice in its Official Gazette on October 16, 2015, to ratify the DTA Protocol signed with Cyprus. The Protocol entered into force on September 18, 2015.

SWEDEN - SAUDI ARABIA

Signature

Sweden and Saudi Arabia signed a DTA on October 19, 2015.

SWITZERLAND - OMAN

Forwarded

The Swiss Federal Council on October 14, 2015, forwarded a dispatch on the pending DTA with Oman to Parliament for its approval.

SWITZERLAND - VARIOUS

Forwarded

The Swiss Government on October 28, 2015, approved a DTA with Liechtenstein and a DTA Protocol with Norway, and forwarded legislation to Parliament for its approval.

UNITED ARAB EMIRATES - CUBA

Negotiations

The United Arab Emirates and Cuba are engaged in DTA negotiations, it was confirmed on October 25, 2015.

UNITED ARAB EMIRATES - MACEDONIA

Signature

The United Arab Emirates and Macedonia signed a DTA on October 26, 2015.

UNITED ARAB EMIRATES - SENEGAL

Signature

According to preliminary media reports, the United Arab Emirates signed a DTA with Senegal on October 24, 2015.

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

THE AMERICAS

PRINCIPLES OF INTERNATIONAL TAXATION

Bloomberg BNA

Venue: Bloomberg LP, 731 Lexington Avenue, New York, NY 10022, USA

Key Speakers: TBC

11/16/2015 - 11/18/2015

http://www.bna.com/principlesintltax_NYC/

ANNUAL CONFERENCE ON TAXATION

National Tax Association

Venue: Boston Park Plaza Hotel, 50 Park Plaza, Boston, MA 02116, United States

Key Speakers: TBC

11/19/2015 - 11/21/2015

http://ntanet.org/events.html

INTERNATIONAL TAX PLANNING

IBFD

Venue: Av. das Nacoes Unidas, 12901, Sao Paulo, SP 04578-000, Brazil

Key Speakers: Shee Boon Law (IBFD), Boyke Baldewsing (IBFD)

11/25/2015 - 11/27/2015

http://www.ibfd.org/Training/International-Tax-Planning-0

INTRODUCTION TO US INTERNATIONAL TAX – ARLINGTON, VA

Bloomberg BNA

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

Chairs: TBC

11/30/2015 - 12/1/2015

http://www.bna.com/intro_va/

US INTERNATIONAL TAX COMPLIANCE WORKSHOP

Bloomberg BNA

Venue: Bloomberg LP, 731 Lexington Ave, New York, NY 10022, USA

Key speakers: TBC

11/30/2015 - 12/1/2015

http://www.bna.com/intlcomp_nyc/

THE NEW ERA OF TAXATION

International Bar Association

Venue: TBC, Mexico City, Mexico

Key speakers: TBC

12/3/2015 - 12/4/2015

http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bf91caa6-9df6-454b-a682-8b57c7bf9209

ACCOUNTING FOR INTERNATIONAL OPERATIONS

ACS

Venue: Hyatt Santa Clara, 5101 Great American Parkway, Santa Clara, CA 95054, USA

Key Speakers: Cody Smith (Radius), John Benedetti (PricewaterhouseCoopers), Usha Francis (Deloitte & Touche), Ron Kiima (Kiima Inc.), Mark Webster (Treasury Alliance Group LLC), Steve DiPietro (Deloitte & Touche), among numerous others

12/8/2015 - 12/9/2015

http://www.acslive.com/events/international_santaclara_2015.html

2015 CORPORATE TAX DEVELOPMENTS – THE YEAR IN REVIEW – CHICAGO

BNA

Venue: Baker & McKenzie LLP, 300 East Randolph Drive, Chicago, IL 60601, USA

Key speakers: TBC

12/14/2015 - 12/15/2015

http://www.bna.com/2015yearinreview/

2015 CORPORATE TAX DEVELOPMENTS – THE YEAR IN REVIEW – SAN FRANCISCO

BNA

Venue: Morgan Lewis LLP, 1 Market Street, Spear St Tower, San Francisco, CA 94111, USA

Key speakers: TBC

12/16/2015 - 12/17/2015

http://www.bna.com/yearend_sf/

INTERNATIONAL TAX ISSUES 2016

PLI

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

Chair: Michael A. DiFronzo (PwC)

2/9/2016 - 2/9/2016

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2016/_/N-4kZ1z11j97?ID=259129

THE 5TH OFFSHORE INVESTMENT CONFERENCE PANAMA 2016

Offshore Investment

Venue: Hilton Panamá, Avenida Balboa and Aquilino de la Gua, 00000, Panama

Chair: Derek Sambrook (Trust Services)

3/9/2016 - 3/10/2016

http://www.offshoreinvestment.com/pages/index.asp?title=The_5th_Offshore_Investment_Conference_Panama_2016&catID=12383

8TH REGIONAL MEETING OF IFA LATIN AMERICA

IBFD

Venue: JW Marriott Hotel Lima, Malecón de la Reserva 615, Lima, Peru

Key speakers:TBC

5/4/2016 - 5/6/2016

http://www.ibfd.org/IBFD-Tax-Portal/Events/8th-Regional-Meeting-IFA-Latin-America

ASIA PACIFIC

JUBILEE CONFERENCE

Foundation for International Taxation

Venue: ITC Maratha Hotel, Sahar Tower, Andheri East, Mumbai, Maharashtra 400099, India

Chairs: Sohrab Dastur, Girish Vanvari (KPMG), Dinesh Kanabar (Dhruv Advisors), Nishith Desai (Nishith Desai Associates), Vipul Jhaveri (Deloitte), Kiran Umrootkar (Jacobs Engg.), V. Lakshmikumaran (Lakshmikumaran & Sridharan), Mukesh Butani (BMR Legal), Pranav Sayta (E & Y), Rohan Shah (ELP), Ajay Vohra (Vaish Associates), Gautam Mehra (PwC), Richard Vann (Challis Professor)

12/3/2015 - 12/5/2015

http://www.fitindia.org/downloads/FIT_flier.pdf

THE 4TH OFFSHORE INVESTMENT CONFERENCE SINGAPORE 2016

Offshore Investment

Venue: Raffles Hotel, 1 Beach Rd, 189673, Singapore

Chair: Nicholas Jacob (Wragge Lawrence Graham & Co)

1/20/2016 - 1/21/2016

http://www.offshoreinvestment.com/pages/index.asp?title=The_4th_Offshore_Investment_Conference_Singapore_2016&catID=12382

INTERNATIONAL TAX PLANNING – POST BEPS

IBFD

Venue: Conrad Centennial Singapore, Two Temasek Boulevard, 038982 Singapore

Key speakers: TBC

2/24/2016 - 2/26/2016

http://www.ibfd.org/Training/International-Tax-Planning-Post-BEPS

CENTRAL AND EASTERN EUROPE

THE OFFSHORE INVESTMENT CONFERENCE CYPRUS 2015

Offshore Investment

Venue: Amathus Beach Hotel, Amathountos St, Mesa Geitonia 4005, Cyprus

Chair: Christos Mavrellis (Chrysses Demetriades)

11/18/2015 - 11/19/2015

http://www.offshoreinvestment.com/pages/index.asp?title=The_Offshore_Investment_Conference_Cyprus_2015&catID=12288

MIDDLE EAST AND AFRICA

MENA TAX FORUM

International Tax and Investment Center

Venue: TBC, Doha, Qatar

Key Speakers: Doctor Ibrahim Abdul Aziz Al Assaf, Sir Mark Moody-Stuart (ITIC), Mr. Robin Walduck (KPMG UK)

11/10/2015 - 11/12/2015

http://www.qfc.qa/news-and-events/Pages/MENA-Tax-Forum.aspx

TRANSFER PRICING SUMMIT AFRICA

IIR & IBC

Venue: TBC, Cape Town, South Africa

Key Speakers: Mayra Lucas (OECD), Ian Cremer (WCO), Ilka Ritter (United Nations), Samuel Ogungbesan (Federal Inland Revenue Service of Nigeria), Lucia Hlongwane (Barclays), among numerous others

11/24/2015 - 11/25/2015

http://www.iiribcfinance.com/event/TP-Minds-Africa-conference

INTERNATIONAL TAX ASPECTS OF CORPORATE TAX STRUCTURES

IBFD

Venue: Radisson Blu Gautrain Hotel, Sandton Johannesburg, Cnr Rivonia Road and West Street, Postnet Suite 2010, Private Bag X9, Benmore 2010, Johannesburg, South Africa

Key speakers: Shee Boon Law (IBFD), Boyke Baldewsing (IBFD)

4/13/2016 - 4/15/2016

http://www.ibfd.org/Training/International-Tax-Aspects-Corporate-Tax-Structures

TREATY ASPECTS OF INTERNATIONAL TAX PLANNING

IBFD

Venue: Hilton Dubai Jumeirah Hotel, Jumeirah Beach Road, Dubai Marina, Dubai

Key speakers: Bart Kosters (IBFD), Ridha Hamzaoui (IBFD)

5/22/2016 - 5/24/2016

http://www.ibfd.org/Training/Treaty-Aspects-International-Tax-Planning-1

WESTERN EUROPE

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE – SOUTHAMPTON

CCH

Venue: Grand Harbour Hotel, W Quay Rd, Southampton SO15 1AG, UK

Key Speakers: Chris Burns, Louise Dunford, Paul Gee, Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others.

11/10/2015 - 11/11/2015

https://www.cch.co.uk/AIC

PRIVATE WEALTH EASTERN EUROPE

IIR & IBC

Venue: Radisson Blu Portman Hotel London, 22 Portman Square, London W1H 7BG, UK

Key Speakers: Andrew Terry (Withers), Kamal Rahman (Mishcon de Reya), Egor Noskov (Duvernoix Legal), Piers Master (Charles Russell Speechlys), Damian Bloom (Berwin Leighton Paisner), Claire Gordon (Farrer & Co), among numerous others

11/12/2015 - 11/12/2015

http://www.iiribcfinance.com/event/Private-Wealth-Eastern-Europe-Conference

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE – GATWICK

CCH

Venue: Sofitel London Gatwick, Gatwick Airport North Terminal, Crawley, West Sussex, RH6 0PH, UK

Key Speakers: Chris Burns, Louise Dunford, Paul Gee, Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others

11/17/2015 - 11/18/2015

https://www.cch.co.uk/AIC

2ND ANNUAL CORPORATE TAX SUMMIT

Uniglobal

Venue: TBC, Vienna, Austria

Key speakers: Georg Gam-Jensen (Lego), Peter Hordijk (Unilever), Clive M. Baxter (Maersk), Sabine Bernegger (KPMG), Rod Sayers (Petrofac Services Limited), among numerous others.

11/19/2015 - 11/20/2015

http://www.ibfd.org/sites/ibfd.org/files/content/pdf/Corporate_Tax_Summit_2015.pdf

19TH CROSS ATLANTIC AND EUROPEAN TAX SYMPOSIUM

CIOT

Venue: Auditorium Deloitte, 2 New Street Square, London, EC4A 3BZ, UK

Chairs: Liesl Fichardt (Clifford Chance), Anne Fairpo (CIOT European Branch)

11/20/2015 - 11/20/2015

https://www.regonline.co.uk/builder/site/Default.aspx?EventID=1711857

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE – BIRMINGHAM

CCH

Venue: Marriott Forest of Arden, Maxstoke Lane, Meriden, Birmingham, CV7 7HR, UK

Key Speakers: Chris Burns, Louise Dunford, Paul Gee, Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others

11/24/2015 - 11/25/2015

https://www.cch.co.uk/AIC

EU FINANCIAL ACCOUNTING IN INTERNATIONAL COOPERATION AND DEVELOPMENT PROJECTS

European Academy

Venue: Arcotel John F, Wederscher Markt 11, 10117, Berlin, Germany

Key Speakers: TBC

11/26/2015 - 11/27/2015

http://www.euroacad.eu/events/event/eu-financial-accounting-in-international-cooperation-and-development-projects.html

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE – GLASGOW

CCH

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

Key Speakers: Chris Burns, Louise Dunford, Paul Gee, Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others

12/1/2015 - 12/2/2015

https://www.cch.co.uk/AIC

UPDATE FOR THE ACCOUNTANT IN INDUSTRY AND COMMERCE – LONDON

CCH

Venue: Jumeirah Carlton Tower Hotel, On Cadogan Place, London, SW1X 9PY, UK

Key Speakers: Chris Burns, Louise Dunford, Paul Gee, Toni Trevett, Dr. Stephen Hill, Kevin Bounds, among others

12/8/2015 - 12/9/2015

https://www.cch.co.uk/AIC

INTERNATIONAL TAXATION OF OIL AND GAS AND OTHER MINING ACTIVITIES

IBFD

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

Key speakers:TBC

12/9/2015 - 12/11/2015

http://www.ibfd.org/Training/International-Taxation-Oil-and-Gas-and-Other-Mining-Activities-0#tab_program

5TH ANNUAL IBA TAX CONFERENCE

IBA

Venue: TBC, London, UK

Key speakers: TBC

2/8/2016 - 2/9/2016

http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e4f0bf6f-997e-470b-971f-c884539fb93b

21ST ANNUAL INTERNATIONAL WEALTH TRANSFER PRACTICES CONFERENCE

IBA

Venue: Claridge's Hotel, Brook St, London W1K 4HR, UK

Key speakers: TBC

2/29/2016 - 3/1/2016

http://www.ibanet.org/Article/Detail.aspx?ArticleUid=db061854-33d1-4297-b9bc-6058df392231

PRINCIPLES OF INTERNATIONAL TAXATION

IBFD

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

Key speakers: Bart Kosters (IBFD), Carlos Gutiérrez (IBFD), Boyke Baldewsing (IBFD)

2/29/2016 - 3/4/2016

http://www.ibfd.org/Training/Principles-International-Taxation-1

ITPA LUXEMBOURG MARCH 2016

International Tax Planning Association

Venue: Le Royal, 12 Boulevard Royal, 2449 Luxembourg

Chair: Milton Grundy

3/13/2016 - 3/15/2016

https://www.itpa.org/?page_id=10132

INTERNATIONAL TRANSFER PRICING SUMMIT 2016

TP Minds

Venue: Millennium Gloucester Hotel, London Kensington, 4-18 Harringdon Gardens, Kensington, London, SW7 4LH, UK

Key Speakers: TBC

3/15/2016 - 3/16/2016

http://www.iiribcfinance.com/event/International-Transfer-Pricing-Summit/dates-venue

CURRENT ISSUES IN INTERNATIONAL TAX PLANNING

IBFD

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

Key speakers: TBC

5/25/2016 - 5/27/2016

http://www.ibfd.org/Training/Current-Issues-International-Tax-Planning-0

THE AMERICAS

United States

The US Tax Court has ruled against a taxpayer who had structured the sale of a C corporation through a "Midco" transaction in an effort to unlock gains tax efficiently.

"Midco" transactions, a type of tax shelter, were widely promoted during the late 1990s and early 2000s. These transactions were chiefly promoted to shareholders of closely held C corporations that had large built-in gains.

The Court of Appeals for the Second Circuit has described one variation of a Midco transaction as follows:

> "'Midco transactions' or 'intermediary transactions' are structured to allow the parties to have it both ways: letting the seller engage in a stock sale and the buyer engage in an asset purchase. In such a transaction, the selling shareholders sell their C Corp stock to an intermediary entity (or 'Midco') at a purchase price that does not discount for the built-in gain tax liability, as a stock sale to the ultimate purchaser would. The Midco then sells the assets of the C Corp to the buyer, who gets a purchase price basis in the assets. The Midco keeps the difference between the asset sale price and the stock purchase price as its fee.

A listing of key international tax cases in the last 30 days

> "The Midco's willingness to allow both buyer and seller to avoid the tax consequences inherent in holding appreciated assets in a C Corp is based on a claimed tax-exempt status or supposed tax attributes, such as losses, that allow it to absorb the built-in gain tax liability. If these tax attributes of the Midco prove to be artificial, then the tax liability created by the built-in gain on the sold assets still needs to be paid. In many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek

payment from the other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid."

In this case, the taxpayer, Mr. Tricarichi, who was the sole shareholder of West Side (a C Corp), engaged in a Midco transaction with an affiliate (the intermediary company) of Fortrend International LLC (the promoter).

Summarizing the facts of the case, the Tax Court explained that: "The Petitioner engaged in a Midco transaction with a Fortrend shell company; the shell company merged into West Side and engaged in a sham transaction to eliminate West Side's corporate tax; the IRS disallowed those fictional losses and assessed the corporate-level tax against West Side; but West Side, as was planned all along, is judgment proof. The IRS accordingly seeks to collect West Side's tax from petitioner as the transferee of West Side's cash" – that is, from the taxpayer, Mr. Tricarichi.

In its argument, the IRS sought to rely on section 6901 of the Tax Code, which permits the Commissioner to assess tax liability against the transferee of assets of a taxpayer who owes income tax. However, to impose that liability on a transferee, a court must first determine whether the party is substantively liable for the transferor's unpaid taxes under state law, and whether that party is a "transferee" within the meaning of section 6901.

The Court found that the transaction had no economic substance, had no *bona fide* business purpose, and was entered into solely to evade West Side's federal and Ohio tax liabilities. It therefore disregarded the form of the transaction and concluded that since Tricarichi was a direct recipient of West Side's cash, in substance, he is liable under Ohio law for the full amount of West Side's tax deficiency (with penalties and interest), and that the IRS may collect this aggregate liability from him as a "transferee" under section 6901.

In addition, the Court ruled that the transaction satisfied all of the three elements set out under section 1336.05(A) of the Ohio Uniform Fraudulent Transfer Act. Under that section, a transfer is fraudulent with respect to a creditor where: the creditor's claim arose before the transfer; the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and the transferor became insolvent as a result of the transfer.

This judgment was delivered on October 14, 2015.

http://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10577

US Tax Court: *Tricarichi v. Commissioner of Internal Revenue (T.C. Memo. 2015-201)*

ASIA PACIFIC

India

The High Court of Bombay in India has ruled in favor of UK telecom giant Vodafone in a transfer pricing dispute with the Indian tax authority worth INR85bn (USD1.3bn).

Vodafone had brought an appeal against a ruling from India's Income Tax Appellate Tribunal (ITAT) in favor of the tax authority on December 10, 2014.

The ruling pertains to the sale of Vodafone India Services, a call centre business in Ahmedabad, India. The tax authority had claimed that the sale transaction had been structured to avoid Indian transfer pricing laws inappropriately.

Accepting Vodafone's argument, the Bombay High Court set aside the ITAT's ruling and said the transaction should not have been subject to India's transfer pricing law, agreeing with Vodafone's argument that the transaction was not an international transaction and gave rise to no taxable income.

It is anticipated that the ruling will support the arguments of other multinational corporations also appealing transfer pricing adjustments in similar circumstances. The Government may however choose to appeal the ruling before the Supreme Court.

In October last year, Vodafone won a separate transfer pricing dispute worth INR32bn (USD494m), concerning the issuance of equity shares in FY2009/10 by Vodafone India's resident subsidiary to its UK parent as part of a rights issue.

In that case, the Bombay High Court ruled the transaction did not give rise to income taxable under the 1961 Income-tax Act and therefore could not be subject to transfer pricing rules. Interestingly, the Government in January 2015 announced that it would not appeal that ruling and later instructed tax officials to follow the ruling in other similar transfer pricing disputes, in a move welcomed by foreign investors.

This judgment was released on October 8, 2015.

Bombay High Court: *Vodafone India Services Pvt Ltd v. Indian Government*

WESTERN EUROPE

Bulgaria

The European Court of Justice (ECJ) has ruled that the excise duty exemptions provided for in Council Directive 92/83/EEC, on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, should be available for ethyl alcohol used to sterilize facilities for the manufacture of medicines.

The appellant, Biovet, manufactures medicinal products and markets veterinary medicinal products, agricultural products, and medicinal products for human use. In its manufacturing of medicinal products, Biovet uses ethyl alcohol, in the form of a 70 percent water-based solution of ethanol, to clean and disinfect technical equipment, production facilities, and working areas and surfaces.

In September 2012, Biovet applied for a refund of excise duty paid on 271 liters of ethyl alcohol, which had been used for those purposes in Bulgaria between August 1 and 31, 2012. The Head of the Plovdiv Customs Office refused to refund the excise duty.

Biovet brought an action against that decision before the Administrative Court in Sofia, which held that cleaning and disinfection constitute different activities which form part of the process for the manufacture of a final product which does not contain alcohol, with the result that the excise duty that was paid on the acquisition of the alcohol used for disinfectant purposes was to be refunded pursuant to the relevant articles of domestic law (Article 22(4)(4) and Article 22(7) of the Law on excise duties and tax warehouses (ZADS)).

The Customs Agency Director appealed against this judgment to the Supreme Administrative Court (SAC), which referred questions to the ECJ.

By its first and second questions, the SAC asked, in essence, whether Article 27(1)(d) of Directive 92/83 must be interpreted as meaning that the obligation to exempt laid down in that provision applies to ethyl alcohol used by an undertaking for cleaning or disinfecting equipment and facilities used in the production of medicines.

Article 27(1) of Directive 92/83 provides that:

> "Member states shall exempt the products covered by this Directive from the harmonized excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance, or abuse:
>
> (a) when distributed in the form of alcohol which has been completely denatured in accordance with the requirements of any member state, such requirements having been duly notified and accepted in accordance with paragraphs 3 and 4 of this Article;
>
> (b) when both denatured in accordance with the requirements of any member state and used for the manufacture of any product not for human consumption; and
>
> (d) when used for the production of medicines defined by [Council Directive 65/65/EEC of 26 January 1965]."

The ECJ said that the Administrative Court had been right to rule in favor of the taxpayer. It said that the exemption provided for in Directive 92/83 is not subject to conditions relating to whether they are used directly in the production of medicines or whether they form part of the composition of medicines.

"In accordance with the settled case-law of the [ECJ], the objective of the exemptions contained in Directive 92/83 is, in particular, to neutralize the impact of excise duties on alcohol used as an intermediate product in other commercial or industrial products," the ECJ said, explaining further:

> "It is apparent from the file submitted to the [ECJ] that the disinfection of material, equipment, and facilities used for the production of medicines constitutes a necessary stage in the process of that production and that the use of ethyl alcohol is indispensable to such disinfection operations.

> In that regard, medicines have the peculiarity that, in comparison to other products, their production process is subject to compliance with very strict health rules. As the [SAC] notes, the disinfection operations at issue in the main proceedings seek in particular to eradicate pathogenic microorganisms, which are not permitted to be present in terms of the requirements regarding the germ content of medicinal products.
>
> It follows therefrom that, in so far as that disinfection is inherent in the production process for medicines, the ethyl alcohol used for that purpose must be regarded as being used 'for the production of medicines' within the meaning of Article 27(1)(d) of Directive 92/83.
>
> Consequently, in accordance with that provision, that alcohol must be exempt from the harmonized excise duty on the conditions laid down by the member state concerned for the purpose of ensuring the correct and straightforward application of the exemption laid down in that provision and of preventing any evasion, avoidance, or abuse."

This judgment was released on October 15, 2015.

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd13590a008f264340a1a5a721b1913b1c.e34KaxiLc3qMb40Rch0SaxuRbxn0?text=&docid=169821&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=311672

European Court of Justice: *Bulgarian Customs Agency Director v. Biovet AD (Case C-306/14)*

Poland

Poland's Constitutional Tribunal has ruled against the Polish Government for failing to ensure that the personal income tax-exempt threshold is adjusted upwards automatically, such that low-income earners have borne too much tax.

A challenge was brought against Poland's individual income tax law and specifically provisions that set the tax-exempt threshold, currently at more than half the income required for a taxpayer (or household) to be above the poverty line.

The Tribunal found that the provision was unconstitutional in failing to recognize taxpayers' propensity to pay, and criticized the lack of a mechanism to revise the threshold upwards each year. The threshold was last revised in 2006.

The Tribunal ruled that the tax system must be subject to principles of social solidarity.

The Polish Government will be required to amend the threshold before the provision ceases to have effect, based on the Tribunal's ruling, from November 30, 2016.

This judgment was released on October 28, 2015.

(*Judgment not yet available in English*)

http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/8667/

Poland's Constitutional Tribunal: *Ombudsman v. Polish Government (K 21/14, 28.X.2015)*

Sweden

The European Court of Justice (ECJ) has ruled that taxpayers that exchange traditional currencies for units of "bitcoin" virtual currency should be exempt from value-added tax (VAT), in a long-awaited ruling that will create greater certainty regarding the tax treatment of using and trading in virtual currencies in the EU.

In its ruling on October 22, the ECJ said that "purchases" of bitcoin should fall under provisions in the EU VAT Directive that provide that member states must exempt, among other things, transactions relating to "currency, bank notes, and coins used as legal tender."

David Hedqvist, a Swedish taxpayer, had earlier received a favorable ruling from the Revenue Law Commission, but its decision that bitcoin transactions should be exempt was challenged by the Swedish Tax Agency (*Skatteverket*) before the Swedish Supreme Administrative Court.

The Swedish Government had argued that the transactions that Hedqvist intended to effect were not covered by the exemptions provided for in the VAT Directive. The Swedish court then referred the matter to the ECJ.

In its judgment, the ECJ agreed that transactions to exchange traditional currencies for units of bitcoin (and vice versa) constitute a supply of services for consideration within the meaning of the Directive, since they consist of the exchange of different means of payment and there is a direct link between the service to be provided by Hedqvist and the consideration received by him, namely the margin created by the difference between, on the one hand, the price at which he purchases currencies, and, on the other hand, the price at which he sells them to his clients.

The ECJ also held that those transactions are exempt from VAT under the provision concerning transactions relating to "currency, bank notes and coins used as legal tender." To exclude transactions such as those envisaged by Hedqvist from the scope of that provision would deprive them of part of their effects having regard to the aim of the exemption, which is to alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible which arise in the context of the taxation of financial transactions, the ECJ concluded.

This judgment was released on October 22, 2015.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=170305&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=457327

European Court of Justice: *Skatteverket v. David Hedqvist (Case C-264/14)*

Dateline November 5, 2015

Singapore may not be everybody's cup of tea. Social and cultural attitudes are still quite conservative, it's often insufferably hot and humid, and, like in many Asian cities, lungs of steel are required when the haze descends. But as a place to do business, it's second to none. At least according to the latest Doing Business report by the World Bank, which attempts to measure how easy (or not) it is to establish and operate a business in a given country, and which again ranks Singapore first out of the 189 jurisdictions reviewed.

The relative ease with which companies in Singapore are able to discharge their tax obligations combined with relatively low tax rates are, of course, major factors in Singapore's enduring success in these sorts of polls. But it also goes beyond tax. It's all well and good charging companies low rates of tax, but if it takes forever and a day to actually start your company, obtain any necessary licenses, and get hooked up to water and electricity, or you can't trust the judicial system to enforce contracts and property rights in a fair and even-handed manner, you might as well not bother. Singapore has the best all-round package it seems – as long as the air conditioning works!

Another country worthy of mention in the new Doing Business rankings is Spain, which was singled out for special praise by the World Bank for the dramatic improvement it has made in the "paying taxes" sub-index, having surged 19 places from last year's 79th place to 60th this year. Apparently, what has made the difference is the introduction of a new e-government portal, which has dramatically simplified interactions between the public and government agencies, especially in the area of taxation, with taxpayers now able to submit income tax and VAT returns online, as well as access tax information for past years. I suppose this represents another milestone on the path to Spain's economic redemption, which has necessitated some quite painful economic reforms.

Yet, without wishing to sound too harsh, e-government is hardly a revolutionary concept, and the submission of tax returns online has been fairly standard practice all over the world for a number of years now. What I suppose this shows is how far behind the pack some countries fell in the pre-crisis years as they failed to reform rigid bureaucracies and turned a deaf ear to the pleas of taxpayers and investors.

Indeed, the 2016 Doing Business Index shows that Spain has a lot of ground to make up on somewhere like the UK, languishing as it is back in 33rd place overall, which is only a marginal improvement on last year's 34th. And I again make the point that being competitive isn't always just about taxes. The overall regulatory and legal framework is just as important, and this is where there is much room for improvement. Still, it's progress, and worthy of an encomium.

For a high-tax European economy, the UK usually fares quite well in Doing Business, and even in Paying Taxes (it was ranked 6th this year in Doing Business, and 16th in the most recent version of the Paying Taxes). I'm starting to wonder though how long these positive ratings will last, as the country descends deeper and deeper into the mire that is tax devolution. Those with a fairly peripatetic lifestyle, or who have left home for pastures new, will know all about the pitfalls of tax residence – either trying to establish it or shaking it off. That's fairly par for the course when you're moving between two countries, have interests across several jurisdictions, or live within a federalist system.

However, the UK is trying to create two tax systems – actually, more like one-and-a-half – within one jurisdiction (the United Kingdom is still, in a strict constitutional sense, a united kingdom), and to me it sounds like a car crash waiting to happen. In order to help those taxpayers who might be affected by the changes, HM Revenue & Customs has published a battery of guidance, including some more recently on how to identify a Scottish taxpayer.

I've got my own advice if you happen to identify a Scottish Taxpayer [Caledonius Tributum] in the wild. First and foremost, *do not approach*! Having just received his first Scottish tax return, Caledonius Tributum may very tired, extremely confused, angry, and liable to lash out. Second, slowly back away Caledonius Tributum, preferably without being spotted; Caledonius Tributum has magical properties and may confer on you Scottish tax status without you even noticing. Third, scurry back down south as fast as possible!

I've been following the world of tax for more years than I care to remember, and therefore I've heard all the excuses under the sun that finance ministers give when they need to increase tax. Or so I thought. I'm going to remember October 23, 2015, as the date when Malaysia's Prime Minister and Minister of Finance sprung a new one on me by announcing in the 2016 Budget statement that a hike in income tax would make the country more "competitive." No, that's not a mistake, and you haven't misread that, he actually said it. From the budget speech itself, I quote: "In an effort to strengthen the tax structure to be more competitive and progressive, it is proposed that the taxable income band for the highest tax rate be increased …"

Progressive, certainly. But competitive? I've yet to hear anyone say: "I've decided to move to such-and-such a country, because, guess what, they've just put tax up! Yippee!" And I'm acquainted with some pretty odd people.

I'm not sure which is worse: the raising of taxes, or politicians' attempts to sugar-coat tax hikes. I do understand that sometimes tax increases are unavoidable, but political double-speak certainly is avoidable, and the world would be an infinitely better place without it.

The Jester