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a closer look

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

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

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

GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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

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Topicality, thoroughness and relevance are our watchwords: CCH's network of expert local researchers covers 130 countries and provides input to a US/UK team of editors outputting 100 tax news stories a week. GTW highlights 20 of these stories each week under a series of useful headings, including industry sectors (e.g. manufacturing), subjects (e.g. transfer pricing) and regions (e.g. asia-pacific).

Alongside the news analyses are a wealth of feature articles each week covering key current topics in depth, written by a team of senior international tax and legal experts and supplemented by commentative topical news analyses. Supporting features include a round-up of tax treaty developments, a report on important new judgments, a calendar of upcoming tax conferences, and "The Jester's Column," a lighthearted but merciless commentary on the week's tax events.

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NEWS ROUNDUP

For article guidelines and submissions, contact GTW_Submissions@wolterskluwer.com

New Considerations For Cross-Border Structures Following The Tax Cuts And Jobs Act

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The 2017 Tax Cuts and Jobs Act ("*TCJA*") made several key changes that will need to be reviewed in determining the most tax efficient structure for US companies with cross-border operations. Business owners will need to review current structures and determine whether they are structured properly with the changes made under the TCJA. This article briefly reviews the key changes under the TCJA that affect cross-border structuring.

One key change is the corporate tax rate changing from a progressive tax with a top rate of 35 percent and moving to a flat tax rate of 21 percent. The new corporate tax rate is below the top individual tax rate of 37 percent, below the individual capital gains rate of 23.8 percent (after including the net investment income tax), and below the worldwide average corporate tax rate of 22.96 percent.

The TCJA provides a deduction for individuals who operate through a US pass-through entity. Under prior law, individual owners of a pass-through entity paid tax on the profits at individual income tax rates. Under the TCJA, individual owners of a pass-through entity are permitted a 20 percent deduction on their qualified domestic business income when computing their taxable income. This deduction lowers the top effective tax rate on pass-through income to 29.6 percent. This deduction is only available for domestic income and is not available for pass-through generating foreign-source income. The pass-through deduction expires at the end of 2025 unless there is legislation to extend or make the provision permanent.

The key change in relation to international tax is the implementation of a quasi-territorial tax system that exempts corporate tax on earnings distributed from foreign subsidiaries other than US income inclusions for subpart F and global intangible low-taxed income ("*GILTI*"). The US tax exemption for foreign earnings will be applied through a 100 percent dividends received deduction on distributions from a 10 percent owned corporate subsidiary to a US parent company (via the addition of new IRC Section 245A). This provision does not apply to foreign income earned by a domestic corporation directly or through foreign branches. There is a one-year holding period requirement and no foreign tax credits are allowed for any taxes relating to the exempt dividend.

As a result of the new international tax rules, companies may consider transferring directly-held foreign branch assets to a foreign corporation subsidiary. The TCJA provides a recapture of any loss the domestic corporation recognized from the foreign branch in order to avoid a double benefit. Also, the tax-free transfer of assets to a foreign corporation that is an active trade or business is no longer available to offset the US charge resulting from outbound transfers of branch assets.

For companies with foreign branches, the companies will have to allocate the income to a new and separate basket in determining the foreign tax credit. This eliminates the company's ability to cross-credit foreign tax credits with a high tax jurisdiction against income from a low tax jurisdiction.

The new Section 951A provides that a US shareholder of a controlled foreign corporation ("CFC") must include its share of the CFC's GILTI in its gross income, similar to the inclusion of subpart F income. Generally, GILTI refers to the residual income of a CFC in excess of a fixed 10 percent return on tangible assets. GILTI income is subject to US tax at an effective rate of 10.5 percent after applying a 50 percent deduction for corporate shareholders. The GILTI tax may be offset by up to 80 percent of the foreign tax credits paid on the GILTI inclusion.

Foreign derived intangible income ("*FDII*") is income that US corporations derive from marketing, selling, or providing services using US based intangibles abroad. The FDII provision uses a series of increasingly formulaic calculations to divide a domestic company's income amounts among two key taxable categories:

1. Deemed tangible income return taxed at 21 percent; and
2. FDII taxed at 13.125 percent.

The reduced FDII rate is only available to corporations, individuals and noncorporate entities are subject to full tax on FDII.

Conclusion

As result of the changes made under the TCJA as noted above, determining the most tax efficient structure for cross-border operations is more complicated. As a result of the changes, a US business owner that receives income from foreign subsidiaries from a flow-through structure may find a US corporation would reduce overall taxation. Since operations abroad range in size and have different combinations of US and foreign owners, detailed analysis is needed to determine the optimal structure for purposes of US taxation.

VAT And Vouchers In The European Union

by Stuart Gray, Senior Editor, Global Tax Weekly

While long-established, the European Union value-added tax regime is far from perfect, with disputes frequently arising between taxpayers and tax authorities over the VAT treatment of supplies that may have fallen between the cracks of the EU's fragmented VAT system. A prime example is that of vouchers, the VAT treatment of which should be clarified by an EU directive, which enters into force next year.

The Problem

Vouchers have become an increasingly popular medium of payment for goods and services in the EU, and they come in a variety of forms, such as pre-paid telecom cards, gift cards, and price discount coupons. Indeed, the European Commission has said that the EU vouchers market is "booming" and is worth EUR52bn per year, according to a 2012 estimate. Pre-paid telecom vouchers are the largest segment of this market, representing 70 percent of its overall value.

However, vouchers can be treated differently from one member state to another for VAT purposes, and this poses especial problems in cases where a voucher is issued in one EU country and is used in another. Examples include international hotels promoting accommodation through vouchers in several member states, and international phone cards.

European Commission's 2012 Proposals

On May 10, 2012, the European Commission proposed to update EU VAT rules to ensure the uniform tax treatment of all types of vouchers across the EU. These included three main changes:

First, the Commission proposed to harmonize the definition of vouchers for VAT purposes and the point of taxation for voucher transactions. The time of taxation would be determined by the nature of the voucher, thereby clarifying if the tax should be charged when a voucher is issued or when it is redeemed for goods and services.

Second, the proposed rules would draw a clear line between vouchers and other means of payment. As the Commission observed: "The growing number of mobile devices makes it necessary to distinguish between prepaid telecom credits, which are vouchers, and mobile payment services, which are taxed differently. Changes in payment technology, notably the increasing use of mobile payments, require that any room for confusion is removed."

Last, the proposals would establish common rules for the distribution of vouchers in a chain of intermediaries, especially where this extends across two or more member states.

A number of other technical measures were also included to deal with the right of deduction, redemption and reimbursement procedures, the person liable for payment of the tax, and other obligations for businesses.

Commenting on the proposals, then Commissioner for Taxation Algirdas Semeta said: "There is no justification for this ever-expanding market to be held back because of uncertainty and complications in the tax rules. With the new VAT rules proposed today, we can move to a genuine single market for vouchers, to the benefit of businesses, citizens and tax administrations."

The Vouchers Directive

The Commission's 2012 proposals were intended to enter into force on January 1, 2015. However, it took until June 27, 2016, for the European Council to finally adopt a Directive on the harmonized VAT treatment of vouchers.

Narrower in scope that the Commission's initial proposals, the EU Vouchers Directive (Directive 2016/1065)[1] sets out definitions for single-purpose vouchers and multi-purpose vouchers and sets rules to determine the taxable value of transactions in both cases.

The Vouchers Directive defines a voucher as "an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument."

A single-purpose voucher is defined as "a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher," with a multi-purpose voucher defined as a voucher other than a single-purpose voucher.

Under the Directive, where the VAT treatment attributable to the underlying supply of goods or services can be determined with certainty already upon issue of a single-purpose voucher, VAT should be charged on each transfer, including on the issue of the single-purpose voucher. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher should not be regarded as an independent transaction. For multi-purpose vouchers, VAT should be charged when the goods or services to which the voucher relates are applied. According to the Directive, any prior transfer of multi-purpose vouchers should not be subject to VAT.

It is intended that only vouchers which can be used for redemption against goods or services should be targeted by the new rules. However, instruments entitling the holder to a discount upon purchase of goods or services but carrying no right to receive such goods or services are not targeted by the Directive. The provisions are also not intended to trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps, or similar supplies.

United Kingdom

Member states are now in the process of transposing the requirements of the Vouchers Directive into domestic law. By way of an example, the United Kingdom included the new measures in the 2018/19 Finance Bill, published on July 6, 2018.[2]

According to the explanatory memorandum to the proposed amendments to the UK's 1994 VAT Act, the Government's objective is to ensure that the amounts customers pay when using vouchers to obtain goods or services is better reflected in the tax base.

"It also wants to make improvements for business by modernizing and harmonizing the VAT treatment of vouchers. It aims to do this by providing new, clear rules which separate vouchers with a single purpose (e.g. a traditional book token) from the more complex gift vouchers and set out how and when VAT should be accounted for in each case," the document states.

It was emphasized that the new legislation is not concerned with the scope of VAT and whether VAT is due, "but with the question of when VAT is due and - in the case of multi-purpose vouchers - the consideration upon which any VAT is payable."

Next Steps

Member states have until December 31, 2018, to transpose the Vouchers Directive into domestic law, and the measures will have effect from January 1, 2019. Besides the UK, Estonia, Hungary, and Finland have also made recent announcements that they are legislating for the new rules. However, to date, only two member states have notified the European Commission that they have fully transposed the Directive into national VAT law: Luxembourg and Malta.

Considerations

While the establishment of a common framework for the VAT treatment of vouchers in the EU is a welcome step, warnings have been made that the new rules still leave some room for interpretation, particularly with respect to deciding whether a voucher is single or multiple-use in nature. As the Institute of Chartered Accountants in England and Wales (ICAEW) noted in its submission to the UK Government's consultation on the changes:[3]

"[...] there is a risk of double taxation where a voucher is treated as a SPV on purchase and a MPV on redemption. There is a similar risk of non-taxation where a voucher is treated as a MPV on purchase and a SPV on redemption."

The ICAEW says that correctly identifying whether a voucher is an SPV or an MPV at the time of purchase will be "crucial" to its VAT consequences.

Judging by the ICAEW's comments, the solutions included in the vouchers Directive are not ideal, but taxpayers will have to plan for them as best they can irrespective of the law's imperfections.

Endnotes

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.177.01.0009.01.ENG

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723030/Draft_Finance_Bill.pdf

3 https://www.icaew.com/-/media/corporate/files/technical/icaew-representations/2018/icaew-rep-24-18-vat-and-vouchers.ashx

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UAE Signs Multilateral Instrument – Impact On UAE's Double Tax Treaties And Implications For Investors And Businesses

by Ton van Doremalen and Sachin Sachdeva, DLA Piper

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Introduction

On June 27, 2018, the United Arab Emirates (UAE) signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI"). The signing of the MLI is an important event for the UAE's double tax treaty network and also an encouraging sign of the country's effective actions to be completely removed from the European Union (EU) Council's lists of jurisdictions deemed to be non-cooperative for tax purposes.

The MLI is a legal instrument which has been developed to amend and update, at once, countries' bilateral tax treaty networks in order to implement the tax treaty measures developed under various actions of the G20/Organisation for Economic Cooperation and Development's (OECD) anti-Base Erosion and Profit Shifting (BEPS) project. The MLI has been signed by 78 countries[1] and more are expected to sign it in the future.

Currently, there are more than 80 double tax treaties in force between the UAE and other jurisdictions and several others are under negotiation or awaiting ratification. For a country which does not currently levy corporate income tax, with the exception of oil and gas companies and branches of foreign banks, this extensive double tax treaty network is an unprecedented achievement and a testament to the jurisdiction's commitment to accommodate internationally active businesses and multinationals. The large number of double tax treaties concluded by the UAE means that the MLI will most certainly have an impact on many of the UAE legal structures currently relying on double tax treaty protection.

Multilateral Instrument In More Detail

The BEPS project is, *inter alia*, aimed at countering the phenomena of tax treaty abuse and tax avoidance. Tax treaties which seek to relieve double taxation of income and capital in cross-border scenarios have sometimes been used by taxpayers to artificially generate low or no taxation, typically by using treaty shopping arrangements. Treaty shopping is a specific form of tax treaty abuse whereby residents of a non-treaty state try to obtain the benefits of a tax treaty by interposing a company in a treaty state which subsequently forwards passive income to the residents of the non-treaty state. In the absence of such interposition, the resident of the non-treaty state would, at best, be entitled to benefits under the tax treaty between the country of its residence and the state of source of income (assuming a tax treaty exists at all) and not of any other tax treaty.

With a view to counteracting these practices, the OECD released, in 2015, recommendations which required a revamp of the existing tax treaty rules. In order to ensure swift and coordinated implementation of these measures, a multilateral instrument was considered to be the instrument of choice as that would update the existing network of more than 2,000 bilateral tax treaties at once, thus avoiding the need to renegotiate each bilateral tax treaty separately.

The MLI contains a number of treaty related measures, each of which constitutes either an optional provision or a minimum standard. Optional provisions[2] offer participating countries choice of adoption which means that countries enjoy the flexibility to adopt (or not) such a provision. By contrast, minimum standard provisions are those which the participating countries must adopt and incorporate in their tax treaties unless an equivalent provision already exists in those tax treaties. One such measure concerns an anti-abuse rule which the countries may choose to adopt either in the form of a Principal Purpose Test (PPT) or a Limitation-on-Benefits provision (LoB) or both. The idea behind introducing these rules is to give tax treaties their own anti-abuse rules (rather than depend on domestic law for that purpose).

Principal Purpose Test

With respect to the PPT, that rule looks at the *principal purposes* for entering into a transaction or arrangement. Where a principal purpose of a transaction or arrangement is to secure the benefits of a tax treaty, the PPT rule will be triggered and the tax authorities will, on that basis, be entitled to deny that treaty benefit. As a quick illustration, ACo, a company tax resident in Country A, wholly owns an operating subsidiary, CCo, in Country C. Subsequently, ACo interposes a holding company, BCo in Country B solely with a view to benefiting from the more favorable treatment under the B-C tax treaty (*e.g.*, an increased reduction of withholding tax on dividend distributions). The interposition of BCo is very likely to be challenged by Country C's tax authorities under the PPT rule.

Under the PPT rule, obtaining the benefit under a tax treaty need not be the sole or main or dominant purpose of the arrangement or transaction in question. For triggering the rule, it is sufficient if *one of the principal purposes* of the arrangement or transaction was to obtain the benefit.

Limitation-on-Benefits provision

By contrast, the LoB rule applies regardless of whether obtaining the tax benefit was a principal purpose of the transaction or arrangement in question. Under the LoB provision, in order to be eligible for tax treaty benefits, a taxpayer needs to be a "qualified person" in addition to being a resident of a treaty state. The determination whether a taxpayer is a qualified person is made against specified objective standards (such as legal form, ownership, *etc.*) which are set out in the tax treaty itself. A positive determination entitles a taxpayer to all the benefits of a particular tax treaty. The "qualified person" test needs to be carried out for each tax treaty separately.

Where a tax treaty contains both a PPT and an LoB provision, both tests need to be met in order for a taxpayer to be eligible for tax treaty benefits.

Impact Of The MLI On UAE Double Tax Treaties

The effect of the UAE having signed the MLI is that its tax treaty network will be updated to include the PPT and/or the LoB rule and the other minimum standard provisions. Depending on the choices exercised and reservations made (in the ratification instrument), at a minimum, the anti-abuse rules in the form of PPT and/or LoB (minimum standard) will be adopted and will subsequently form part of the UAE's tax treaties. It must be noted that the MLI provision will apply only where the PPT rule is symmetrically adopted for implementation by the UAE and its relevant tax treaty partners. By symmetrical adoption it is meant that both tax treaty partners must adopt the PPT rule as opposed to tax treaty partners' asymmetrical adoption[3] which would create an impasse which needs to be resolved in favor of a mutually acceptable solution that meets the (anti-treaty shopping) minimum standard.

Subsequent to the MLI taking effect for the UAE and its tax treaty partners, the tax authorities of the UAE tax treaty partners will very likely scrutinize a transaction or arrangement against the PPT and/or LoB rule and potentially deny treaty benefits where the taxpayer fails to meet those tests.

Historically, the UAE has been used by non-resident investors and businesses not only as the destination country for their investments and business operations but also to structure their investments into the region. The impact of the new rules will very likely be felt in the latter cases where a UAE tax treaty partner country is the state of the source of income. In order to ensure that the tax treaty benefits are not granted in inappropriate circumstances, tax authorities of the UAE tax treaty partner country will test an arrangement or transaction in question against the parameters of the PPT and/or LoB rule.

Where, in a case, tax treaty benefits are denied and these cannot be used effectively to generate (higher) foreign tax credits in the home country of the taxpayer, these will end up becoming a permanent tax cost for the taxpayer.

It is worth noting that these new anti-abuse rules do not replace the existing treaty requirements found in the concepts of residence and beneficial ownership but are in addition thereto which means that the taxpayers will need to satisfy these (also) before they can be held to be entitled to tax treaty benefits. As it is, both residence and beneficial ownership requirements can be difficult to apply in a tax treaty context. This difficulty is accentuated due to the fact that the concept of residence takes a variety of forms under the UAE's double tax treaties which employ, for companies, criteria such as place of incorporation, place of management, liability to tax, and whether they are subject to tax, to name a few.

What Should Investors And Businesses Do?

The adoption of the new anti-abuse rules, whether in the form of a PPT or an LoB, will constitute a serious concern for businesses and investors investing in or through the UAE. That concern seems even more pertinent where a PPT is adopted since that rule, in its current form, uses a relatively low threshold for perceived abuse. As noted earlier, to trigger the application of the PPT rule it is sufficient that at least one of the principal purposes of an arrangement or transaction is to obtain the benefit under a tax treaty. The presence of this lower threshold increases the likelihood of an arrangement or transaction being found to be abusive by a foreign tax authority and consequently being denied treaty benefits by one of the UAE's tax treaty partners.

Taxpayers are therefore advised to revisit and review their existing investment and legal structures to determine if, and to what extent, the newly introduced anti-treaty shopping rules will impact those structures. This assessment should be followed, where necessary, by steps to revamp (or even overhaul) existing structures so that they do not fall foul of these new rules. In addition, taxpayers considering making investments out of or through the UAE should take these new anti-treaty shopping rules into account to ensure that the structures being put in place will withstand the scrutiny of the PPT and/or the LoB rule.

With respect to ensuring compliance with the LoB test, a taxpayer must ensure that it fulfils the conditions necessary for it to be a qualified person under the tax treaty. In the context of the PPT rule, structures that are founded on commercial objectives, with business motives and operational substance at their core, are more likely to pass the stringent standards under the new anti-treaty shopping rules. Where taxpayers can demonstrate economic substance and commercial reasons for setting up a structure, it is very likely to successfully meet the challenges posed by the new anti-abuse rules.

The adoption and use of the PPT and/or the LoB rule is likely to encourage centralization of activities, in one place or a few places globally by businesses, for example in the form of global or regional investment platforms. Centralization and the related concentration of substance will be instrumental for demonstrating commercial reasons and economic substance for a structure to counter another country's tax authorities' challenge under the PPT rule. Businesses will naturally be inclined to consider, for this purpose, jurisdictions which have the necessary legal environment and the appropriate infrastructure in this regard. Because the UAE has an ideal infrastructure, including an extensive tax treaty network, to accommodate the creation of such regional platforms (specifically focusing on the Middle East, Africa and South East Asia), it would be advantageous for businesses and investors to use a UAE platform for their multinational operations and investments.

A Word Of Caution

One word of caution regarding the way the MLI instrument has been developed to function: which is to operate alongside the existing tax treaties instead of directly amending (the text of) those tax treaties. This will require a meticulous handling of the two instruments, *i.e.*, the MLI and the relevant tax treaty to ensure proper interpretation and correct application of the newly adopted provisions. The approach is far from straightforward (as is the case with tax treaties and amending protocols) and will be best handled with the assistance and advice of an expert who has extensive experience with (the application of) tax treaties.

Endnotes

[1] Number of signatories as on June 27, 2018.

[2] An example of an optional provision is the anti-abuse rule concerning permanent establishments, or "taxable presence" in other jurisdictions, which seeks to lower the threshold to create such taxable presence.

[3] For example, where UAE chooses to adopt the PPT rule (which is the default rule) whereas its tax treaty partner notifies adoption of the detailed LoB provision together with the anti-conduit rules.

Topical News Briefing: Taking Stock Of BEPS

by the Global Tax Weekly Editorial Team

Barely a day goes by without a BEPS-related tax development being reported in one jurisdiction or another, as seen by the stories included in this week's issue of *Global Tax Weekly*.

Indeed, that low-tax jurisdictions like Hong Kong have put in place transfer pricing regimes and other BEPS recommendations (as reported last week) when the lack of such anti-avoidance provisions was a selling point to investors just a few years ago is an indication of just how deeply the BEPS project has penetrated the fabric of international taxation.

The timing of the OECD's latest stock-take of the BEPS project to the G20 therefore seems apposite, and its new report indeed confirms that the world's tax systems are becoming increasingly BEPS-proof.

With 116 jurisdictions having signed up to the BEPS Inclusive Framework, this initiative now includes economies accounting for 95 percent of global GDP. With regards to BEPS Action 5, 175 harmful tax regimes have been reviewed and 130 have been amended or abolished, and 17,000 tax rulings have been identified and exchanged between tax authorities. Almost 120 countries now participate in the Mutual Administrative Assistance Convention and the BEPS Multilateral Instrument counts 82 jurisdictions among its signatories.

As impressive as these feats sound, they would count for nothing if they fail to bring about the changes desired by OECD and G20 governments at the launch of the BEPS project. But, according to the report, the results of the BEPS implementation phase have been equally as impressive. By June 2018, jurisdictions around the globe had identified EUR93bn (USD109bn) in additional revenue, including tax, interest, and penalties, from such initiatives. Crucially, although less quantifiable, the OECD says that BEPS has changed taxpayer behavior, and separate studies showing that multilateral corporations are practicing more conservative and cautious tax planning strategies would seem to bear this conclusion out.

However, just as importantly for taxpayers, anecdotal evidence also suggests that BEPS has changed the behavior of tax authorities too. And while multinationals are now able to factor in the likelihood of certain BEPS changes in the jurisdictions in which they operate, or intend to operate, the way that countries apply and enforce these measures remains something of an unknown quantity in many cases.

Indeed, it may be possible that the aforementioned achievements will be undermined if another (unintended) consequence of the BEPS project is increased taxpayer uncertainty, a result which could also lead to more inhibited investment flows around the world, although the jury is out on whether one begets the other.

Not that the OECD is blind to the issue of uncertainty. That it produced a report in March 2017 on the matter at the request of the G20 and the IMF, and a follow-up to this report earlier this year, shows that tax uncertainty is as important a concern for those steering and overseeing the implementation of BEPS as it is for taxpayers. And these reports indicated that at jurisdictional level, there is certainly scope for BEPS-related measures to be clarified, and for tax administration practices to become more predictable and consistent.

However, even on this issue, the OECD is claiming a victory. Thanks to the implementation of Action 14 on the more efficient resolution of cross-border tax disputes, over 85 percent of mutual agreement procedures resolved the tax disputes at issue in 2016, according the latest BEPS progress report.

With so many variables at play, it is difficult to reach firm and concise conclusions about the impact of the BEPS project, positive or negative. However, it is clear that, for better or for worse, the international tax landscape has transformed radically given the volume of changes that have taken place, or are still due to be implemented. And unfortunately, multinational businesses have little choice but to continue navigating a path through this maze.

Draft Laws Update Treatment Of Multinational Companies In Russia

by Marina Belyakova, Georgy Kovalenko and Anna Nazarchuk, EY, Russia

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Introduction

The State Duma has been presented with a package of six draft laws,[1] in which it is proposed:

- To create special administrative districts (SADs) in the Kaliningrad Province (Oktyabrsky Island) and the Primorye Territory (Russky Island);
- To make it possible for joint stock companies (JSC) and limited liability companies (LLC) to acquire the status of multinational (international holding) companies;
- To establish special tax and currency regulation for multinational (international holding) companies;
- To create a Russian Open Register of Ships in which ships owned by foreign citizens and foreign and multinational companies would be registered.

Below we present brief comments on key provisions of the draft laws.

The status of a multinational company is granted to a JSC or LLC which meets all the following criteria:

1. Carries on business activities in multiple states, including Russia;
2. Is a participant in a SAD;
3. Has assumed obligations to make investments in Russia, including on the basis of:
    - A notice of intention to make investments in Russia;
    - An agreement on the carrying on of activities in a SAD;

- A special investment contract;
- A concession agreement;
- A public-private (municipal-private) partnership agreement;
- Another agreement.

The specific forms of and time limits for making investments and the minimum amount of investment needed to obtain the status of a multinational company are not laid down in the draft laws and are to be established at a later date by the government. A multinational company would be given six months from the date of its state registration to provide proof that it meets criteria 1 and 3 above.

Means of acquiring the status of a multinational company include:

- The foundation of a Russian JSC or LLC which meets the above-mentioned criteria;
- A change in the status of an existing JSC or LLC which meets the above-mentioned criteria;
- A change in the personal law of a foreign company under a continuation (redomiciling) procedure.

The status of multinational companies (*e.g.*, compliance with the above criteria) would be checked by the Management Company, which would be able to deprive them of that status should they cease to meet the criteria.

The draft law provides for flexible corporate regulation for multinational companies. In particular, the founders of a multinational company may lay down in its foundation agreement the size and method of formation of the charter capital and the amounts of contributions. No minimum capital requirements are established.

Access to information contained in state registers on the founders of a multinational company, persons authorized to act on its behalf without a power of attorney and parties to the corporate agreement would be restricted and made available to third parties only with the consent of the company itself.

Currency Law

Amendments to the currency law are proposed, under which entities registered as multinational companies under a continuation (redomiciling) procedure would be granted non-resident status. A list is to be drawn up of currency operations that such entities are permitted to carry out without using bank accounts with authorized banks, and rules governing their dealings with Russian currency residents are to be established.

Tax Aspects

In connection with the creation of SADs, a number of amendments to the Tax Code are proposed[2] which establish special provisions governing the taxation of multinational companies registered under a continuation procedure (including international holding companies) and Russian tax-resident foreign companies.

Special Taxation Rules for Multinational Companies and Russian Tax-resident Foreign Companies

The draft law envisages that multinational companies registered under a continuation procedure would be treated as Russian companies for tax purposes.

The draft law establishes rules for determining the value of assets of multinational companies registered under a continuation procedure and foreign companies which are recognized as Russian tax residents for tax purposes.

As a rule, the value of such assets (property rights) must be determined on the basis of the accounting records of the foreign company as at the last reporting date preceding the registration of a multinational company under a continuation procedure, or the date preceding the date on which a foreign company is recognized as a Russian tax resident. It is important to note that that value may not exceed the market value of the assets in question. At the same time, special rules are established for determining the tax value of securities and participating interests in companies:

- **Securities** are to be recognized at market value or at the price calculated in accordance with the rules of Article 280 of the Tax Code as at the date on which a multinational company is registered or a foreign company is recognized as a Russian tax resident;
- **Participating interests in companies** are to be recognized at market value as at the date on which a multinational company is registered or a foreign company is recognized as a Russian tax resident.

In this respect, the value of participating interests in non-public companies more than 50 percent of whose assets consist of immovable property situated in Russia (or participating interests in other companies meeting those criteria) is to be determined according to the general rules prescribed for assets.

International Holding Companies

According to the proposed amendments, a multinational company may be classed as an international holding company if it meets the following conditions:

- The company was registered by way of the continuation of a foreign company established before January 1, 2018;
- The controlling persons of the multinational company as at the date of its registration as a continuation of a foreign company became controlling persons of that foreign company before January 1, 2017;[3]
- The following have been provided in relation to the multinational company: (1) financial statements for the last accounting period, (2) an auditor's report not containing an adverse opinion, and (3) details of its controlling persons.

A controlling person of a multinational company (a foreign company as a continuation of which a multinational company has been registered) is defined by reference to participating interest in, or actual control over, the company.

In terms of participating interest, a controlling person may be:

- An individual or company whose participating interest in a multinational company exceeds 15 percent;
- An individual or company whose participating interest in a multinational company exceeds 5 percent, if the aggregate participating interest of Russian tax residents in the multinational company exceeds 25 percent.

Where participating interest requirements are not met, a person may also be classed as controlling if they exercise control over a multinational company in their own interests or in the interests of their spouse and/or minor-aged children.

International holding company status gives a company the following tax advantages:

- Tax exemption for profit of subsidiary controlled foreign companies under the controlled foreign company rules until January 1, 2029 (the company would be required to report such profit);
- A reduction in the participating interest required for 0 percent taxation of dividend income from 50 percent to 15 percent;

- Exemption of income from the sale of shares (interests) in Russian or foreign companies if the following conditions are met;
  - The international holding company has owned at least 15 percent of the shares (interests) in the company for more than a year;
  - Less than 50 percent of the assets of the company in which shares (interests) are sold consist of immovable property situated in Russia;
  - The jurisdiction in which the company was founded is not on the Finance Ministry's black-list; and
  - The shares (interests) in the company were not received as a contribution to the capital of the international holding company and were not acquired as a result of re-organization less than a year before or after the registration of the international holding company;
- Reduction in the withholding tax rate for dividends paid by the international holding company in favor of foreign shareholders from 15 percent to 5 percent until January 1, 2029 (it is unclear from the text of the amendments whether the international holding company must have public status in order for this reduced rate to be applied).

Current Status

The package of bills was initiated by a group of State Duma deputies and Federation Council members (including Deputy V.V. Pinsky).

The government largely supports the bills, but has made some observations that must be taken into account in finalizing them.[4]

The bills have been submitted for preliminary review by appropriate State Duma committees[5] and may undergo changes.

Endnotes

1 Draft Laws No. 488838-7, No. 488862-7, No. 488869-7, No. 488870-7, No. 488871-7 and No. 488878-7 (http://sozd.parliament.gov.ru/) *(In Russian)*

2 Draft Law No. 488869-7 (http://sozd.parliament.gov.ru/bill/488869-7) *(In Russian)*

3 The controlling persons condition does not apply to public companies or 100 percent subsidiaries of such companies.

4 http://m.government.ru/activities/32892/ (*In Russian)*

5 http://sozd.parliament.gov.ru/ (*In Russian)*

Topical News Briefing: Tax Reform 2.0

by the Global Tax Weekly Editorial Team

As the United States Congress gears up for its next tax reform push under the guise of "tax reform 2.0," businesses are still attempting to assimilate the fundamental tax changes brought about by the initial tax reform act.

As reported in this week's issue of *Global Tax Weekly*, House Ways and Means Chairman Kevin Brady (R – TX) told Bloomberg Television that congressional Republicans are already discussing the contents of tax reform 2.0 with a view to a vote being staged on a bill in September 2018.

The main objective of the next round of tax reforms is to extend measures that could only be legislated for temporarily due to budgetary constraints. These temporary measures mainly affect the individual side of the tax code and include the income tax rate changes among other provisions. However, with the pass-through business deduction also set to expire at the end of 2025, SMEs will want to keep a keen eye on the progress of tax reform 2.0 too.

The pass-through deduction rules have been the subject of much criticism for adding complexity to the tax code, and for increasing opportunities for tax planning, as pass-throughs weigh up the merits of the deduction against a substantially reduced corporate tax rate. It remains to be seen therefore if Congress uses tax reform 2.0 to improve upon the initial changes brought about by the Tax Cuts and Jobs Act (TCJA), as well as to extend the temporary provisions.

However, some would argue that there is a strong case for Congress to revisit several other changes brought about by the TCJA, particularly the international tax provisions, which have come in for sustained reproach in recent months.

As also reported in this week's issue, one of the latest critiques comes from Senator Ron Wyden (D – OR), the senior Democrat on the Senate Finance Committee, who released a report last week which concluded that, far from simplifying the international tax code and discouraging offshoring, the TCJA is likely to achieve the exact opposite.

While it would be easy to dismiss Wyden's findings as politically motivated, other studies and evaluations of the US tax reforms have largely concurred, including those by the IMF, the OECD, and the tax policy think-tank, The Institute on Taxation and Economic Policy.

The TCJA's impact is also being felt beyond the federal tax realm. Many states use federal tax rules as a basis for their own tax regimes, so any additional tax reforms at federal level could impact businesses' and individuals' tax obligations at state level. As also reported in this week's *GTW*, there has been a particularly strong backlash against the cap on state and local tax deductions in certain high-taxing states, and the recently-filed lawsuit against the federal government by four states has created additional uncertainty for some taxpayers.

For their part, the Republican lawmakers largely responsible for drafting the TCJA have responded to criticism of the reforms by pointing to the results of surveys showing that taxpayers are generally satisfied with the changes, and to reports showing increasing levels of domestic investment by US multinationals as a result of corporate tax measures, as well as a growing economy and strong consumer confidence.

However, few people who interact with the reformed tax code on a regular basis would disagree that while the TCJA has solved some problems, it has created others. And the need for a second round of tax reform, coupled with ongoing tweaks to existing laws and regulations, reinforces the view that overall, the tax reform process hasn't ended yet, and could well occupy taxpayers, policy makers and lawmakers for some time to come. Will tax reform 3.0 be next?

Clock Ticking On The Offshore Voluntary Disclosure Program

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IRS
Department of the Treasury
Internal Revenue Service

Just when you thought it was safe to get back in the water, the IRS has issued a stern warning to taxpayers that unreported foreign accounts and income remain a top priority for enforcement. And your chance to seek shelter in the OVDP bunker is slowly fading. Since 2008, the IRS has operated its Offshore Voluntary Disclosure Program[1] (OVDP), which is considered a tax amnesty program. But now, the final curtain will be coming down on the program as it will officially be coming to an end on September 28, 2018.[2]

The Streamlined Procedures, a program tailored for taxpayers who can certify under penalties of perjury that their conduct was non-willful, will continue into the foreseeable future. However, as enticing as the streamlined procedures might be, the fact remains that the streamlined program has shortcomings that are not readily apparent. For example, the streamlined program does not immunize taxpayers from a referral being made to Criminal Investigation (CI) in the same way that OVDP did. As if that was not bad enough, IRS audits of streamlined submissions have risen dramatically in the last two years.

If you want the protection of the OVDP, you must act fast before the window of opportunity closes. The IRS announcement offers no guidance insofar as what a latecomer must do if he or she wants to apply to the OVDP before the bewitching hour. The general consensus among tax professionals is that September 28, 2018 is a "hard and fast date" at least when it comes to the deadline by which taxpayers must submit their "Initial Submission" requesting admission.

It is also necessary to distinguish between a "pre-clearance request" and an "Initial Submission." A pre-clearance request is the first of three steps in the rather tedious OVDP application process. Unfortunately, filing a pre-clearance request on or before September 28 does not guarantee that you will get in under the wire. In fact, because a pre-clearance request demands such a small amount of information about you and can be prepared quickly, it may just have the opposite effect. In other words, waiting until the eleventh hour to submit it may guarantee rejection of your application on the grounds of late filing.

As benign as a pre-clearance letter might be, it still serves a purpose. The purpose of requesting preclearance is to confirm that the IRS isn't already hot on your trail.

A pre-clearance letter must include the following information:

- Applicant identifying information including complete names, dates of birth (if applicable), tax identification numbers, addresses, and telephone numbers;
- Identifying information of all financial institutions where undisclosed OVDP assets are held. Identifying information for financial institutions includes complete names (including all DBAs and pseudonyms), addresses, and telephone numbers;
- Identifying information of all foreign and domestic entities (*e.g.,* corporations, partnerships, limited liability companies, trusts, foundations) through which the undisclosed OVDP assets were held by the taxpayer seeking to participate in the OVDP. Information must be provided for both current and dissolved entities. Identifying information for entities includes complete names (including all DBAs and pseudonyms), employer identification numbers (if applicable), addresses, and the jurisdiction in which the entities were organized;
- Executed power of attorney forms (if represented).

Pre-clearance is binary:

> It requires either a "yes" or "no" answer. Usually the answer is "yes," which means that the taxpayer can advance to Step two.

There can be no larger of a doomsday scenario than if the answer is "no." If the answer is "no," then you're probably already under investigation and the last thing on your mind should be providing the IRS with additional information. Instead, the only thing on your mind should be lawyering up.

With the September 28 deadline looming on the horizon, many taxpayers are afraid to take any chances and are bypassing the pre-clearance step altogether and going directly to the Initial Submission. And this is a sound strategy.

While a pre-clearance request can be whipped up in no time, the taxpayer may not hear back from the IRS for what seems like an eternity, even though the IRS claims that it will respond within 30 days. If you decide to submit a pre-clearance request, it goes without saying that you should do so as soon as possible, but in any event no later than August 28, 2018. While waiting for a response to your pre-clearance request, it is best to be proactive and begin assembling your Initial Submission. This way you won't have to scramble to draft your OVDP letter and Attachments in the eleventh hour with a gun to your head. Instead, you can do so in a leisurely fashion and then submit them promptly upon receipt of the IRS's response.

In the past, once a taxpayer received pre-clearance, the taxpayer had 45 days to submit their Initial Submission. While that time frame is still listed on the IRS website, it is not clear whether the IRS will honor it if those 45 days stretch out to a date beyond September 28, 2018. Needless to say, it is better to be safe than sorry. Be vigilant and begin preparing your Initial Submission immediately after faxing the IRS your pre-clearance letter.

The Initial Submission demands more information than the Preclearance Request. However, delinquent or amended tax returns and FBARs need not accompany an Initial Submission. Instead, an Initial Submission consists of two forms: the letter and attachments. Each is a standardized IRS form with numbered questions and empty cells that must be filled in with a response. The letter, referred to as Form 14457,[3] contains questions that are designed to elicit history pertaining to the foreign accounts, foreign assets, and reporting behavior. Additional questions probe deeper, requiring the taxpayer to disclose how he or she learned about OVDP, the source of the foreign funds, an estimate of the combined account/asset values for each year, and other general information. Only one Form 14457 is required.

If you thought completing Form 14457 was arduous, wait until you get a hold of Form 14454.[4] The volume of information needed to complete this form is even greater. As a preliminary matter, a separate Form 14454 must be completed for *each* foreign account, even if all of the foreign accounts are maintained at the same foreign financial institution. Form 14454 contains more detailed questions. For example, it asks whether you made deposits into the foreign account from the United States, or whether you transferred funds from the account to the United States. It also asks about the personnel at the foreign bank who facilitated, advised, and/or counseled you about opening up the foreign account. While bank statements need not accompany Form 14454, if experience is such a good teacher, it is difficult if not impossible, to accurately complete this form without them.

The most tedious and time-consuming part of making an OVDP disclosure comes at the end, in Step three, when all of the tax returns and FBARs must be prepared. Recall that they are not required for the Initial Submission. Step three is referred to as the "Final Submission," which need not be completed by September 28, 2018.

While time is of the essence, do not be hasty. Applying for the OVDP is a big decision and should not be made haphazardly without sitting down with a tax attorney for a thorough and comprehensive risk assessment. A risk assessment is necessary to identify which compliance options are best suited for you. One size does not fit all.

Like the last grain of sand passing through the bulb of an hourglass, the September 28, 2018 deadline will be here before you know it. Getting a jump on things now instead of waiting until the last minute will allow you to weigh your options and make a carefully reasoned decision.

Endnotes

1 https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program.

2 https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now.

3 https://www.irs.gov/pub/irs-pdf/f14457.pdf.

4 https://www.irs.gov/pub/irs-pdf/f14454.pdf.

Spain's PM Proposes Minimum Corporate Tax Burden

Spanish Prime Minister Pedro Sanchez has pledged to reform Spain's corporate tax rules so that companies pay an effective rate no lower than 15 percent.

Laying out the new Socialist Government's two-year economic plan before parliament on July 17, Sanchez proposed that, by restricting the use of deductions, he would attempt to ensure that companies pay effective corporate tax rates closer to the headline rate of 25 percent.

Sanchez also said that the Government intends to crack down on tax avoidance and evasion by legislating to prevent the further use of tax amnesties and by drawing up a new list of jurisdictions considered by the Government to be "tax havens."

Sanchez became Prime Minister on June 2 following a vote of no-confidence in his predecessor Mariano Rajoy, although the Socialist Party holds just 84 seats in Spain's 350-seat assembly. Sanchez has promised to dissolve parliament and call fresh elections.

Australia To Reduce Audit Burden On Firms Requesting APAs

The Australian Taxation Office (ATO) is to better align the timing of its Top 1000 tax performance program reviews with the processes involved in its Advance Pricing Arrangement (APA) program.

Under the Top 1000 tax performance program, the ATO reviews the income tax affairs of large public and multinational groups with a turnover above AUD250m (USD158m) that it does not engage with through pre-lodgment compliance reviews or annual compliance arrangements. The program aims to obtain additional evidence to achieve greater assurance that the largest 1,000 public and multinational companies are reporting the right amount of income tax. Specialist tax performance teams engage with each group.

The ATO said it is starting to align the timing of its Top 1000 reviews with its activities under its APA program, to minimize potential duplication between the programs.

It said that if a business is within the scope of the Top 1000 program and approaches it to enter into an APA, the ATO will seek to align the timing of its review with the APA early engagement stage.

How closely the ATO aligns its activities under the two programs will depend on the facts and circumstances of each taxpayer.

MNEs To Benefit From US Tax Reform Spillovers: IMF Paper

The International Monetary Fund has estimated that the US tax reform legislation, the Tax Cuts and Jobs Act, will lead to a reduction in the tax base of multinationals of between 1.6 percent and 5.2 percent, but this could rise to between 4.5 percent and 13.5 percent due to other countries' potential responses to the US tax cuts.

The IMF paper, Tax Spillovers from US Corporate Income Tax Reform (Working Paper No. 18/166), describes likely tax spillovers from the US corporate income tax reform. It calculates effective tax rates under various assumptions, showing among other findings, how the interest limitation and the Foreign Derived Intangible Income provision can raise or reduce rates. As well as quantifying its likely impact on effective corporate tax rates paid by multinationals, the paper also discusses profit-shifting, relocation, and policy reactions to the more complex features of the reform.

The Tax Cuts and Jobs Act brought about sweeping tax cuts for corporations from 2018, with corporate tax, previously at 35 percent, reduced to a flat rate of 21 percent, and a form of territorial corporate taxation to be introduced through the provision of a 100 percent dividend tax exemption on the foreign income of domestic corporations, provided the domestic corporations own at least 10 percent of the foreign subsidiary. A deemed repatriation tax on foreign deferred income of US corporations (the transition tax) applies at a rate of 15.5 percent for cash and eight percent for illiquid assets.

The report points out that while the US corporate tax reform dramatically reduced the effective corporate tax burden on multinationals, the changes, which significantly enhance the US's international competitiveness, may prompt reactionary policies that will further reduce the domestic tax burden for groups' operations overseas.

The report observes that: "Tax competition and declining corporate income tax (CIT) rates are not new phenomena. However, over the past 30 years, the United States has been an outlier in not reducing tax rates. Combined with the worldwide system of taxation, this is widely regarded as having served as an anchor to world CIT rates. Now the United States has cut its rate by 14 percentage points to 26 percent (21 percent excluding state taxes), which is close to the OECD member average of 24 percent. Combined with the (partial) shift toward territoriality, this may intensify tax competition."

Among the final conclusions of the report are that "some jurisdictions may still be affected very strongly, for example low-tax jurisdictions, which will find it difficult, if not impossible, to maintain their relative attractiveness."

It concludes: "Despite many uncertainties, it seems very clear that further tax reforms, both in the United States and around the world are likely to happen in the near future. CIT rates have been falling for decades. In this respect, the US reform is not unexpected, if anything it joined the trend surprisingly late."

"So far, despite falling tax rates, CIT revenues have held up relatively well. Initially revenues were supported by base-broadening measures, though recently there is less scope for this – and the US reform contained important base-narrowing measures, such as expensing. It is questionable though whether rising corporate profits, driven by a rising share of capital, can forever compensate for lower rates. Moreover, lower corporate tax rates may jeopardize personal income tax revenues, by increasing incentives for individuals to incorporate. Ultimately pressures on revenue can be expected and this can be expected to further increase the appetite for more fundamental reforms toward systems less prone to tax competition and profit shifting."

US Challenges States' 'Retaliatory Duties' Before The WTO

The United States has requested WTO dispute consultations with Canada, China, the European Union, Mexico, and Turkey regarding additional duties imposed by the five WTO members on imports of certain US products. The request was circulated to WTO members on July 19.

The duties were imposed in response to the additional duties imposed by the United States on steel and aluminum products. The United States claims the actions by the five WTO members are inconsistent with provisions of the WTO's General Agreement on Tariffs and Trade (GATT) 1994.

EU Warns US To Not Impose Tariffs On Cars

The EU's Trade Commissioner has said that the imposition by the US of tariffs on car imports would be "disastrous" and potentially illegal.

Cecilia Malmstrom issued the warning during a speech on transatlantic trade.

In May, the US imposed a 25 percent tariff on steel products and a 10 percent tariff on aluminum products originating in the EU, claiming that such imports pose a national security risk. In response, the EU imposed "rebalancing" tariffs on a list of US products worth EUR2.8bn. The EU's list includes a number of US steel, iron, and aluminum products, along with food items, alcoholic drinks, tobacco products, and clothing items.

President Trump then tweeted that if the EU's "tariffs and barriers" were not "broken down and removed," the US would place a 20 percent tariff on "all of their cars coming into the US."

Malmstrom said she had tried to persuade the US Secretary of Commerce that the EU "is not the source of American problems in steel and aluminum" but had been unsuccessful. She added that she is now seriously concerned about the US's new investigation on cars, which also cites national security concerns.

"Steel and aluminum measures turned rhetoric into reality, but doing the same on cars would create a grim new reality indeed," she said.

According to Malmstrom, while EUR6.4bn (USD7.5bn) worth of EU steel and aluminum exports are affected by the US tariffs, EU car and car exports to the US are worth more than EUR50bn a year. She said that the US auto sector is healthy and that US car producers did not request tariffs.

"Tariff measures on cars are neither wanted or warranted. At best, they are a solution in search of a problem. At worst, they are an illegal move to gain leverage in trade negotiations," Malmstrom argued.

Malmstrom is due to travel to Washington with EU Commission President Jean-Claude Juncker this week. She said that they will try "to find solutions to de-escalate the present situation and prevent it from worsening."

OECD, IMF Issue Update On Enhancing Tax Certainty

The OECD and the International Monetary Fund have released a follow-up report on increasing tax certainty for taxpayers globally.

The report – OECD/IMF Report on Tax Certainty (2018 Update) – puts forward practical approaches and solutions policymakers can adopt to enhance tax certainty for taxpayers, with a particular focus this year on measures to support developing country tax administrations. It was developed in response to a request from the G20 leaders to follow-up on the first report, presented in March 2017.

The approaches put forward in the report focus on improving the clarity of legislation, increasing the predictability and consistency of tax administration practices, and mitigating tax disputes and resolving such disputes effectively when they arise.

The 2017 report highlighted that, for countries, tax uncertainty risks discouraging investment.

The update discusses what has happened since the 2017 report. It elaborates first on developments in OECD and G20 countries. Progress is reported on, for example, implementation of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project and developments in dispute resolution, such as mutual agreement procedures (MAP) and arbitration. The update also reports on new initiatives, such as the OECD initiatives to mitigate uncertainty in tax treaties; the IMF initiative to address international taxation issues in its surveillance; developments in the treaty relief and compliance enhancement (TRACE) project; and the Forum on Tax Administration (FTA) initiative to improve risk assessment and audit processes.

Finally, some initiatives are discussed that were not explicitly mentioned in the 2017 report, but which matter for tax certainty, such as the exchange of information, country-by-country reporting, and the OECD International VAT/GST Guidelines.

G20 Backs Consensus-Based Digital Tax Solution

G20 finance ministers and central bankers meeting in Argentina reaffirmed their commitment to finding a multilateral solution to the tax challenges posed by the digitalization of the global economy.

The final communique following the group's latest meeting in Argentina, dated July 23, states: "We remain committed to working together to seek a consensus-based solution to address the impacts of the digitalization of the economy on the international tax system by 2020, with an update in 2019."

Members of the OECD/G20 Inclusive Framework on base erosion and profit shifting confirmed that they will work towards a consensus-based solution on digital taxation by 2020 in an interim report on the tax challenges of digitalization published in March 2018. The interim report included an in-depth analysis of the changes to business models and value creation arising from digitalization, and identified characteristics that are frequently observed in certain highly digitalized business models. However, it did not include any specific proposals to ensure that digital business models pay a more appropriate level of tax.

The communique also emphasized the G20's support for completion of the OECD's base erosion and profit shifting project and raised the possibility that countermeasures could be applied against jurisdictions failing to meet current international tax transparency standards.

"We support a globally fair, sustainable, and modern international tax system," it states.

"We call on all jurisdictions to sign and ratify the multilateral Convention on Mutual Administrative Assistance in Tax Matters," the communique continues. "Jurisdictions scheduled to commence automatic exchange of financial account information for tax purposes in 2018 should ensure that all necessary steps are taken to meet this timeline. We support the OECD strengthened criteria to identify jurisdictions that have not satisfactorily implemented the internationally agreed tax transparency standards. Defensive measures will be considered against listed jurisdictions."

Support for the work of multilateral organizations to build tax administrative capacity in developing countries is also mentioned in the communique. "We support enhanced tax certainty and tax capacity building, including through the Global Knowledge-Sharing Platform for Tax Administration under the umbrella of the Platform for Collaboration on Tax, and welcome the Latin America Academy for Tax Crime Investigation in Buenos Aires."

Pakistan To Receive OECD's Support To BEPS-Proof Tax Regime

The OECD has announced the launch of a support program for authorities in Pakistan on the implementation of the OECD's base erosion and profit shifting minimum standards.

As a member of the BEPS Inclusive Framework, Pakistan has committed to implementing measures to counter harmful tax practices, prevent treaty abuse, introduce new transfer pricing documentation requirements, including country-by-country reports, and improve how the country resolves tax disputes. In addition, Pakistan will receive support from Tax Inspectors Without Borders, a joint OECD/ United Nations Development Programme initiative, in particular on handling audit cases on transfer pricing and international tax issues.

A delegation from the OECD met with senior officials over four days from July 16 to July 19. During the visit, OECD representatives discussed areas where Pakistan requires support, with officials from Pakistan's Federal Board of Revenue. The OECD said Pakistan has so far made good progress on implementing the BEPS standards. "A roadmap outlining actions to be undertaken by Pakistan on the remaining work on implementation of the international standards, according to a defined timetable, was agreed," the OECD concluded.

Offshore Indirect Asset Transfers BEPS Toolkit Revised

The Platform for Tax Collaboration, a joint initiative of the IMF, the OECD, the UN, and the World Bank Group, is seeking feedback on a revised version of its report on the taxation of offshore indirect asset transfers.

The World Bank announced on July 16 that the initial draft report, published in 2017, has been revised to reflect the diverse array of comments received from a public consultation held in August and September last year.

"That draft generated huge interest, with 19 sets of detailed comments received from various groups, including country authorities, civil society organizations, and the private sector. These groups represented a much larger number of individual entities," the World Bank explained.

"Given the volume of thoughtful comments, and some of the concerns raised, the Platform partners spent considerable time digesting and responding to the comments in a new draft of the report," it added.

The report forms part of the Platform for Tax Collaboration's efforts to develop a series of tax toolkits to help developing countries build up their defenses against aggressive tax avoidance.

According to the OECD, the tax treatment of offshore indirect transfers – the sale of an entity located in one country that owns an "immovable" asset located in another country, by a non-resident of the country where the asset is located – has emerged as a significant concern in many developing countries.

The OECD has said that it has become a relatively common practice for some multinational corporations trying to minimize their tax burden, but there is no unifying principle on how to treat these transactions, and the issue was not addressed in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.

According to the World Bank, while offshore indirect transfers are addressed in the OECD's and the UN's model tax treaties, not all treaties include these model provisions, and individual jurisdictions are taking different approaches as they seek to tackle the problem.

The consultation asks contributors to consider three main questions:

- Has the draft better clarified the economic rationale for taxing such transfers by offshore indirect owners?
- Whether, as is intended, the new draft does not express a preference for either of the described legislative approaches to taxing these transfers?
- Does the draft adequately reduce any perceived emphasis on such offshore transfers as constituting tax avoidance, and make clear that the economic rationale for so taxing them is not as an anti-avoidance device?

Comments are being invited until September 24, 2018.

US State Sales Tax Holidays 'Bad Policy,' Says Tax Foundation

Sales tax holidays tend to complicate tax compliance and business planning while offering few benefits to consumers, the Tax Foundation has concluded in a new study.

According to the report, 17 states will hold temporary sales tax holidays this year, up from 16 last year. However, the report argues that such initiatives "create complexities for tax code compliance, efficient labor allocation, and inventory management."

"At first glance, sales tax holidays seem like great policy," the report observes. "They enjoy broad political support, with backers arguing that holidays are a highly visible form of tax cuts and provide benefits to low-income consumers. Politicians and other supporters routinely claim that sales tax holidays improve sales for retailers, create jobs, and promote economic growth."

However, the Foundation argues that, far from improving tax regimes, sales tax holidays represent poor tax policy and distract policymakers from enacting more meaningful tax reforms at state and local level.

"Sales tax holidays introduce unjustifiable government distortions into the economy without providing any significant boost to the economy," it said. "They represent a real cost for businesses without providing substantial benefits. They are also an inefficient means of helping low-income consumers and an ineffective means of providing savings to consumers.".

Sales tax holidays also represent tacit acknowledgment by tax policymakers that state tax regimes are uncompetitive, the Foundation said. "If policymakers want to save money for consumers, then they should cut the sales tax rate year-round."

Brady Expects Vote On US 'Tax Reform 2.0' In September

Kevin Brady (R-TX), the Chairman of the US House Ways and Means Committee, has indicated that Congress could vote on legislation to extend the temporary elements of the Tax Cuts and Jobs Act (TCJA) by September 2018.

Speaking on Bloomberg Television, Brady said a "listening round" with House Republicans on "tax reform 2.0" will be held in the week commencing July 23 following committee members' meeting with President Trump last week.

The objective of these discussions, according to Brady, is to "fine-tune, adjust, [and] have this outline out in August."

"We expect a vote on the US House floor in September," he revealed.

Several aspects of the TCJA were legislated for on a temporary basis, with most of the individual tax changes due to expire on December 31, 2025.

US's New International Tax Measures Fail To Prevent BEPS: Wyden

Senator Ron Wyden (R - OR), the ranking Democrat on the Senate Finance Committee, has released a report which argues that the tax reform legislation, the Tax Cuts and Jobs Act (TCJA), has complicated the tax code further and encouraged companies to continue shifting profits and overseas.

In particular, Wyden's report, published on July 18, says the new international tax provisions have added further complexity to an already difficult area of the tax code, particularly with the addition of the new Global Intangible Low Taxed Income (GILTI) regime.

"The international tax laws governing the taxation of passive income like interest, known collectively as subpart F, contain some of the most complicated rules in the tax code," the report observed, before going on to note that the TCJA "largely retains the existing subpart F rules and adds new rules that both rely on the old system and create a new web of complexity."

The report contends that, contrary to the intentions of the authors of the TCJA, the law's provisions, including GILTI, provide incentives for US companies to invest in foreign jurisdictions.

The GILTI regime was included in the TCJA to discourage US corporations from shifting high-yielding intangible assets such as intellectual property rights to low-tax jurisdictions. GILTI is defined as the portion of the income of a controlled foreign corporation owned by US shareholders that exceeds a notional 10 percent return - a rate that is intended to reflect the normal rate of return on intangible assets. After a 50 percent deduction GILTI is subject to an effective corporate tax rate of 10.5 percent, half the regular 21 percent US corporate tax.

However, the report argues that, by exempting a "routine" rate of return on depreciable assets outside of the US, "a low-margin company pays no tax to the US on income earned from offshore investments, such as new plants and equipment (and the jobs to build and run them)."

The TCJA's foreign-derived income attributable to intangibles (FDII) deduction is also criticized in the report. Intended to encourage US corporations to hold IP rights in the United States, the FDII regime provides a 37.5 percent deduction on income exceeding a 10 percent normal rate of return for an effective US tax rate of 13.125 percent.

However, the report said that new investment in plants and equipment in the US reduces the

FDII tax incentive, meaning that "more investment in plants and equipment in the US results in a smaller FDII deduction and higher US tax."

The report also concludes that the TCJA has increased levels of tax uncertainty "as it is now up to the Treasury Department to clarify a hastily written law."

US States File Lawsuit Against SALT Deduction Cap

The states of New York, Connecticut, Maryland, and New Jersey have jointly filed a lawsuit against the federal Government challenging the legality of the recently enacted restriction on the amount of state and local taxes (SALT) that can be deducted from individuals' income for federal tax purposes.

The lawsuit, filed in the US District Court for the Southern District of New York on July 17, was led by New York Attorney General Barbara D Underwood and joined by the attorneys general of the other three states. It alleges that the measure, included in the federal tax reform law, the Tax Cuts and jobs Act (TCJA) of 2017, was politically motivated as it disadvantages taxpayers mainly in Democratic Party-voting states. It also argues that the provision is unconstitutional because it violates the principle of equal state sovereignty.

The TCJA, enacted in December 2017, limited the amount of state and local taxes an individual can deduct in a calendar year to USD10,000. The limitation applies to taxable years beginning after December 31, 2017, and before January 1, 2026. Prior to the change, SALT deductions were uncapped.

According to a joint statement by New York Attorney General Barbara D Underwood and state Governor Andrew M Cuomo, many New Yorkers will experience a substantial increase in tax as a result of the cap, with their federal taxes set to rise by USD14.3bn in 2018, and by an additional USD121bn between 2019 and 2025.

"As set forth in the complaint, the law flies in the face of centuries of precedent, which establishes constitutional limits on the federal government's ability to use its tax power to interfere with the sovereign authority of the states," the statement said.

"For the entire history of the United States, every federal income tax law protected the sovereign interests of the states by providing a deduction for all or a significant portion of state and local taxes. This uninterrupted history demonstrates that the unprecedented cap on the SALT deduction is unconstitutional, as the lawsuit notes," it added.

Contending that the cap is "unconstitutional," Underwood said that the measure goes "well beyond settled limits on federal power to impose an income tax, while deliberately targeting New York and similar states in an attempt to coerce us into changing our fiscal policies and the vital programs they support."

Ontario, Saskatchewan Join Forces Against Federal Carbon Tax

The Ontarian and Saskatchewan governments have announced that together they will use "every single tool" at their disposal to challenge the federal Government's carbon pricing policy.

The federal Government intends to impose a federal carbon pricing option in provinces that do not have a provincial carbon pricing system in place from this year. Federal carbon levy rates will initially be set for the period 2018-2022. Rates for each fuel subject to the levy will be equivalent to CAD10 per tonne of CO2 in 2018, and increase by CAD10 per tonne to reach CAD50 per tonne in 2022.

Doug Ford's first order of business as Ontarian Premier was to revoke on July 3 the regulation which had kept the province's cap-and-trade regime in force. Saskatchewan has refused to put a price on carbon.

In April, the Saskatchewan Government launched a constitutional reference case in the Saskatchewan Court of Appeal to challenge the federal Government's ability to impose a carbon tax on the province.

The Ontarian Government has now announced that it will support Saskatchewan in its constitutional reference case against the carbon tax, and will also "intervene" in the case.

According to a joint statement by Ford and Saskatchewan Premier Scott Moe, Ontario and Saskatchewan will "use every single tool at our disposal to challenge the federal Government's authority to arbitrarily impose a carbon tax" on the provinces.

The federal floor price applies under the Pan-Canadian Framework on Clean Growth and Climate change, agreed between federal and provincial governments in December 2016. Ontario's former government agreed to the Framework, but Saskatchewan has never signed up to the deal. Manitoba initially refused to join the Framework but in February 2018 announced that it would impose a carbon tax, albeit one that will not meet the Government's floor price over the whole of the 2018-22 period.

Singapore Hikes Property Tax Rates

Singapore has increased Additional Buyer's Stamp Duty (ABSD) to cool the territory's residential property market.

ABSD is payable on acquisitions of residential property on top of buyer's stamp duty. Where there is more than one buyer, ABSD is payable by all buyers at the top rate applying to at least one of them.

Singapore's Inland Revenue Authority has published a fact sheet detailing the new ABSD rates, which are effective from July 6, 2018.

Singaporean citizens buying a sole residence remain exempt from ABSD, while purchases of a second property will attract ABSD at a rate of 12 percent (formerly seven percent). Purchases of a third and subsequent properties are liable to ABSD at a rate of 15 percent (formerly 10 percent).

Singapore permanent residents purchasing a first property pay ABSD at a rate of five percent, as before. Those purchasing a second or subsequent properties are liable to ABSD at a rate of 15 percent, up from 10 percent. Foreigners who are not permanent residents will pay ABSD on property purchases of 20 percent, up from 15 percent.

A new ABSD rate of 25 percent applies to legal entities acquiring residential property, up from 15 percent. Housing developers are also subject to an additional ABSD charge of five percent bringing the cumulative ABSD rate to 30 percent. Developers who meet certain conditions may apply for a remission of the upfront 25 percent ABSD charge.

EU Challenges Three Areas Of UK Tax Law

The European Commission on July 19, 2018, announced that it has launched infringement proceedings against the United Kingdom concerning three areas of its tax rules: on the value-added tax mini one-stop shop (MOSS) scheme; its rules on income tax relief for losses on the disposal of shares; and on tax relief for loans to traders.

First, the Commission has called on the UK to bring its national practices regarding the VAT MOSS scheme into line with EU rules. It has sent a reasoned opinion to the UK for failing to collect and transmit to other member states the bank account details for each taxable person registered for the EU-wide system for VAT collection on online sales of e-services.

The VAT MOSS was intended to simplify tax compliance for businesses alongside the change from July 1, 2015, to the taxation of business-to-consumer supplies of broadcasting, telecommunications, and electronic services to consumers in the EU. The change provided that tax should be charged based on the location of the consumer. It was coupled with the introduction of the MOSS scheme, to enable businesses to comply with obligations connected to the regime in a single member state, thereby removing the need for a business to engage with each member state tax authority where it provides services.

On the UK's failure to collect taxable persons' bank account details, the Commission said: "This practice violates EU rules on administrative cooperation and exchange of information. At the moment, member states who want to refund taxable persons in the UK have to collect additional information on a case-by-case basis, which is burdensome and delays refunds. If the United Kingdom does not act within the next two months, the Commission may decide to bring the case before the Court of Justice of the EU."

Second, the Commission has sent a letter of formal notice requesting that the UK align its rules with EU law on income tax relief for losses on disposals of shares. Currently, only shares in companies that carry out their business activities wholly or mainly in the United Kingdom can qualify for the relief. This rule puts taxpayers who invest in qualifying shares of companies that carry out their business in other EU member states than the United Kingdom at a disadvantage. It also imposes a restriction on the free movement of capital. If the United Kingdom does not act within the next two months, the Commission may send a reasoned opinion to the authorities of the United Kingdom, after which it could take the matter before the European Court of Justice.

Last, the Commission has issued a letter of formal concerning the UK's national law on tax relief for loans to traders. UK legislation currently provides for a specific relief where a "qualifying loan" has become irrecoverable. In this case, the lender is entitled to make a claim that the amount of the loan should be deductible against his liability to capital gains tax or to corporation tax on chargeable gains. However, the rules differentiate between the tax treatment of "irrecoverable loans" granted to UK residents and those granted to non-UK resident borrowers. This imposes an unjustified restriction on the free movement of capital, the Commission says. If the United Kingdom does not act within the next two months, the Commission may send a reasoned opinion.

Bahamas To Establish Tax-Exempt 'Development Zones'

The Bahamas Government recently introduced a bill into the territory's Parliament for the creation of tax-free zones.

The Economic Empowerment Zones Bill 2018 offers tax and other incentives to communities designated as economic empowerment zones. The aim is to encourage economic activity in the zones and to promote property construction, renovation, and restoration.

The bill would provide tax relief from the real property tax, customs duties, excise duties, business license fees, and stamp tax.

Malaysia Issues Guidance On Repeal Of GST

The Royal Malaysian Customs Department on July 19 and July 17 issued guidance for taxpayers on the repeal of the goods and services tax and the adoption of sales tax.

Earlier, the Goods and Services Tax (Rate of Tax) (Amendment) Order 2018 reduced the rate of GST prospectively from June 1, 2018, effectively repealing the regime. Sales tax will be reinstated from September 1, 2018, it is proposed, providing that the Government secures support for the necessary legislation, the Service Tax Act 2018.

As with GST, a business will be obligated to register to collect, account, and remit tax once its annual supplies exceed MYR500,000 (USD122,750).

As well as publishing Sales Tax FAQs on the announcements section of its website on July 19, 2018, on July 17, 2018, the Department released three updates to tax guides concerning the GST treatment of the travel industry, event management services, and the entertainment industry.

The guides have been expanded to provide guidance on the GST treatment of services rendered after the introduction of a zero percent rate of GST, where a contract was entered into before June 1, 2018, including in cases where a security payment or holding payment, or partial payment has been made.

EU Proposes Extension Of Austrian VAT Derogation

The European Commission has proposed that Austria be allowed to continue derogating from the EU VAT Directive by restricting the right of certain taxpayers to deduct VAT.

The proposal for a Council Implementing Decision, issued July 18, follows a request by Austria that it be permitted to continue entirely excluding from the right of deduction the VAT borne on goods and services that are 90 percent used by a taxable person for private or non-business purposes.

This measure deviates from the VAT Directive, which stipulates that the VAT on expenditure related to immovable property forming part of the business assets of a taxable person and used both for business and non-business purposes is deductible only up to the proportion of the property's use for purposes of the taxable person's business. Member states may also apply this rule in relation to expenditure related to other goods forming part of a business's assets.

However, member states can apply to derogate from the VAT Directive if the special measures in question simplify the charging of VAT or prevent certain forms of tax avoidance and evasion. Austria said the additional VAT deduction restrictions at issue have achieved both these objectives while making the VAT system fairer.

"The abolition of the derogation would lead to an unjustified cash flow benefit for a taxable person who uses a good or service only marginally for business purposes and who is allowed to deduct VAT for this minor business use compared to a taxable person who uses the good or service for business purposes only," the Commission stated in the proposal.

"A subsequent minimal change in the ratio of private and business use of a good or service only marginally used for business purposes would lead to an adjustment of the VAT deducted. This minor adjustment would be disproportionate both from the taxpayer's and tax administration's perspective," it argued.

The derogation was first granted by the Council in December 2004 for a temporary period which expired on December 31, 2009, and has been extended on numerous subsequent occasions, most recently in December 2015 until December 31, 2018.

The proposal must be approved unanimously by the Council before the extension to the scheme can be authorized.

EU Asks Germany, Italy To Amend VAT Law

The European Commission has called upon Germany and Italy to bring their VAT regimes into line with EU rules.

As part of its July infringements package, the Commission has sent a reasoned opinion to Germany asking it to amend its VAT refund rules.

The Commission said that, in some cases, Germany refuses to grant a VAT refund applied for by a taxable person established in another EU member state because it considers the information provided to have been insufficient – and does so without having requested additional information from the applicant.

The Commission said that this practice leads to refunds being denied even when applicants fulfill the substantive requirements laid down in EU law. If Germany does not act to the Commission's satisfaction within the next two months, the Commission may take the case to the Court of Justice.

The Commission has also launched infringement proceedings against Italy for violations of EU VAT law. Italian legislation currently requires that for the exemption from VAT to be applied to ancillary services relating to the importation of goods, their value must be included in the taxable amount and the VAT must be charged on them at the customs stage at the time of importation. The Commission said that this system runs against the provisions of the VAT Directive. If Italy does not act within the next two months, the Commission may send a reasoned opinion to the Italian authorities.

ARGENTINA - BRAZIL

Into Force

A Protocol to the Argentina-Brazil DTA signed in 2017 will enter into force on July 29, 2018.

BRAZIL - LITHUANIA

Negotiations

During a meeting held in Brazil on July 17, 2018, representatives of the Brazilian and Lithuanian governments engaged in negotiations on a prospective DTA between the two countries.

FINLAND - VARIOUS

Forwarded

Finland's Ministry of Finance has published a decision of the President on July 13, 2018, approving for signature the amending protocol to the 1996 double taxation agreement between the Nordic countries, *i.e.* Finland, Denmark, the Faroe Islands, Iceland, Norway and Sweden.

INDIA - ARMENIA

Effective

India's Ministry of Finance published a notification declaring that the protocol signed on January 27, 2016, amending the country's

2003 DTA with Armenia, entered into force on June 14, 2017. The notification was published in the Gazette of India on July 5, 2018.

INDONESIA - TIMOR-LESTE

Negotiations

Indonesia and Timor-Leste agreed to launch negotiations towards a DTA on June 28, 2018.

KENYA - PORTUGAL

Signature

On July 10, 2018, officials from Kenya and Portugal signed a DTA.

MALDIVES - SINGAPORE

Negotiations

On July 14, 2018, the tax authorities of The Maldives and Singapore concluded a first round of negotiations on a prospective DTA.

PORTUGAL - MACAU

Signature

Portugal and Macau signed a DTA Protocol on June 21, 2018.

SAN MARINO - UNITED ARAB EMIRATES

Signature

On July 11, 2018, San Marino and the United Arab Emirates signed a DTA.

SPAIN - UKRAINE

Forwarded

Spain's Council of Ministers on June 29, 2018, approved the signing of a DTA with Ukraine.

UNITED KINGDOM - MAURITIUS

Into Force

On July 13, 2018, an amending protocol signed in February between the United Kingdom and Mauritius entered into force.

UNITED KINGDOM - VARIOUS

Signature

The UK signed DTAs with its Crown Dependencies – Jersey, Guernsey, and the Isle of Man – on July 2, 2018.

VIETNAM - ALGERIA

Negotiations

During a meeting held in Hanoi on July 13, 2018, representatives from Vietnam and Algeria discussed potentially negotiating a DTA.

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

THE AMERICAS

STEP Global Congress

9/13/2018 - 9/14/2018

STEP

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

Key speakers: Ivan Sacks (Withersworldwide), Jason Sharman (University of Cambridge), Desmond Teo (EY), Leanne Kaufman (RBC Estate and Trust Services), among numerous others

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

STEP Wyoming Conference

9/21/2018 - 9/22/2018

STEP

Venue: Four Seasons Resort and Residences, Jackson Hole, 7680 Granite Loop Road, Teton Village, WY 83025, USA

Key speakers: Amy Castoro (The Williams Group), Joseph Field (Pillsbury Winthrop Shaw Pittman LLP), Michael Karlin (Karlin & Peebles LLP), Carl Merino (Day Pitney), among numerous others

https://www.step.org/wyoming-2018

Fiduciary Institute 2018

9/27/2018 - 9/27/2018

American Bar Association

Venue: Steptoe & Johnson LLP, 1330 Connecticut Avenue NW, Washington, DC 20036, USA

Chairs: Joni Andrioff (Steptoe & Johnson), Peter Kelly (Blue Cross and Blue Shield Association)

https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=320379633

STEP LatAm Conference

10/4/2018 - 10/5/2018

STEP

Venue: Hyatt Regency Mexico City, Campos Elíseos 204, Polanco, Polanco Chapultepec, Ciudad de México, 11560, Mexico

Key speakers: Bill Ahern (Ahern Lawyers), Simon Beck (Baker McKenzie), Mauricio

Cano del Valle (Brook Y Cano), Ceci Hassan (Baker McKenzie), among numerous others

https://www.step.org/events/step-latam-conference-4th-5th-october

Family Office & Private Wealth Management Forum West

10/24/2018 - 10/26/2018

Opal Group

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

Key speakers: TBC

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

Family Office Summit: Integrating the Full Balance Sheet

11/1/2018 - 11/1/2018

ClearView Financial Media

Venue: The New York Times Building, 37th Floor, 620 Eight Avenue, New York, 10018-1405, USA

Key speakers: TBC

http://clearviewpublishing.com/events/fwr-summit-complete-view-familys-balance-sheet-long-term-investment-lifestyle-management/

TP Minds West Coast

11/13/2018 - 11/15/2018

Informa

Venue: Four Seasons Silicon Valley, 2050 University Ave, East Palo Alto, CA 94303, USA

Key speakers TBC

https://finance.knect365.com/tp-minds-west-coast/?_ga=2.241077507.122439778.1526991001-1525335460.1512406535

111th Annual Conference on Taxation

11/15/2018 - 11/17/2018

National Tax Association

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

Chair: Rosanne Altshuler (National Tax Association)

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

8th Annual Institute on Tax, Estate Planning and the World Economy

2/4/2019 - 2/5/2019

STEP

Venue: Fashion Island Hotel, 690 Newport Beach, Newport Beach, 92660, USA

Key speakers: Jay D. Adkisson (Riser Adkisson), Colleen Barney (Albrecht & Barney), Joseph A. Field (Pillsbury), Sandra D. Glazier (Lipson Neilson), among numerous others

http://www.stepoc.org/institute/

ASIA PACIFIC

72nd Congress of the International Fiscal Association

9/2/2018 - 9/6/2018

IBFD

Venue: COEX Convention & Exhibition Center, 513, Yeongdong-daero, Gangnam-gu, Seoul 06164, Republic of Korea

Key speakers: TBC

https://www.ifaseoul2018.com/

TP Minds Asia

9/18/2018 - 9/20/2018

Informa

Venue: Novotel Clarke Quay Singapore, 177A River Valley Rd, Singapore 179031, Singapore

Key speakers: Melinda Brown (OECD), Monique van Herksen (UN Transfer Pricing Subcommittee), Audrey Low (DBS Bank), Gena Cerny (Goldman Sachs), among numerous others

https://finance.knect365.com/tp-minds-asia/?_ga=2.241077507.122439778.1526991001-1525335460.1512406535

Practical Aspects of Tax Treaties

10/10/2018 - 10/12/2018

IBFD

Venue: Address TBC after registration, Kuala Lumpur, Malaysia

Instructors: Bart Kosters (IBFD)

https://www.ibfd.org/Training/Practical-Aspects-Tax-Treaties

International Tax Planning after BEPS and the MLI

10/15/2018 - 10/17/2018

IBFD

Venue: Address TBC, Singapore

Key speakers: Bart Kosters (IBFD), Tom Toryanik (Deloitte), Hemal Zobalia (Deloitte Haskin & Sells), among numerous others https://www.ibfd.org/Training/International-Tax-Planning-after-BEPS-and-MLI

STEP Asia Conference 2018, Hong Kong

11/20/2018 - 11/21/2018

STEP

Venue: Grand Hyatt Hong Kong, 1 Harbor Rd, Wan Chai, Hong Kong

Key speakers: Jonathan Midgley (Haldanes), James Lau (Financial Services and the Treasury Bureau, Hong Kong), among numerous others

https://www.step.org/asia2018

The 4th International Conference on Private Capital and Intergenerational Wealth

11/22/2018 - 11/22/2018

STEP

Venue: The University of Hong Kong, Pokfulam, Hong Kong

Key speakers: TBC

https://www.step.org/events/4th-international-conference-private-capital-and-intergenerational-wealth-22-november-2018

STEP Australia 2019

5/15/2019 - 5/17/2019

STEP

Venue: The Stamford Plaza, Brisbane, Australia

Key speakers: TBC

https://www.step.org/events/step-australia-2019-conference-save-date-15-17-may-2019

CENTRAL AND EASTERN EUROPE

Ukrainian Business Forum Kiev 2018

11/12/2018 - 11/12/2018

CIS Wealth

Venue: Fairmont Grand Hotel Kyiv, 1 Naberezhno-Khreshchatytska Street, Kyiv 04070, Ukraine

Key speakers: TBC

http://cis-wealth.com/en/konferencii/21-ubf2018.html

MIDDLE EAST AND AFRICA

Tax Planning in Africa and the Middle East

10/28/2018 - 10/30/2018

IBFD

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

Key speakers: Ridha Hamzaoui (IBFD), Reggie Mezu (Baker McKenzie Habib Al Mulla), among numerous others

https://www.ibfd.org/Training/Tax-Planning-Africa-and-Middle-East-1

TP Minds Africa

10/31/2018 - 11/2/2018

Informa

Venue: Radisson Blu Hotel Sandton, Rivonia Rd & Daisy St, Sandown, Sandton, 2146, South Africa

Key speakers: Lee Corrick (OECD), Ian Cremer (World Customs Organization), Tanya Bester (MMI Holdings), Mlondie Mohale (Swaziland Revenue Authority), among numerous others

https://finance.knect365.com/tp-minds-africa-transfer-pricing-conference/?_ga=2.241077507.122439778.1526991001-1525335460.1512406535

STEP Arabia Branch Conference

11/11/2018 - 11/11/2018

STEP

Venue: Abu Dhabi Global Markets, Al Maryah Island, Abu Dhabi, UAE

Key speakers: TBC

https://www.step.org/events/step-arabia-branch-conference-11-november-2018-save-date

WESTERN EUROPE

UK Tax, Trusts and Estates Conference 2018

9/4/2018 - 9/4/2018

STEP

Venue: Mercure Manchester Piccadilly Hotel, Portland Street, Manchester, M1 4PH, UK

Key speakers: Julia Abrey (Withers LLP), John Bunker (Irwin Mitchell), Lucy Obrey (Higgs & Sons), Chris Whitehouse (5 Stone Buildings), among numerous others

https://www.step.org/events/uk-tax-trusts-and-estates-conference-2018-manchester-4-september-2018

BEPS Country Implementation – MLI and beyond

9/10/2018 - 9/11/2018

IBFD

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

Instructors: Bart Kosters (IBFD), Tamás Kulcsár (IBFD), Ridha Hamzaoui (IBFD), Luis Nouel (IBFD) https://www.ibfd.org/Training/BEPS-Country-Implementation-MLI-and-beyond

European Value Added Tax Masterclass

9/20/2018 - 9/21/2018

IBFD

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

Instructors: Fabiola Annacondia (IBFD), Jordi Sol (IBFD), Jan Snel (Baker & McKenzie), Claus Bohn Jespersen (KPMG)

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

UK Tax, Trusts and Estates Conference 2018

9/21/2018 - 9/21/2018

STEP

Venue: Westminster Park Plaza Hotel, 200 Westminster Bridge Road, Lambeth, London, SE1 7UT, UK

Key speakers: Julia Abrey (Withers LLP), John Bunker (Irwin Mitchell), Lucy Obrey (Higgs & Sons), Chris Whitehouse (5 Stone Buildings), among numerous others

https://www.step.org/TTE18

International Tax Academy 2018

9/24/2018 - 9/26/2018

Informa

Venue: Downing College, Regent St, Cambridge, CB2 1DQ, UK

Key speakers: Daniel Erasmus (Tax Risk Management), Robert De La Rue (Jardine Motors Group), Jan Weerth (Deutsche Bank), Anne Fairpo (Temple Tax Chambers), among numerous others

https://finance.knect365.com/international-tax-academy/

International Tax Aspects of Permanent Establishments

9/24/2018 - 9/26/2018

IBFD

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

Instructors: Bart Kosters (IBFD), Carlos Gutiérrez Puente (IBFD), Hans Pijl (independent tax lawyer), Jan de Goede (IBFD), among numerous others

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

Private Equity Tax Practices

9/26/2018 - 9/26/2018

Informa

Venue: Address TBC, London, UK

Key speakers: Mary Kuusisto (Proskauer), Mark Baldwin (Macfarlanes), Jenny Wheater (Linklaters), Emily Clark (Travers Smith), among numerous others https://finance.knect365.com/private-equity-tax-practices/

Private Investor Middle East International Conference

9/26/2018 - 9/27/2018

Adam Smith Conferences

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

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

http://www.privateinvestormiddleeast.com/

Wealth Insight Forum 2018

9/27/2018 - 9/27/2018

Spear's

Venue: One Great George Street, 1 Great George St, Westminster, London, SW1P 3AA, UK

Key speakers: Trevor Abrahmsohn (Glentree International), Robert Amsterdam (Amsterdam & Partners), Stephen Bush (New Statesman), Mark Davies (Mark Davies & Associates), among numerous others

http://wif.spearswms.com/

Principles of Transfer Pricing

10/1/2018 - 10/5/2018

IBFD

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

Instructors: TBC

https://www.ibfd.org/Training/Principles-Transfer-Pricing-2

UK Tax, Trusts and Estates Conference 2018

10/2/2018 - 10/2/2018

STEP

Venue: The Principal York, Station Road, York, YO24 1AA, UK

Key speakers: Julia Abrey (Withers LLP), John Bunker (Irwin Mitchell), Lucy Obrey (Higgs & Sons), Chris Whitehouse (5 Stone Buildings), among numerous others

https://www.step.org/TTE18

STEP Europe Conference

10/4/2018 - 10/5/2018

STEP

Venue: Hôtel Le Royal, 12 Boulevard Royal, 2449 Luxembourg, Luxembourg

Key speakers: John Marshall (British Ambassador to Luxembourg), Miguel Poiares Maduro (European University Institute, Italy), Serge Schroeder (Cour Administrative, Luxembourg), Judge Christopher Vajda

(Court of Justice of the European Union), among numerous others

https://www.step.org/europe18

European Value Added Tax – Selected Issues

10/10/2018 - 10/12/2018

IBFD

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

Instructors: Fabiola Annacondia (IBFD), Jordi Sol (IBFD)

https://www.ibfd.org/Training/European-Value-Added-Tax-Selected-Issues-2

9th Annual International Taxation in CEE

10/11/2018 - 10/12/2018

GCM Parker

Venue: Address TBC, Prague, Czech Republic

Key speakers: TBC

http://gcmparker.com/gcm-conference-listing?menuid=0&conferenceid=77

UK Tax, Trusts and Estates Conference 2018

10/16/2018 - 10/16/2018

STEP

Venue: Bristol Marriott Royal Hotel, College Green, Bristol, BS1 5TA, UK

Key speakers: Julia Abrey (Withers LLP), John Bunker (Irwin Mitchell Private Wealth), Christopher Groves (Withers LLP), Chris Whitehouse (5 Stone Buildings), among numerous others

https://www.step.org/events/uk-tax-trusts-and-estates-conference-2018-bristol-16-october-2018

International Tax Planning Association Meeting

10/17/2018 - 10/19/2018

ITPA

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

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

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

Current Issues in International Tax Planning

10/22/2018 - 10/24/2018

IBFD

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

Key speakers: Annemiek Kale (Arla Foods), Adam Zalasinski (European Commission), Tamás Kulcsár (IBFD), Jeroen Kuppens (KPMG Meijburg & Co), among numerous others

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

Transfer Pricing and Substance Masterclass

10/31/2018 - 11/2/2018

IBFD

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

Key speakers: Eric Vroemen (PwC), Önder Albayrak (Genzyme-Sanofi), Sandra Esteves (SABIC), Monica Erasmus-Koen (Tytho), among numerous others

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

Global VAT

11/13/2018 - 11/16/2018

IBFD

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

Key speakers: Fabiola Annacondia (IBFD), Jordi Sol (IBFD), Wilbert Nieuwenhuizen (University of Amsterdam), Bhavna Doshi (independent consultant), among numerous others

https://www.ibfd.org/Training/Global-VAT-0

Annual Conference on European VAT Law 2018

11/22/2018 - 11/23/2018

Academy of European Law

Venue: TBC, Trier, Germany

Key speakers: TBC

https://www.era.int/cgi-bin/cms?_SID=9e33bf77b0e4587e14991159621fbca45243657200594226138893&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=127489&idrubrik=1024

Capital Taxes Update

12/5/2018 - 12/5/2018

STEP

Venue: Holiday Inn, Impington, Lakeview, Bridge Rd, Impington, Cambridge, CB24 9PH, UK

Key speaker: Chris Whitehouse (5 Stone Buildings)

https://www.step.org/events/capital-taxes-update-5-december-2018

THE AMERICAS

Canada

A listing of recent key international tax cases.

In a landmark judgment, Canada's Tax Court has ruled that the fees paid by Canadian Imperial Bank of Commerce (CIBC) for the credit payment processing services rendered by Visa to the bank's customers should be subject to goods and services tax (GST), rather than being classified as a financial service exempt from tax.

The bank had sought to reclaim GST that it had paid to Visa for the services.

It was argued that although Visa offered payment processing services, Visa was able to have such transactions on credit accepted by retailers because of its brand strength and reliability and such was a fundamental part of the supply. Further, it was said that the financial services were in fact rendered by CIBC, rather than Visa; Visa's services were intended to support the administration of such instead. The Court said Visa's supplies were "of a payment platform and facilitating payments on that platform."

More broadly, the Court summarized that the fees paid by CIBC to Visa were for:

- Transaction processing, involving the routing of payment information and related data to facilitate the authorization and settlement of transactions between issuers, acquirers, and merchants;
- Licensing of the Visa brand;
- Payment network management, including maintenance of the Visa network, data processing, rule making, and adjudication; and
- Brand management and promotion.

Although some aspects of the services rendered were said to fall within some categories of exempt financial services, that the service was deemed administrative in nature meant that it was excluded from the definition.

The Court said:

> "The value added service which Visa provides to CIBC is to relieve them of the need to keep track of and then individually pay merchants for the transactions paid for on credit by CIBC clients. Instead, Visa gives CIBC the ability to offer its clients the option of paying for goods and services on credit while only needing to make one lump sum payment to Visa at the end of every day to settle the transactions undertaken by these clients. At its most basic level then, the benefit that Visa offered CIBC was cost saving and logistical simplification. Both of which, like in [*Great-West Life Assurance Co. v. R.*, 2016 FCA 316], are quintessentially administrative in nature."

The Canadian authorities here successfully argued that, considering the objective factors, such as the complexity of maintaining the Visa network, the speed at which the Visa Net system was able to clear and settle transactions, and the huge sums of money spent by Visa on advertising, marketing, and promotional services, as well as the high value of the Visa brand name, it should be concluded that the electronic transfer of money was not the predominant element of the supply and that the supply instead had multiple predominant elements such as right to use the Visa brand name, data transmission services, and the right to access Visa's proprietary network.

The Court concluded that the fees and services are in respect of a taxable supply for GST purposes and are not exempt from GST.

https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/311772/index.do?r=AAAAAQAHVENDIDEwOQE

Tax Court of Canada: *Canadian Imperial Bank of Commerce v. The Queen, 2018 TCC 109*

ASIA PACIFIC

India

To reduce the number of tax appeals brought before the courts, the Indian Government has announced it will increase the amount of tax that must be at stake for the Government to consider an appeal.

In a July 11, 2018 announcement, the Government said it would permit appeals only where the following revenue is at stake:

- INR2m (USD29,000), up from INR1m, for appeals before the Income Tax Appellate Tribunal (ITAT) and the Customs, Excise, and Service Tax Appellate Tribunal (CESTAT);
- INR5m, up from INR2m, for appeals before the High Courts; and
- INR10m for appeals before the Supreme Court, up from INR2.5m.

This will result in a large number of cases being withdrawn. In direct tax matters, the following percentage of cases will be withdrawn: 34 percent of cases before the ITAT, 48 percent of cases before the High Courts, and 54 percent of cases before the Supreme Court. On average, 18 percent of indirect tax cases will be withdrawn.

Cases below the new thresholds that concern a substantial point of law will be pursued, the Government said.

http://pib.nic.in/PressReleseDetail.aspx?PRID=1538352

Income Tax Appellate Tribunal; Customs, Excise, and Service Tax Appellate Tribunal; High Courts; Supreme Court: *Government Announcement*

WESTERN EUROPE

Latvia

The European Court of Justice has ruled that pawned goods, forfeited by a pawn shop's debtors, that are sold to another taxable person for their intrinsic value and not for resale should not be subject to the EU VAT Directive's special rules for second-hand goods and should instead be taxable under general VAT rules.

The court was asked in what circumstances goods including precious metals or precious stones are no longer "second-hand goods" and are instead a supply of those materials, which are excluded from the EU's profit-margin scheme for second-hand goods.

Under the profit-margin scheme, instead of VAT being calculated based on the sales price, the VAT due is calculated based on the difference between the purchase and sales price of the goods. This is intended to avoid double taxation, as a dealer selling a second-hand good, acquired from a consumer, to another trader would not be able to recover the VAT embedded in its value.

Precious metals or precious stones are excluded from the notion of second-hand goods, and, by the same token, from the derogating profit-margin scheme. As a result, such supplies are instead subject to the general VAT regime.

In the case before the court, E LATS, a taxable person, offered loans to individuals, who were not liable to pay VAT. As collateral for the loan, it would accept goods containing precious metals or precious stones, such as chains, pendants, rings, wedding rings, spoons, and dental material. Where a debtor failed to repay the amount, the pawned goods were sold to other VAT-registered traders.

E LATS sought to apply the profit-margin scheme to the onward supplies, as supplies of second-hand goods. However, the Latvian tax agency disagreed and said that the goods should be excluded from the profit-margin scheme.

The company appealed against the assessment and the case was heard by the Latvian Supreme Court, which referred questions to the European Court of Justice.

The relevant provision of EU VAT law is Article 311(1)(1) of the EU VAT Directive, which provides for the treatment and classification of second-hand goods and sets out the exclusions, including for precious metals and precious stones. "Second-hand goods" are defined as "movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques, and other than precious metals or precious stones as defined by the Member States."

The ECJ noted that Article 311(1)(1) of the VAT Directive expressly mentions actual precious metals and precious stones, but it makes no express reference to items containing precious metals or precious stones that are suitable for "further use."

The ECJ said: "in order for an object composed of precious metals or precious stones to be capable of falling within the category of 'second-hand goods,' within the meaning of Article 311(1)(1) of the VAT Directive, which are eligible for the special margin scheme, and not that of 'precious metals or precious stones,' which are excluded from that scheme, it must have had a functionality other than that which is inherent in the materials of which it is composed, have retained that functionality, and be suitable for further use, as it is, or after repair."

"By contrast," the ECJ continued, referencing an earlier ECJ Advocate General opinion, "where an object has no functionality other than that inherent in its component materials, or is not capable of fulfilling any other function, the object in question does not qualify for the special margin scheme since it is no longer in the same economic cycle and will be useful only for the purposes of being transformed into a new object, which will have a new economic cycle, with the result that the risk of double taxation, which is the basis for the establishment of the margin scheme, disappears."

"The factors which must be taken into account in order to establish, in a particular case, whether a resold item falls within the category of 'second-hand goods' or that of 'precious metals and precious stones' include all the objective circumstances in which the resale has taken place. [...] factors such as the presentation of the items in question, the method of valuing them and the method of charging, namely in bulk (gross/weight) or per item, are objective factors that may legitimately be taken into consideration." The ECJ advised the Supreme Court that the taxable dealers' records and connected invoices may provide objective information to make a determination.

The ECJ concluded by ruling that: "Article 311(1)(1) of the EU VAT Directive must be interpreted as meaning that the concept of 'second-hand goods' does not cover used goods containing precious metals or precious stones if those goods are no longer capable of performing their initial function and have retained only the functionalities inherent in those metals and stones, which is for the national court to determine taking into account all the objective circumstances relevant in each individual case."

http://curia.europa.eu/juris/document/document.jsf?text=&docid=203905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=165510

European Court of Justice: *Case C-154/17*

Netherlands

The Dutch Government has published a summary of its arguments put forward in the General Court of the European Union to support its appeal against the European Commission's decision in the Starbucks state aid case.

Following an investigation, the Commission decided in October 2015 that an advanced tax ruling provided to Starbucks by the Netherlands does not reflect economic reality and grants a selective advantage to Starbucks in breach of EU law.

In its non-confidential version of the decision, published in June 2016, the Commission said: "Starbucks Manufacturing pays a very substantial royalty to Alki (a UK-based company in the Starbucks group) for coffee-roasting know-how [and] it also pays an inflated price for green coffee beans to Switzerland-based Starbucks Coffee Trading SARL," noting the margin on these beans had more than tripled since 2011.

The Commission concluded that its investigation "established that the royalty paid by Starbucks Manufacturing to Alki cannot be justified as it does not adequately reflect market value. In fact, only Starbucks Manufacturing is required to pay for using this know-how – no other Starbucks group company nor independent roasters to which roasting is outsourced are required to pay a royalty for using the same know-how in essentially the same situation … the existence and level of the royalty means that a large part of its taxable profits are unduly shifted to Alki, which is neither liable to pay corporate tax in the UK, nor in the Netherlands."

Disagreeing with the Commission's conclusions, the Dutch Government subsequently appealed, and a hearing took place before the General Court on July 2, 2018.

According to the Dutch Government's summary of its arguments, the outcome of the case revolved around the method used to calculate the taxable profit in the Netherlands of Starbucks Manufacturing BV, and whether this resulted in the correct amount of taxable profit.

The Netherlands' position in the case is based on three arguments:

- That the Commission failed to carry out an analysis based on the arm's length principle under Dutch tax law;
- That the profit determination in the ruling is at arm's length; and
- That the intercompany transactions that the Commission said should have been assessed are not relevant for determining the arm's length profit of Starbucks Manufacturing.

With regards to the first argument, the Government stated:

> "To determine whether or not there is a state aid must be determined on the basis of national law. After all, member states are autonomous with regard to direct taxation. With its analysis, the European Commission is taking it upon itself to impose its own interpretation of the arm's length principle on member states. However, there is no basis for this in Article 107 of the Treaty."

On the issue of whether the profit determination was at arm's length, the Government said:

> "Starbucks Manufacturing BV is a coffee roaster and logistics and administrative service provider in the Netherlands, which performs simple, routine activities. Under Dutch law, an arm's length profit should be determined in case of transactions with affiliated companies. This arm's length profit is determined on the basis of the rules set out in the law and in the Dutch Transfer Pricing Decree. Because of the relatively simple functions it performs, Starbucks Manufacturing BV should receive a remuneration for its routine activities. To determine this remuneration, Starbucks Manufacturing BV has been compared with 20 independent coffee roasters. These coffee roasters were selected because they are very similar to Starbucks Manufacturing BV. The 20 coffee roasters realize a net profit margin that is similar to the remuneration agreed upon in the ruling."

On the matter of the relevance of the transactions highlighted by the Commission, the summary concluded:

> "A part of the income that is earned by Starbucks Manufacturing BV is attributable to functions performed by Starbucks US in the United States. In the United States, these monies are then taxed at a 35 percent rate. The state is of the opinion that this cash flow has no consequences for the business profit of Starbucks Manufacturing BV."

The Netherlands expects the court to deliver its judgment within the next few months. It said that judgments by the General Court of the European Union can be appealed before the European Court of Justice.

https://www.government.nl/latest/news/2018/07/02/point-of-view-of-the-netherland-at-the-general-court-of-the-european-union-on-starbucks

General Court of the European Union: *Hearing On July 2, 2018 On Starbucks Manufacturing BV*

United Kingdom

The UK's Supreme Court has released a ruling in favor of HM Revenue & Customs (HMRC) in a case concerning a VAT claim by a member of a VAT group that was not the representative member of that group.

The case concerned Taylor Clark Leisure Plc (TCL), which between 1973 and 2009 was the representative member of the Taylor Clark VAT Group, and Carlton Clubs, another member of the VAT group.

In about 1990, TCL undertook a group reorganization that involved the transfer of its bingo business to another member of the VAT group, Carlton Clubs Ltd. The transfer to Carlton was effected by a letter dated March 30, 1990 ("the 1990 Asset Transfer Agreement"). In 1998 Carlton ceased to be part of the VAT group.

In 2008 the House of Lords held that UK legislation that imposed a shortened three-year time limit on claims for the refund of overpaid VAT in the period from 1973 to December 4, 1996, without providing for an adequate transitional period, which was fixed in advance, was contrary to European law. In response, the UK Parliament enacted Section 121 of the Finance Act 2008 (FA 2008), which provides an extended time limit for claims relating to a prescribed accounting period ending before December 4, 1996. Instead of requiring that the claim must be made within the three-year time limit, Section 121 required such a claim to be made before April 1, 2009.

In November 2007, Carlton submitted four claims to HMRC under Section 80 of the Value Added Tax Act 1994 for repayment of VAT output tax, which TCL as representative member for the VAT group had overpaid in accounting periods between 1973 and 1998. Carlton submitted these claims without notifying TCL. These claims related to (i) mechanized cash bingo takings, (ii) gaming machine takings, (iii) participation fees, and (iv) added prize money and participation fees.

In January 2009, it submitted a revised claim in which it asserted a right to claim overpaid VAT back to 1973 (before its incorporation in 1990) by relying on the 1990 Asset Transfer Agreement. After initially refusing all of Carlton's claims, HMRC paid the sum claimed by Carlton in its revised claim to TCL (as representative member of the VAT Group) in May 2009.

In September 2010, HMRC confirmed to TCL an assessment for repayment of the sum paid in May 2009 and refused TCL's claim for repayment of the other claims. HMRC gave three reasons: TCL had not submitted claims before the expiry of the time limit imposed by Section 121 of the Finance Act 2008; the claims predating March 30, 1990, had been assigned to Carlton; and, because the VAT group had since been disbanded (on February 28, 2009), the claim for over-declared output tax must be made by the company whose activities gave rise to the over-declaration and Carlton had made that claim.

TCL and Carlton pursued rival appeals against HMRC's decision.

The First Tier Tribunal (FTT) held, among other things, that TCL had not made a claim under Section 80 of VATA and could not rely on Carlton's claims.

On appeal by TCL, the Upper Tribunal (UT) found that TCL had not made a claim and no claim had been made on its behalf before expiry of the time limit.

TCL's further appeal to the Inner House of the Court of Session (IH) on this issue was successful. The IH held that the representative member embodied the VAT group which was a single taxable person, or "a quasipersona" and Carlton's claims fell to be construed as claims on behalf of TCL.

In its July 11, 2018, ruling, the UK's Supreme Court upheld an appeal by HMRC.

Explaining its reasoning for the ruling in favor of HMRC, the UK Supreme Court said:

> "HMRC's principal argument is that the IH erred in holding that a claim for repayment of VAT by an individual member of a VAT group must normally be construed as a claim made on behalf of the representative member of that group. HMRC argued that Carlton's claim was made on its own behalf and TCL could not rely on it to avoid the statutory time bar. TCL relied on the reasoning of the IH and argued that, as the representative member, it was entitled to rely on Carlton's claims. The Court notes that Article 11 of the Principal Directive (like Article 4.4 of the Sixth Directive), is permissive and is not prescriptive; it does not require member states to institute a single taxable person regime and does not lay down a template as to how a member state will treat a group of persons as a single taxable person.
>
> It is clear from the words in Section 43(1) of the Value Added Tax Act 1994 (VATA) that the UK chose to achieve the end which the Principal Directive authorized not by deeming the group to be a quasi-person but by treating the representative member as the person which supplied or received the supply of goods or services. In UK legislation, the single taxable person is the representative member. There is no need to complicate matters by introducing a concept of the VAT group as a quasi-persona in an analysis of the UK legislation. Section 43 of VATA does not make the group a taxable person but

treats the group's supplies and liabilities as those of the representative member for the time being.

It is clear from Section 80 of VATA that HMRC's liability for overpaid output tax is owed to the person who accounted to them for VAT. It is also clear that a claim must be made for the credit or repayment to that person before HMRC comes under any liability to credit or repay. It follows from the operation of Section 43 of VATA that where the representative member has overpaid VAT, the person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as the representative member's agent.

The FTT correctly found that Carlton did not make the claims on behalf of TCL. Four reasons supported this finding. Firstly, when Carlton made the claims, it had long ceased to be a member of the VAT group. Secondly, it appears from the 2007 letters that Carlton had already presented claims in relation to its own business activities in the period after it had left the VAT group. Thirdly, the use by Carlton of the VAT group's VAT registration number was necessary to identify the original source of the allegedly overpaid VAT but did not disclose who was entitled to the repayment. Fourthly, in each of the claims submitted in 2007, Carlton was claiming repayment of sums paid from 1973, long before its incorporation in 1990, as well as in the period after 1990 when it was member of the VAT group. It clarified the basis on which it made those claims in its 2009 revised claim. At the time, both Carlton and HMRC would have readily understood Carlton to be claiming repayment in its own interest. The 2009 revised claim provides relevant and admissible evidence concerning the basis upon which Carlton made the 2007 claims."

The Court concluded:

"Carlton did not act as TCL's agent. Carlton had no actual authority to send the letter on TCL's behalf. In any case, in circumstances where the UT made its decision on the basis that Carlton had submitted the letters on its own behalf, it was not open to an appellate court to find that there was an agency relationship between Carlton and TCL. Furthermore, there is also no basis for the argument that TCL ratified Carlton's claims, thereby conferring retrospective authority upon them. Finally, TCL applied to the Court to make a reference in this case to the Court of Justice of the European Union

> but this is neither necessary nor appropriate. A ruling by the CJEU on the nature of the single taxable person is not necessary for the determination of this appeal. There is also no inconsistency between schedule 1 of VATA and the Court's interpretation of s43 of VATA."

https://www.supremecourt.uk/cases/docs/uksc-2016-0204-press-summary.pdf

UK Supreme Court: *Commissioners for Her Majesty's Revenue and Customs (Appellant) v. Taylor Clark Leisure Plc (Respondent) (Scotland) [2018] UKSC 35*

Dateline July 26, 2018

Europe and the United States aren't just separated physically by 3,000 miles of ocean. Often, the divides are economic, political, social, and cultural. Put it this way, Paris, France, is a very different place to Paris, Texas. And the fact that the latter has a replica Eiffel Tower topped with a cowboy hat only reinforces this.

There is also a **widening gap** to be bridged between these two economic superpowers on **trade matters**. Indeed, it is striking how the US's and EU's trade policies are moving in different directions, save for the latter's retaliatory tariffs on the former. President Trump's first act was to pull the US out of the Trans-Pacific Partnership, and he has also shown his distaste for the existing NAFTA text. Meanwhile, the EU is negotiating and signing free trade agreements like they're going out of fashion.

Given rising concerns about a looming trade war (perhaps it has already begun?), the signing of an **FTA between the EU and Japan** flew in under the radar somewhat last week, even though this is one of Europe's most significant bilateral trade agreements to date. But that's far from the only item on the **EU's negotiating agenda**.

Last month, it launched trade talks with both Australia and New Zealand, and negotiations are already underway with several other key economies, including the Mercosur trade bloc (Argentina, Brazil, Paraguay, Uruguay, and Venezuela, although the latter is currently suspended), Singapore, and Mexico (to update the existing FTA). Furthermore, last month, the EU and Vietnam agreed on the final text of a new FTA that will eliminate 99 percent of taxes on cross-border trade, while 2016 saw the EU-Canada FTA sealed amid great fanfare, and coming into provisional force the following year.

The merits or drawbacks of either policy could be debated at great length, so intricate is the global trading framework. However, it is clear that for businesses, **tariffs are a major concern**, so much so that iconic motorbike manufacturer Harley Davidson is shifting production in order to mitigate against them. And surely it won't be the only manufacturer that will re-examine its supply chain in the coming months and years, depending on how long any trade war is waged for, especially if they are importers of metallic components. So, just as BEPS has forced multinational companies to rethink where and how they are structured and where and how they operate, perhaps **global trade policy** will be the **next major area of concern** at board level. Perhaps the WTO will become the new OECD?

Before I leave this topic, there is one other important item on the EU's trade agenda of course: **Brexit**. And it is anomalous that while the EU is making the job of trade negotiations look relatively easy elsewhere, a trade deal with the **United Kingdom** is being made very hard work indeed, especially since the UK and the EU already effectively have a trade deal in place. It's a bit like knocking down the house you built because you fancy something a bit different, but then forgetting how you built it in the first place. And now you've got two sets of architects arguing over two very different specifications – open plan, light and airy with easy access to the vegetable garden versus all partitioned and walled off with a gated entrance. They haven't even decided whether the gate will be an automatic affair, or whether you have to present your credentials to be let in. Let's just hope the new roof is in place before winter sets in!

Not that I'm taking sides here, but it's obvious to most that the clock is ticking, that the situation is becoming increasingly urgent, and that the British aren't helping their own cause, with the **Government seemingly incapable of showing a united front.** Indeed, if the internal Brexit debate were set to music, it would surely have to be the hokey pokey. "You put your left hand in (the customs union), your right hand out (the common VAT area), in, out, in, out…" Little wonder, then, that the Government is shaking all about. Will it turn itself around? We certainly don't know what it's all about yet.

The **lack of clarity over Brexit policy** on the UK side should come as no surprise really, given that the Government depends on the support of opposition parties in Parliament to pass fundamental constitutional changes. But delicately-poised coalition and minority governments are fast becoming commonplace, with voters unsure these days whether to go left, right, or do the hokey pokey. However, none are in quite as precarious a parliamentary position as **Spain's newly-appointed Prime Minister, Pedro Sanchez**, whose Socialist Party have just 84 seats in the 350-seat lower house. Those sorts of numbers make Theresa May's position look, as the Brits sometimes say, "safe as houses." Although given my former analogy, perhaps another British idiom would have been preferable.

Nevertheless, with the numbers stacked against him, Sanchez has proposed a pretty ambitious economic agenda, including in the area of taxation, where he wants to make it so that **companies**

pay an effective rate no lower than 15 percent by removing the few deductions that are left to companies in Spain.

With the finer details lacking, this is a policy that still needs to be fleshed out, leaving a certain amount of tax uncertainty hanging in the air as a result. However, before we can even entertain the idea that Sanchez will get his agenda through the legislature, surely his own party needs to be fleshed out too. For sure, he's got nowhere near enough bodies on his side of Parliament to carry the day yet.

The likelihood is that at some point, the Spanish parliament will be dissolved, and **new elections called** to achieve some sort of **functioning government**. Sanchez has said as much, although, since taking the reins almost two months ago, he has rather gone off the idea. That's probably because, by all accounts, he will lose. The trouble is, against the backdrop of Spain's current political melting pot, it's anybody's guess what will come next.

The Jester