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a closer look

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Global Tax Weekly – A Closer Look

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Cross-Border Mergers And Acquisitions Under The Tax Cuts And Jobs Act

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The 2017 Tax Cuts and Jobs Act (TCJA) made several key changes that US taxpayers will need to review in structuring cross-border mergers and acquisitions. The TCJA signed into law December 22, 2017, is the most comprehensive tax reform in over thirty years and requires new considerations in this area, including the taxation of controlled foreign corporations (CFC). The changes to the tax law present a range of questions, opportunities, and traps for the unwary.

TCJA's Changes To International Taxation

Under prior law, foreign income of a US person was subject to current taxation at regular US tax rates. The foreign income of a foreign subsidiary of a US company was divided into two categories that were taxed differently in the US. Subpart F income was subject to current taxation at regular US tax rates unless the income was subject to a sufficiently high foreign tax rate (high-tax kickout income). Once the Subpart F income was taxed, the shareholder of the foreign subsidiary had an account for previously taxed income (PTI) with respect to the foreign subsidiary/CFC, and distributions from the PTI account were not subject to additional US tax provided the US tax accounting correctly traced the PTI account. All other income of the foreign subsidiary was not subject to US taxation until the profits were distributed/repatriated back to the US shareholder or the US shareholder sold its investment in the foreign subsidiary. When the US shareholder sold its investment in the foreign subsidiary, gain from the sale was treated as a dividend to the extent of the CFC's untaxed earnings. Gain above the untaxed earnings was taxed as a capital gain, either short or long term depending on the holding period.

Under the TCJA, income of a foreign subsidiary that is a CFC is divided into several categories that are subject to tax at different rates and require many items to be tracked. The income of the US shareholder is divided into regular income and Foreign Derived Intangible Income (FDII). The regular income is subject to tax at regular US tax rates. FDII is taxed at a reduced rate of 13.125 percent. FDII is income from the sale of property for foreign use to or performance of services for foreign customers.

The income of the foreign subsidiary is split into additional categories under the TCJA than under prior law. The Subpart F income rules are generally the same, the other foreign income is divided between global low-tax intangible income (GILTI), which, with certain exceptions, is subject to current US taxation at a rate of 10.5 percent and included in the US shareholder's PTI account, and the net deemed tangible return (NDTR), which is generally not subject to current US taxation. The NDTR is 10 percent of the tangible asset basis of the foreign subsidiary and GILTI is all income, other than Subpart F income and high-tax kickout income, in excess of the NDTR.

The NDTR and high-tax kickout income are generally not subject to US taxation when earned or for a US corporation when repatriated to the US as a dividend under the new participation exemption. However, if the CFC uses such earnings to make an investment in certain US property, the earnings will be included in the US parent's income and subject to regular US taxation. When the US parent sells its interest in the CFC, the participation exemption can apply to the portion of the gain that is recharacterized as a dividend.

There are new rules for the foreign tax credit. Only 80 percent of foreign taxes paid on income that constitute GILTI are creditable, and there are no carryforwards for foreign tax credits associated with GILTI. Foreign tax credits paid on income that constitutes NDTR or high-tax kickout income cannot be claimed if the earnings are distributed as a dividend (now exempt from taxation under the participation exemption), but can be claimed if the earnings are deemed to be repatriated because the CFC makes an investment in US property (income is now taxable). The pooling approach to foreign tax credits was eliminated and foreign tax credits are now apportioned to income under an annual tracing rule. Where a CFC has no income in a given category for a year, foreign taxes paid with respect to that category in that year may be lost and never creditable against US tax.

The rules above are materially different for US individuals, partnerships, or S corporations. The reduced tax rates for FDII and GILTI and the new participation exemption for high-tax kickout income and the NDTR are not available to taxpayers other than C-corporations. For non C-corporation taxpayers, all income of a CFC other than NDTR and high-tax kickout income is subject to current US taxation at individual tax rates on ordinary income. Distributions of high-tax kickout income and NDTR are taxable as dividends and foreign tax credits cannot be claimed for foreign taxes imposed on CFCs – however, foreign taxes on the dividend distributions are creditable.

Individuals that include GILTI or Subpart F income from CFCs usually can make an election to be taxed as though the CFC interest was held through a domestic C-corporation for purposes of taxing the inclusions in income (IRC § 962 election). Where a 962 election is made, the GILTI or Subpart F inclusion is subject to tax at the corporate income tax rate and foreign tax credits are available for foreign taxes paid by the CFC, subject to the 20 percent reduction for GILTI inclusions. When the CFC distributes the income, it is subject to US tax to the extent the amount of the distribution exceeds the amount of US tax previously imposed.The 962 election is not available where the CFC stock is held through a partnership or S-corporation.

TCJA Changes To Definition Of CFC

A CFC is any foreign corporation if more than 50 percent of its voting power or value is owned by US shareholders on any day during the foreign corporation's taxable year. A US shareholder is any US person that is a 10 percent shareholder in the foreign corporation. Only US shareholders of CFCs are required to include Subpart F income and GILTI in their income. Thus, a US person is not required to include Subpart F income or GILTI if their ownership in the CFC stock is less than 10 percent. For Subpart F and GILTI inclusions, the US shareholder only include their proportionate share of the items which do not include the percentage of ownership indirectly or constructively attributed in determining US shareholder status.

Under prior law, a US person had to own 10 percent or more of the total voting power of the CFC to be a US shareholder. Under the TCJA, the US person is a US shareholder if they own 10 percent or greater of the total voting power or value of the foreign corporation.

Partnerships

Many structures use partnerships or other transparent entities to own interest in foreign corporations. Where a US partnership owns 10 percent or more in a foreign corporation, the partnership may now be required to recognize Subpart F and GILTI inclusions even though under the prior law the foreign corporation would not be a CFC. In addition, if the partnership's voting power is under 10 percent but its ownership in the value of the CFC stock is 10 percent or more, the partnership could now be a US shareholder of the CFC. The reduced tax rate for GILTI inclusions may be unavailable to a partnership unless it elects to be taxed as a C-corporation and therefore subjecting the partnership to multiple levels of taxation.

The determination of whether to own the foreign corporation stock through a US corporation will depend on the foreign tax credits and the desirability of current distributions of profits. Where the foreign tax credits are high enough, it may be tax efficient to treat the foreign corporation as a partnership for US tax purposes, avoiding the 20 percent haircut on foreign tax credits from GILTI inclusions. In contrast, where the foreign taxes are low enough, it may be more tax efficient to hold the interest through a domestic C-corporation.

IRC § 338(g) Elections

Under prior law, a US acquirer would purchase a foreign target and the US acquirer would routinely make an IRC § 338 election that causes the target foreign corporation to be treated for US tax purposes as having sold all of its assets to a new corporation and liquidated. The tax attributes of the target foreign corporation are eliminated and the target foreign corporation receives a step-up in the basis of its assets to fair market value. In the case of a domestic target corporation, the deemed asset sale would result in double taxation and was therefore undesirable to the domestic target corporation. Under prior law, the target foreign corporation was often not subject to US taxation on the deemed asset sale so the IRC § 338(g) election was usually beneficial to the US acquiring company.

The elimination of tax attributes, such as earnings and profits and foreign taxes paid, would permit the acquiring company to determine the character of future distributions and related foreign tax credits more easily. The step-up in basis allows additional amortization and depreciation deductions, which would reduce Subpart F income and, subject to limitations, possibly permit the parent to utilize more excess foreign tax credits than if there were no IRC § 338(g) election. The IRC § 338(g) election would eliminate the risk that a purchaser would be required to include Subpart F income earned in the pre-acquisition period. The negative implications are the PTI accounts and foreign taxes paid would be lost, and any US property of the foreign target subject to the grandfather exception of IRC § 956 would lose its grandfather status for certain assets acquired before the corporation became a CFC.

Under the TCJA, the benefits and costs are significantly different, and so acquirers will need to reconsider the benefits of the IRC § 338(g) election. The new participation exemption means that distributions out of the foreign earnings of the foreign target will not be subject to US taxation, and further eliminates the availability of foreign tax credits for those earnings. Thus, retaining untaxed earnings and profits of a foreign target may be beneficial to the acquirer. Foreign tax credits paid will still be relevant to the extent that the foreign corporation makes an investment in US property. Where the untaxed earnings of a foreign target were subject to sufficiently high foreign taxes, it may be beneficial for an acquirer to cause the target to invest in US property. Foreign subsidiaries of US companies may have significant PTI accounts, and the elimination of the PTI accounts is probably undesirable. The step-up in asset basis also presents new considerations. The increased depreciation and amortization deductions may reduce the amount of Subpart F income and increase the GILTI generated by the foreign corporation. The increase in asset basis may increase the NDTR. Similarly, the elimination of the grandfather status for US property for purposes of IRC § 956 may be less significant of a cost, given, that many CFCs will have limited or no income other than GILTI or Subpart F income.

Check The Box And Sell Transactions

Another common acquisition tactic was to have the foreign subsidiary check the box to be treated as a disregarded entity prior to sale which would cause the transaction to be treated as a sale of assets. Under prior law, the sale of stock would be Subpart F income but the sale of assets would not. Under the TCJA, the same check the box election can be made but the treatment as an asset sale would likely generate GILTI income. The reduced US tax rate for corporate US shareholders of CFC sellers is beneficial, but the GILTI inclusion will change the desirability of such structures.

IRC § 965 Deemed Repatriation Transition Tax

The TCJA imposed a one-time repatriation tax on the deferred foreign income of certain foreign corporations. Certain US persons that owned interest in certain foreign corporations were required to take into account a one-time inclusion based on their aggregate deferred income of the foreign corporation. This inclusion was subject to a reduced rate of US tax, at either 8 percent or 15.5 percent, depending on the cash position of the foreign corporation. This tax could be paid in annual installments over an eight-year period. Given the potentially large transition tax liabilities of companies over the next several years, significant due diligence will be required to ensure that all such liabilities have been paid or appropriately reflected in the purchase price.

The deemed repatriation transition tax (DRTT) was imposed on earnings of any "specified foreign corporation", a term that includes both CFCs and any foreign corporation with respect to which one or more US corporation is a US shareholder. This is broader than just CFCs and may not have been tracked by the US shareholder and the change to the constructive ownership rules increased the number of US shareholders in 2017 than in prior years. Many companies with indirect minority holdings in a foreign corporation may not have access to the information necessary to determine whether the foreign corporation was a specified foreign corporation, or, if so determined, the amount of DRTT liability.

Many companies and individuals subject to the DRTT elect to pay the tax in eight annual installments. The installment payments are back loaded, with the majority of the tax due in the final years, so material DRTT liabilities will continue throughout the eight-year period.

Sales By CFC Subsidiaries Of Foreign Corporations

Where a CFC disposes of stock in a foreign corporation in which the CFC is at least a 10 percent shareholder, the gain recognized by the CFC is treated as a dividend to the extent of the untaxed earnings of the foreign corporation accumulated while the CFC held the foreign corporation stock. This deemed dividend likely will not result in US tax to the US shareholders under the new participation exemption. Where there is gain in excess of the amount treated as a dividend, such gain is usually Subpart F income. Under the TCJA, many foreign subsidiaries of CFCs are now CFCs. Therefore, dispositions of lower-tier stock by such CFCs may trigger deemed dividends, Subpart F income, and GILTI.

Foreign Derived Intangible Income (FDII) For Asset Acquisitions

Asset sales by US corporations may benefit from reduced rates of taxation. If a US corporation sells assets to a foreign acquirer for use outside the US, gain from the sale should constitute FDII subject to a reduced federal income tax rate. This may result in providing foreign purchasers with an advantage over domestic purchasers in acquiring targets heavy with intellectual property assets. This may also prompt US corporations to effect acquisitions through their CFCs rather than directly.

Conclusion

The TCJA made significant changes to the US tax law. The changes affect cross-border merger and acquisitions and there are many traps for the unwary. Many structures that are now in place should be reviewed based on the changes to TCJA to see if the structure should be changed.

FIRS Issues Revised Transfer Pricing Regulations

by Taiwo Oyedele, Seun Adu and Olanrewaju Alabi, PwC Nigeria

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Introduction

The Federal Inland Revenue Service (FIRS) has released new TP Regulations with an effective date of March 12, 2018). The TP Regulations incorporate some of the 2017 updates to the OECD's TP Guidelines and some provisions contained in the African Tax Administration Forum's (ATAF) Suggested Approach to drafting TP legislation. The Regulations also introduce administrative penalties for a wide range of offences. We highlight the key changes below.

Purpose

In addition to giving effect to the relevant provisions of the Companies Income Tax Act (CITA), Petroleum Profits Tax Act (PPTA) and Personal Income Tax Act (PITA), the new Regulations have expanded this list to include the Capital GainsTax Act (CGTA) and Value Added Tax Act (VATA).

Persons Covered

The new Regulations replace the concept of "connected taxable persons" with "connected persons" now broadly defined to include persons considered to be related or associated under the UN and OECD model tax conventions and TP guidelines.

Scope

This remains unchanged. The Regulations apply to foreign and domestic related party transactions.

Commodities

The following rules will apply to transactions involving import or export of commodities: a) "quoted prices" for similar commodities that are listed on an international or domestic commodity exchange on the date of the transaction will be deemed to be the transfer price; b) in the case of exports (to related parties) which are subsequently sold to third parties, the transfer price for tax purposes will be the price at which the commodity is sold to the third party (if this price is higher than the quoted price); c) adjustments to the quoted price in (a) or (b) above will only be accepted where there is sufficient evidence to show the basis for the adjustments. Intragroup services Specific tests are to be carried out (in addition to a price assessment) in order to determine the arm's length nature of intragroup charges. These include a benefit test and a shareholder activity test.

Intangibles

Returns from the exploitation of intangibles will only accrue where there is sufficient justification that an entity has contributed to the development, enhancement, maintenance, protection and/or exploitation (DEMPE) of the intangible asset. Tax deductions for any payments for the exploitation rights to intangible assets will be limited to 5 percent of earnings before interest, tax, depreciation and amortization (EBITDA).

Capital-Rich, Low Function Companies

Capital-rich low function companies that do not control the financial risks associated with their funding activities will only be entitled to a risk free return. Profits or losses associated with the actual risk assumption will be allocated to the entities that manage those risks and have the capacity to bear them.

TP Declaration

A connected person is expected to make a declaration of all connected persons resident in Nigeria or elsewhere not later than 18 months after incorporation or within 6 months after the end of the accounting year whichever is earlier. An updated declaration will be required where there is a merger or acquisition of up to 20 percent of an entity or its parent; or any other change in the structure or arrangement of the entity.

Change In Directors

Where there is an appointment or retirement of a director of a connected person, a notification is to be made to the FIRS as part of the TP declaration and submitted within 6 months of the financial year end.

TP Disclosures

Except with respect to a new business, the rules remain unchanged. A connected person is expected to make annual disclosures of transactions covered under the Regulations within 6 months after the end of the accounting year, or no later than 18 months after incorporation, whichever is earlier.

TP Documentation

Connected persons are required to prepare a Master File and Local File as part of their TP documentation in addition to a detailed list of information and analyses contained in the schedule to the Regulations.

Due date: Consistent with the old Regulations, documentation is expected to be in place before the due date for filing income tax returns and is to be submitted upon request within 21 days. Exceptions to the rule: Connected persons with total related party transactions of less than NGN300m (USD834,406) may choose not to maintain the TP documentation. However, they must prepare and submit the TP documentation within 90 days from the date of receipt of a notice from FIRS.

Penalties

These include:

a) Failure to file TP declaration - NGN10m in the first instance and NGN10,000 for every day failure continues.

b) Failure to file updated TP declaration/provide notification about directors - NGN25,000 for every day in which the default continues.

c) Failure to file TP disclosure – the higher of NGN10m or 1 percent of the value of related party transactions not disclosed; and NGN10,000 for every day in which the default continues.

d) Incorrect disclosure of transactions – the higher of NGN10m or 1 percent of the value of related party transactions incorrectly disclosed. e) Failure to file TP documentation upon request– the higher of NGN10m or 1 percent of the value of related party transactions not disclosed; and NGN10,000 for every day in which the default continues.

f) Failure to furnish information/documentation upon request–1 percent of the value of each related party transaction for which information/document relates; and NGN10,000 for every day in which the default continues.

FIRS may grant extensions to filing deadlines under certain conditions, but full penalties will apply if a taxpayer is unable to meet up with the extended timelines.

Safe Harbor

The previous safe harbor provisions relating to statutory or regulator prescribed prices have been removed. The Regulations now provide that the FIRS may publish specific guidelines on safe harbors from time to time.

Dispute Resolution

Under the new Regulations the right to refer a case to the Decision Review Panel (DRP) will now be that of the Head of the FIRS' TP Division. Under the old Regulations, the right to refer an assessment from the FIRS to the DRP was that of the taxpayer. Customs valuation prices applied for customs valuation purposes will not automatically be accepted by the FIRS as arm's length for TP purposes.

Conclusion

The revisions to the TP Regulations are wide ranging and could have a significant impact on the TP affairs of affected taxpayers.

The partial exemption of certain categories of taxpayers from preparing TP documentation will reduce compliance costs for many SMEs.

Many of the changes including requirement to prepare a Master File and local File; TP considerations for intra-group services; Capital-rich low function companies; and the requirement for a DEMPE analysis in respect of intangibles are largely consistent with the OECD's 2017 TP guidelines.

The rule regarding commodities means related parties will be forced to either use a quoted price as their transfer price or provide an analysis showing arm's length adjustments to the quoted price. This will significantly increase the burden of proof on taxpayers and potential disputes.

The introduction of a cap on tax deductibility for royalty payments has been borrowed from ATAF's suggested approach to TP legislation. This is not consistent with the arm's length principle and it is debatable if such a restriction can be introduced via a Regulation.

The penalties that have been introduced are material. It is advisable for taxpayers to make TP compliance a top priority to avoid penalties. While we expect the legality of some of the penalties to become an issue of contention, it is best to make all effort to avoid them.

Taxpayers must begin to pay more attention to their TP affairs. They will need to perform an evaluation of how the new Regulations will impact them. Taxpayers who are behind on compliance must take steps to quickly address all noncompliance. In addition taxpayers must ensure that going forward, they are able to comply as and when due.

Got That GILTI Feeling? A Summary Of The US International Tax Reforms

by Stuart Gray, Senior Editor, Global Tax Weekly

The US tax reforms have made a big splash not only domestically but worldwide. And the ripples continue to reverberate as companies analyze the impact of the measures on their global operations, and governments assess how these measures are likely to affect jurisdictions' relative competitiveness.

Background

The Tax Cuts and Jobs Act of 2017 (H.R. 1)[1] was introduced in the House of Representatives on November 2, 2017, and was signed into law by President Donald Trump on December 22 (becoming Public Law No: 115-97, but referred hereafter as the TCJA) after a relatively brief legislative process that involved several amendments to the original proposals. The TCJA is comprehensive in scope, involving substantial changes to personal income tax, the taxation of small businesses, corporate tax, and international taxation.

The intent of the TCJA was to reduce the tax burden on the majority of taxpayers, particularly those on low- or middle-incomes, small firms, and corporations. The extent to which the law has achieved these objectives has, unsurprisingly for tax reform legislation of this magnitude, been much debated, as has the law's fiscal price tag.

However, generally speaking, as far as corporations are concerned, the changes have been greeted positively, in spite of the inclusion of some unexpected and complex new anti-avoidance rules. In this piece, we concentrate on these corporate tax changes, with an emphasis on the international tax provisions and anti-base erosion and profit shifting measures.

A Summary Of The Corporate Tax Changes

The Tax Cuts and Jobs Act (TCJA) 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 introduced through the provision of a 100 percent dividend tax exemption on the foreign income of domestic corporations, provided the domestic corporation owns at least 10 percent of the foreign subsidiary. A deemed repatriation tax on foreign deferred income of US corporations (the transition tax – discussed below) was also introduced. In addition, several new anti-profit-shifting regimes were introduced, including the Global Intangible Low Tax Income (GILTI) regime, the Foreign Derived Intangible Income (FDII) regime, and the Base Erosion Anti-Abuse Tax (BEAT) rules.

Transitioning Away From Deferral

One of the main criticisms of the pre-TCJA tax code, which featured the highest rate of corporate tax in the OECD, was that it encouraged US multinationals to shelter overseas profits offshore and discouraged them from repatriating these earnings to the US.

Prior to the reform, US tax on the income of a foreign corporation could be deferred until the income was distributed as a dividend or otherwise repatriated. As a result, an estimated USD2 trillion was said to be "locked out" of the US economy.

The transition tax seeks to regularize these holdings as part of the switch from a worldwide corporate tax basis towards a territorial one, with a concessionary tax rate for newly repatriated income. The tax functions by deeming to have been repatriated any untaxed foreign earnings of US companies' foreign subsidiaries. Foreign earnings held in the form of cash and cash equivalents are taxed at a 15.5 percent rate, and the remaining earnings are taxed at an eight percent rate. The tax generally may be paid in installments over an eight-year period.

Anti-Base Erosion

While representing a substantial shift in the US corporate tax landscape, the idea of such a "quasi-territorial" corporate tax regime is nothing new and had been discussed in Congress for several years. A similar proposal was the centerpiece of the comprehensive tax reform discussion draft issued by House Republicans in 2014.[2] Therefore, companies have had some time to get used to the idea. However, the TCJA undoubtedly threw some curve balls at corporate taxpayers in the form of the aforementioned new anti-profit shifting rules.

BEAT

The TCJA introduced a dividend participation exemption, referred to as the Dividend Received Deduction (DRD) on dividend payments received from foreign related companies where the US company holds at least 10 percent of the voting power of the foreign entity, and has done so for at least 365 of the previous 731 days, to include the 365 days prior to the dividend being paid.

Legislated for in Section 59A of the US Internal Revenue Code, the Base Erosion and Anti-Abuse Tax, or BEAT, functions as a kind of alternative minimum tax, ensuring that US corporate share-holders of overseas companies cannot take undue advantage of the aforementioned provision.

Base erosion levels (as defined below) must be computed where the group to which a US corporation belongs have average annual gross receipts in excess of USD500,000 for the previous three years, and where the base erosion percentage (again, to be defined below) exceeds 2 percent in the case of banks and certain securities dealers, and 3 percent for all other industries. It should be noted, however, that BEAT is not required to be calculated in the case of individuals, S corporations, real estate investment trusts, or regulated investment companies.

In the first instance, an affected corporate entity should identify payments that could be deemed to be base erosion payments (*i.e.* amounts paid to the US taxpayer by the related foreign entity for which a deduction could be claimed). Certain payments, such as for inventory and services, and in relation to certain qualified derivative payments, are exempted from this, and where the payment relates to the purchase of depreciable property from the related foreign party, only the depreciation deduction should be taken into account when calculating the overall base erosion benefit, not the whole purchase price.

The overall base erosion benefit will be the total of the base erosion payments, less payments that have been subject to US tax under IRC sections 1441 (Withholding taxes on non-resident aliens) or 1442 (Withholding taxes on foreign corporations).

This figure should then be divided by the deductions available to the taxpayer (with the exception of payments made under IRC section 250 (on foreign derived intangible income (FDII)), payments made under section 245A (on dividends received from certain foreign corporations), net operating losses, and the deductions for services, inventory and in relation to qualified derivatives, as discussed above. This will afford the base erosion percentage of the group; if higher than the 2/3 percent threshold, than BEAT should be calculated, at a rate of 5 percent of the taxpayer's modified taxable income for tax years beginning 2018, 10 percent for those beginning 2019, and 12.5 percent from 2025.

Modified taxable income is calculated as follows: Taxable income + Base erosion tax benefits + (Net operating losses x Base erosion percentage).

The BEAT liability should be compared to the taxpayer's standard tax liability; if the BEAT liability is the higher, than that is the level that should be paid.

GILTI

Under new provisions on Global Low Taxed Intangible Provisions (GILTI) legislated for in section 915AI, the TCJA requires US corporate taxpayers to include in their taxable income GILTI income of foreign related parties in which they have at least 10 percent ownership, in excess of 10 percent of the return on overseas tangible assets.

The International Monetary Fund, in a working paper titled: 'The Tax Cuts and Jobs Act: An Appraisal' explains that:

"This provision taxes at the 21 percent corporate rate the aggregate of the income of controlled foreign corporations that is earned in all foreign jurisdictions that is in excess of 10 percent of qualified business asset investment (i.e., the depreciated value of tangible fixed assets of those controlled foreign corporations, calculated not by the rules that apply to investment in the US, or those of the foreign country, but by reference to a less generous depreciation schedule) but with a deduction for corporate recipients of 50 percent of that income."

"Credit is also given for 80 percent of the foreign tax paid on such income. There is, however, no deferral of the tax and no link to repatriation of the income. This, in effect, imposes a minimum rate on GILTI income of 10.5 percent on such income (when no tax is paid abroad) with the US liability wholly eliminated if the foreign tax on that income is at least 13.125 percent (*i.e.* 10.5 percent divided by the 80 percent foreign tax credit)."

The IMF anticipates that the GILTI provisions may have "substantial bite in practice." At the time of writing, the Office of Management and Budget had completed their review of the GILTI regulations, which were then returned to the Treasury to be finalized, meaning that their issue could be imminent.

FDII

As defined by the International Monetary Fund, the Foreign Derived Intangible Income' (FDII) provides a preferential rate for certain foreign earnings of US-resident firms. The rate for this income is 13.125 percent and the base is defined (i) the earnings in excess of a 10 percent return on its tangible assets (calculated in the same way as GILTI), multiplied by (ii) the proportion of its net income that arises from export sales. From 2026, the rate is scheduled to rise to 16.4 percent.

The bill modifies the definition of "intangible property" to include: any goodwill, going concern value, or workforce in place (including its composition and terms and conditions - contractual or otherwise - of its employment); or any other item the value or potential value of which is not attributable to tangible property or the services of any individual.

Other Base Erosion And Anti-Avoidance Provisions

In line with measures being put in place at international level under the guidance of the OECD's base erosion and profit shifting project, the TCJA also included other anti-base erosion provisions, including the following.

Interest Deduction Limitation

The TCJA limits the deduction for business interest to the sum of: business interest income for the year; 30 percent of the adjusted taxable income of the taxpayer for the taxable year; and the floor plan financing interest of the taxpayer for the taxable year. The amount of any business interest not allowed as a deduction for any year may be carried forward indefinitely.

"Business interest income" is defined as the amount of interest includible in the gross income of the taxpayer for the taxable year which is properly allocable to a trade or business. It does not include investment income. "Floor plan financing interest" is defined as interest paid on debt used to finance the acquisition of motor vehicles held for sale or lease and secured by the inventory so acquired.

The bill includes exceptions for: small businesses that meet the gross receipts test; the trade or business of performing services as an employee; any electing farming business; any electing real property trade or business; and certain regulated public utilities.

Hybrids

The new law denies a deduction for any disqualified related party amount paid or accrued pursuant to a hybrid transaction or by, or to, a hybrid entity.

A "disqualified related party amount" is defined as any interest or royalty paid or accrued to a related party to the extent that: the amount is not included in the income of such related party under the tax law of the country of which such related party is a resident for tax purposes or is subject to tax; or the related party is allowed a deduction with respect to such amount under the tax law of such country.

A "hybrid transaction" is defined as any transaction, series of transactions, agreement, or instrument one or more payments with respect to which are treated as interest or royalties and which are not so treated for purposes the tax law of the foreign country of which the recipient of such payment is resident for tax purposes or is subject to tax.

A "hybrid entity" is defined as any entity which is either: treated as fiscally transparent under US law but not for the purposes of the tax law of the foreign country of which the entity is a resident for tax purposes or is subject to tax; or treated as fiscally transparent for purposes of such tax law but not so treated for purposes of US law.

Appraising The TCJA – A Mixed Bag Of Benefits And Distortions?

As is to be expected with such an historic and far-reaching tax reform, much has been written and said about its numerous provisions, especially on the international tax measures.

The International Monetary Fund in particular has taken a keen interest in the finer details of the TCJA's international tax provisions and its anti-avoidance measures, having devoted much of its post-US mission report to the topic this year, as well as releasing two working papers covering the reforms over the summer, as previously mentioned. And the IMF has seemingly concluded that while the reforms will likely benefit US taxpayers and the wider US economy as intended, there could equally be other, more negative unintended consequences, as well as international spillovers.

In examining the international aspects of the reforms, the IMF has repeatedly suggested that there is scope to strengthen the design of various of the international provisions in the TCJA, particularly with respect to anti-profit shifting regimes, GILTI and FDII rules, and the BEAT.

With respect to GILTI, the paper said that, ideally, the tax should be imposed on a country-by-country basis so that it falls on all profits earned in low tax jurisdictions, instead of on the average global profits of multinationals that are in excess of a deemed 10 percent return on tangible assets.

"As it stands, the link of this provision to worldwide profits and tangible capital will create complex and distortionary effects on firm's global investment decisions and may dilute its effectiveness in disincentivizing cross-border tax competition," the IMF stated.[3]

The paper was also critical of the associated FDII rules, which it said distort investment decisions by effectively providing more favorable tax treatment of exports than domestic sales. Indeed, the IMF goes as far as suggesting that FDII should be eliminated to "provide more of a level playing field for global investment decisions."

Furthermore, the IMF said the GILTI/FDII rules are ineffective in encouraging the relocation of tangible investments that are out of the US, "a tendency that will be strengthened for those projects that generate sizable commercial payments with related parties in other jurisdictions (since these may become subject to the BEAT if such intercorporate transactions are paid from a US entity)," it said.[4]

With regards to the BEAT regime, the IMF has said that while this provision will likely serve its intended function of helping to curtail various base erosion and profit shifting behaviors, it could also affect legitimate commercial activities not linked to tax avoidance and create additional economic distortions.

International Spillovers

The IMF has also concluded that the TCJA has the potential to "significantly reshape the international tax system."[5] And multinational companies are expected to be the main beneficiaries of this process. By significantly enhancing the US's international competitiveness, reactionary policies elsewhere in the world could further reduce the tax burden of groups' operations overseas also.

There is little firm evidence yet that America's competitors are putting in place measures to respond to the US corporate tax cuts, but some recent developments indicate that the TCJA has given certain governments and national business communities much food for thought, particularly in those jurisdictions that feel most exposed to the heightened competition. The Canadian Government, for example, announced earlier in the year that it was studying the potential impact of the TCJA on Canada,[6] while the US corporate tax reforms are generating much debate about the future of Ireland's corporate tax regime. Business associations in Germany have also called on the Government to respond by reducing the corporate tax burden.

What is more evident is that these changes are already having a huge impact on the way in which multinational corporations structure their operations and plan their tax affairs. Since the TCJA was passed, there has been a steady stream of companies announcing in their earnings updates that, in the long-term, they stand to benefit from the much-reduced corporate tax rates. Thanks to the transition to a more territorial tax regime, some companies have also announced plans to invest substantial new sums domestically. However, such statements are often qualified with a measure of caution as taxpayers continue to work out how the anti-avoidance and other new measures will affect their businesses.

In Summary

In summary, the international measures of the TCJA are a mixture of carrot and stick, intended mainly to encourage more domestic investment and deter the shifting of profits and operations overseas. However, perhaps the only objective conclusion than can be drawn from appraising the measures is that, while they are benefiting US taxpayers in many respects, they are far from perfect, and could generate unintended consequences - indeed, some warn that certain aspects of the reforms might achieve the exact opposite. Nevertheless, regardless of their advantages and drawbacks, these changes are a game-changer not just for multinationals, but potentially for the global corporate tax landscape.

Endnotes

1 https://www.congress.gov/bill/115th-congress/house-bill/1/text

2 https://waysandmeans.house.gov/UploadedFiles/Ways_and_Means_Section_by_Section_Summary_FINAL_022614.pdf

3 http://www.imf.org/en/News/Articles/2018/06/13/ms061418-2018-United-States-article-iv-consultation-concluding-statement

4 *Ibid*

5 https://www.imf.org/en/Publications/WP/Issues/2018/08/07/The-Tax-Cuts-and-Jobs-Act-An-Appraisal-46137

6 https://www.cbc.ca/news/business/morneau-economists-budget-1.4539429

FATCA Back In The News

by Mike DeBlis, DeBlis Law

That pestilent FATCA law is back in the news again. Back on July 9, 2018, the Treasury Inspector General for Tax Administration (TIGTA) issued a report (July TIGTA Report) highlighting the IRS' shortcomings in enforcing FATCA. For those unfamiliar with FATCA, it stands for "Foreign Account Tax Compliance Act." FATCA was the culmination of a three-year campaign by Washington to combat offshore tax evasion. It has its genesis in a 2009 settlement with UBS AG where the Swiss bank agreed to turn over to the U.S. the names of more than 4,000 US taxpayers with hidden offshore accounts.

FATCA was loaded to the hilt with various tax provisions, including Code Sec. 6038D. The latter provision requires both US citizens and foreigners living in the US to make extensive disclosures about their offshore holdings on Form 8938 or face stiff penalties. Foreign financial institutions also must report more detailed information on income earned by their US account holders, or face possible US tax penalties.

This is not the first time that TIGTA has published a report highly critical of the IRS in its offshore enforcement. Back on September 11, 2017, TIGTA issued a report revealing how the IRS his falling short of maximizing the full potential of information that it has received from foreign countries, not the least of which includes bulk data resulting from the automatic exchange of information. TIGTA called the IRS out, even going so far as to criticize its data sharing capabilities with foreign governments. TIGTA's July Report is yet another bombshell for the IRS.

Below are some critical points brought to light by the July TIGTA Report:

Despite spending nearly USD380m in its FATCA efforts, the IRS has taken "limited or no action" on a majority of the planned activities enunciated in the FATCA Compliance Roadmap. By way of background information, the underlying goal of the IRS Roadmap is to strategically implement compliance planning activities involving FATCA data and to provide a baseline for future compliance planning and implementation activities. Of the 31 activities listed in the Roadmap, the IRS has only taken action on 24. However, for 16 of those 24 activities, TIGTA was quick to point out that action was either limited or in the early stages of development. In addition, it found delays of up to two years in implementing 20 of the 24 activities, 10 of which are still not fully implemented as of today's date. On six of the 31 activities, the IRS has yet to even take any action and TIGTA identified delays for those six activities of up to two years and counting.

As disturbing as these lackluster statistics might be, what's worse is that the IRS has spent well over USD200m on IT costs over the past few years.

One of the critical FATCA provisions requires participating FFIs to file Form 8966, FATCA Report, annually with the IRS. Information required to be reported on this form includes the name, address, and Taxpayer Identification Number (TIN) of each account-holder who is a specified US person; the account number; the account balance or value; and the gross receipts and gross withdrawals or payments from the account. The IRS began accepting Forms 8966 in January 2015.

For the two-year period marked 2015-2017, 8.7 million new records were included in files submitted by FFIs to the IRS. Of these, however, more than 4.3 million did not include (or included invalid) taxpayer identification numbers (TIN). As a result, the form was rejected. As of 2017, nearly one third of all Forms 8966 filed were rejected.

The IRS did not fair much better on the Form 8938 front. The absence of TINs or invalid TINs reported by FFIs severely hampered the IRS's efforts to match FFI and individual taxpayer data, making it all but impossible for the IRS to identify and enforce FATCA requirements for individual taxpayers. In other words, FATCA has virtually no teeth.

To add insult to injury, the IRS was criticized as being too casual when it came to enforcing withholding agent compliance with the FATCA until after TIGTA provided feedback. Recall that non-compliant foreign financial institutions face a mandatory 30 percent withholding on payments from US-based financial institutions. This is hypocritical in light of the fact that the IRS enforces its eligibility policy for voluntary disclosure as rigidly as strict constructionists interpret the Constitution — disclose your foreign assets before we discover them otherwise you are ineligible to participate.

TIGTA Recommendations

TIGTA made six recommendations to the IRS. They are as follows:

1. Establish follow-up procedures and initiate action to address error notices related to file submissions rejected by the ICMM;
2. Initiate compliance efforts to address taxpayers who did not file a Form 8938 but who were reported on a Form 8966 filed by an FFI;
3. Add guidance to the Form 8938 instructions to inform taxpayers on how to use the FFI List Search and Download Tool on the IRS's website;
4. Initiate compliance efforts to address and correct missing or invalid TINs on Form 8966 filings by non-IGA FFIs and Model 2 IGA FFIs;
5. Expand compliance efforts to address and correct the invalid TINs on all Form 1042-S filings by non-IGA FFIs and Model 2 IGA FFIs; and
6. Initiate compliance efforts to compare Form 1099 filings with valid TINs to corresponding Form 8938 filings.

The IRS agreed to four of the six recommendations, committing to:

1. Establishing follow-up procedures and initiating action on error notices with the FFIs;
2. Continuing efforts to systemically match Form 8966 and Form 8938 data to identify nonfilers and underreporting related to U.S. holders of foreign accounts and to the FFIs;
3. Informing taxpayers on how to obtain global intermediary numbers; and
4. Strengthening overall compliance efforts directed toward improving the accuracy of reporting by Form 1042-S filers.

The IRS parted ways with TIGTA on its' recommendation that the IRS correct missing or invalid TINs in jurisdictions that don't have an agreement in place with the United States. The IRS' rationale for doing so is that it would be too onerous financially, since every TIN would have to be individually reviewed when an FFI submits a Form 8966.

What Does This Mean For A Taxpayer With Unreported Foreign Assets?

FATCA has been in effect for eight years and doesn't appear to be going away. The law is so complex and so confusing that it befuddles event he experts, causing many a tax professional to call it a "riddle, wrapped in a mystery, inside an enigma." It should come as no surprise that FFIs are having fits trying to implement it.

It is worth noting that the backlash against FATCA was so great that it spawned a movement to challenge the constitutionality of the law. The lawsuit, filed in an Ohio federal court, contained some pretty good arguments. For example, the lawsuit maintained that the high penalties, as well as the rather arbitrary nature of these penalties, along with mandatory withholding and a few other provisions violated the excessive fines clause of the Eighth Amendment.

Other plaintiffs that joined in the lawsuit argued that FATCA had denied them access to banking and financial services in foreign countries, because these institutions wanted nothing to do with U.S. expats and their political baggage. Expats have been complaining about this issue for years. Can someone say, "discrimination?"

Unfortunately, the Ohio court dismissed the lawsuit. Undeterred, the plaintiffs appealed to the Sixth Circuit Court of Appeals, but the Sixth Circuit in in *Crawford v. United States Department of the Treasury*, 868 F.3d 438 (6th Cir. 2017) affirmed the ruling of the Ohio court on the basis that the taxpayers "lacked standing" to challenge the constitutionality of the law.

Finally, on April 2, 2018, this saga came to an end, when the United States Supreme Court denied certiorari to review the ruling of the United States Court of Appeals for the Sixth Circuit. In refusing to hear the case, the US Supreme Court essentially put its stamp of approval on the district court's ruling that denied the plaintiffs' claims. The Court did not provide any reasons or explain why, which is customary when it denies a writ of certiorari.

The legal precedent created by this case is a major setback to the anti-FATCA movement, not to mention taxpayers with unreported foreign assets. Implicit in the US Supreme Court denying writ is the notion that courts will continue to uphold FATCA and its reporting requirements. In other words, FATCA is here to stay.

What does this mean for taxpayers with unreported foreign assets? In light of the current economic and political climate, the best advice is to get right with the IRS sooner rather than later. Because the stakes could not be any higher, it is best to seek advice from a seasoned tax professional before taking matters into your own hands.

Topical News Briefing: A Shake-Up Down Under

by the Global Tax Weekly Editorial Team

Despite political gridlock, Australia appears capable of legislating for the sort of routine BEPS-related tax changes that are commonplace the world over on a regular basis.

As reported in this week's issue of *Global Tax Weekly,* hybrid mismatch rules received royal assent on August 24 and will generally apply from January 1, 2019. And earlier that month, Parliament approved legislation that will give legal force to the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

However, following another changing of the guard at the top of Government with former Treasurer Scott Morrison having recently succeeded Malcolm Turnbull as Prime Minister, more fundamental questions about the direction of corporate tax policy remain unanswered.

Morrison is a firm advocate of the Enterprise Tax Plan, under which the headline corporate tax would be gradually lowered from 30 percent – now high by international standards – to 25 percent, which is much closer to the OECD average. However, the Senate, where the governing Liberal/National coalition government is in a minority, continues to stand in the way. As such, Morrison has seemingly taken on board the political reality, and has said that he will instead focus tax cuts on small businesses – a plan which may be more acceptable to the opposition Labor Party opposed as it is to tax cuts for large corporations, and whose votes are needed to push such legislation through.

However, in a development that could cast further doubt on the future make-up of the tax regime, a committee of Australian MPs has now called on the Government to carry out a complete review of the tax system by 2022 (also reported in this week's issue).

Such calls are hardly new in Australia. Indeed, a number of root-and-branch reviews of the Australian tax system have been carried out by governments of various political stripes over the past 10 to 20 years, with little in the way of change actually resulting. Therefore, perhaps the latest call for tax reform should be taken by taxpayers with a pinch of salt.

Nonetheless, the additional uncertainty that aspects of the Australian tax system may or may not be subject to change at some point in the future is unhelpful, and is likely to serve merely to fuel existing uncertainty.

It could be the case that another election is required to shift the political deadlock and enable the corporate tax cuts to proceed through Parliament. However, that is dependent on the Liberal/National coalition winning the vote and taking both House and Senate, and such an outcome is by no means guaranteed. In the meantime, as corporate tax rates continue to fall around the world, Australia will look increasingly like a corporate tax outlier.

Determining UK Employment Status

by Andrew Constable, Kingston Smith, independent member of Morison KSi

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Determining whether an individual should be treated as employed or self-employed for UK tax purposes is not always straightforward.

There are, of course, many clearcut cases. But there are individuals whose status is not immediately apparent. With increasing numbers of individuals adopting new types of working arrangements (*e.g.* through online platforms), more and more businesses are having to consider cases where the answer is not obvious.

The UK legislation relating to employment status is extremely limited. But over the years a substantial body of case law has built up, as the courts have looked at and given judgment on various types of working arrangements. This body of case law contains the various principles that need to be considered and applied in the more difficult employment status decisions.

One principle that has evolved from case law is that the following three characteristics must be present for an individual to be treated as an employee:

- There must be 'mutuality of obligation' (*i.e.* the employee must agree to provide work in consideration for the engaging business providing payment);
- The engaging business must have control over the individual;
- The individual must be required to provide personal service.

A range of other factors may need to be considered, such as the extent to which the individual takes financial risk, and whether they provide their own equipment.

In marginal cases, it can be difficult to arrive at a definitive conclusion about whether an individual is employed or self-employed. Indeed, in some cases, a business may never be completely satisfied that they have reached the right answer, or that their decision will go unchallenged in the future.

Where a business takes on an employee in the UK, the business must pay the employee's salary, plus employer's social security contributions (at 13.8 percent), and potentially pension contributions (of at least 2 percent) and the apprenticeship levy (at 0.5 percent). The business will have to process payments through a payroll scheme, withhold tax and social security contributions and pay these directly to HMRC, and ensure the employee benefits from certain statutory employment rights.

None of these issues arise when a business takes on a self-employed individual. Therefore, employment status decisions do have real and significant consequences.

Businesses clearly want to avoid wrongly treating an employee as if they were self-employed. To prevent this, some businesses simply refuse to engage with individuals on a self-employed basis; they either treat all individuals as employees, or else insist that individuals engage through their own personal service company (which puts the obligation to determine the nature of the relationship on the personal service company).

In 2016, the UK government commissioned the Taylor Review to look into 'modern working practices'. The resulting report was published in July 2017, and following on from this the government published consultation documents into four aspects of the UK working environment, one of which was employment status. The consultation closed on June 1.

The government recognises some of the challenges that businesses face as a result of the current employment status rules. To increase clarity and certainty, they suggested various possible new approaches, including:

- **Setting the current rules in legislation.** This approach would involve preparing a definitive list of all the current principles, setting these out in primary legislation, and then using secondary legislation (which could be updated regularly to take account of changes in work patterns as they emerge) to provide greater detail as to what the various principles mean in practice;
- **Creating a new 'precise test' to determine employment status.** This test would be based as far as possible on objective criteria, which could include things such as the length of the engagement, and the percentage of the individual's income that is expected to derive from the engager;
- **Creating a 'simpler test'.** This would determine employment status on the basis of a small number of factors, and could be similar to the 'ABC test' used in the USA.

Overall, a new ‘precise test’ is likely to be the most attractive option for reform. This would stand the best chance of creating certainty for businesses and individuals and could be designed to ensure that counterintuitive results (*e.g.* individuals who look like employees but are treated as being self-employed) are kept to a minimum. Since 2013 the UK has had a ‘statutory residence test’, and while this can require a large amount of information to determine whether someone is UK tax resident, it is valued for its ability to arrive at a definitive result; some kind of ‘statutory employment test’ is likely to be welcomed for the same reason.

None of the suggested approaches would be easy to get right, and the second and third of these in particular could result in individuals being treated as employees for the first time. However, the government appears to be taking things slowly and carefully, and has promised that if they do decide to make significant changes to the current rules they will ensure that businesses and individuals have plenty of time to adjust and prepare.

Greater certainty in the area of employment status would be warmly welcomed by all those who do business in the UK, and encouragingly this is now something that is firmly on the radar.

Topical News Briefing: Cold-Comfort Letters

by the Global Tax Weekly Editorial Team

While member states at the center of the European Union's tax ruling controversy tend to disagree profoundly with the reasoning used by the European Commission in reaching its conclusions, recent developments suggest that this particular strand of the EU's BEPS-influenced anti-avoidance campaign could be changing tax ruling policy at jurisdictional level nevertheless.

As reported in this week's issue of *Global Tax Weekly*, last week the European Commission published the non-confidential version of its decision that Luxembourg granted undue tax benefits to energy firm Engie worth around EUR120m (USD139m). The crux of the Commission's case is that by allowing Engie to avoid paying taxes on its profits for almost a decade, Luxembourg granted the firm an undue "selective advantage" that gave it an illegal competitive advantage under EU state aid laws.

However, the unprecedented use by the Commission of the state aid regime to effectively challenge companies' transfer pricing arrangements in certain member states has been questioned not only by member states themselves, but also by legal experts. For its part, the Luxembourg Government announced via Minister of Finance Pierre Gramegna on August 31, 2018 that it would appeal the Commission's ruling, contending that it "did not grant Engie state aid incompatible with the internal market." Similarly, the Netherlands is challenging the European Commission's decision with respect to an advance tax ruling provided to Starbucks, and its appeal is similarly predicated on the premise that state aid rules don't apply in this case

However, signalling something of a shift in attitude in government, Gramegna conceded that the arrangements in question "might have resulted in a situation that no longer reflects the current spirit of the national and international tax framework." It was the sort of admission that could presage a change in the way Luxembourg goes about concluding advance tax rulings.

The unwelcome international scrutiny on the Dutch corporate tax rules and practices has prompted the Government to go even further by reviewing the way in which tax rulings are drawn up and delivered. As also reported in this week's issue, this culminated in the launch at the end of August 2018 of a public consultation on the jurisdiction's cross-border tax ruling policies, which focuses on issues of substance and transparency.

Ireland, which is appealing the Commission's decision that it conferred a selective advantage on Apple to the tune of EUR14bn, also recently updated its guidance on changes to how taxpayers can obtain advance tax rulings on complex tax matters, such as on the tax treatment of intra-group transactions.

With advance tax rulings – and large companies' relationships with tax authorities more generally – under the BEPS spotlight, can we expect more countries to begin to change rules and processes in this area? It's certainly not out of the question.

Corporate Tax Rates Continue To Fall, Says OECD

Countries have used recent tax reforms to lower taxes on businesses and individuals, with a view to boosting investment, consumption, and labor market participation, continuing a trend that started a couple of years ago, according to the OECD.

This is the conclusion of the OECD's Tax Policy Reforms 2018 report, published on September 5, which describes the latest tax reforms across 35 OECD members, Argentina, Indonesia, and South Africa, and which identifies major tax policy trends.

The report notes that significant tax reform packages were introduced in Argentina, France, Latvia, and the United States, with a strong focus on both supporting investment and enhancing fairness. Other countries have introduced tax measures in a more piecemeal fashion, it said.

With regards to corporate taxes, the OECD found that the trend towards lower corporate tax rates has continued, driven largely by reforms in high-tax jurisdictions. However, while corporate tax cuts appear to be regaining momentum, they are not falling on the same scale as before the financial crisis, the OECD said. According to the report, the average corporate tax rate across the OECD is 23.9 percent in 2018, down from 32.5 percent in 2000.

"Among the countries that introduced significant corporate tax reforms were a number with high corporate tax rates, where tax reform was long overdue," observed Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration. "While these corporate tax cuts have created some concerns of a 'race to the bottom,' most of these countries appear to be engaged in a 'race to the average,' with their recent corporate tax rate cuts now placing them in the middle of the pack. We will be closely watching how other countries respond to this trend in the future."

Another recent trend identified by the OECD in its review was the introduction by several countries of personal income tax cuts, particularly for those on low and middle incomes. A common strategy has been to increase earned income tax credits, which can achieve dual goals of improving labor market participation and enhancing the progressivity of the tax system, it said.

However, reforms to social security systems have been limited, while value-added tax burdens have largely stabilized, the report found, with South Africa the only jurisdiction to increase its standard rate of VAT in 2018. However, high VAT rates have led many countries to look for alternative ways of raising additional VAT revenues, notably through tax administration and anti-fraud measures, the OECD said.

Other trends identified in the review include widespread excise tax increases, which are largely intended by governments to discourage consumption of alcohol and tobacco, while taxes on sugar-sweetened beverages are also becoming more common, having recently been introduced in Ireland, South Africa, and the United Kingdom.

Environmental tax reforms have continued to focus on energy taxes, where efforts have been made to go beyond road transport, the OECD noted. However, tax reforms outside of energy and vehicles, such as taxes on waste, plastic bags, or chemicals, have been less prevalent.

Bulgaria To Implement EU Corporate Tax Anti-Avoidance Rules

Bulgaria's Ministry of Finance has published for consultation legislation that would transpose the EU's Anti-Tax Avoidance Directive into national law.

ATAD I contains five legally binding anti-abuse measures, which all member states are required to apply against common forms of aggressive tax planning. These include an exit tax, controlled foreign company rules, a general anti-avoidance rule, limitations on interest deductions, and rules to prevent the double non-taxation of certain income.

EU member states have until December 31, 2018, to transpose the directive into their national laws and regulations, with the exception of the exit taxation rules, which must be transposed by December 31, 2019.

Included in the draft law published by the Bulgarian Ministry of Finance on August 31 are proposals to align Bulgaria's CFC rules with ATAD I, and the introduction of interest limitation rules that would restrict the amount of interest payments taxpayers may deduct (including on loans between related and unrelated parties) to 30 percent of EBIDTA, subject to a safe harbor of BGN500,000 (USD296,000) per year.

If approved, the measures would apply from January 1, 2019.

Phillipines' Lower House Approves Corporate Tax Cuts

The Philippines' House of Representatives recently approved, on second reading, a bill to cut the country's corporate income tax rate and modernize tax incentives.

The Tax Reform for Attracting Better and Higher Quality Opportunities (TRABAHO) Bill approved by the House proposes to gradually lower the corporate income tax rate to 20 percent by 2029 from its current rate of 30 percent.

The TRABAHO bill also proposes to modernize the country's tax incentive regime to ensure it is targeted, time-bound, and effective. Income tax incentives would generally be granted for a maximum of five years.

The proposed law further allows an additional tax reduction of 100 percent on innovation and R&D expenses.

Ireland Publishes Corporate Tax Roadmap

Ireland is to introduce Controlled Foreign Company (CFC) rules and anti-hybrid rules under a new Corporation Tax Roadmap.

The Corporation Tax Roadmap was published by Finance Minister Paschal Donohoe on September 5. It sets out the following policy commitments:

- Legislation will be introduced in Finance Bill 2018 to implement new CFC rules with effect from January 1, 2019, which will enable the authorities to attribute undistributed income arising from non-genuine arrangements put in place for the purpose of obtaining a tax advantage;
- The Government will introduce an interest limitation rule that is compliant with the EU's Anti-Tax Avoidance Directives (ATADs);
- Finance Bill 2019 will introduce new anti-hybrid rules from January 1, 2020;
- Legislation relating to anti-reverse hybrid provisions will be introduced in a later Finance Bill;
- The Government will consult later this year on general and detailed technical issues relating to the interlinked issues of interest and hybrid entities/instruments;
- Legislation will be introduced in Finance Bill 2019 to update Ireland's transfer pricing rules with effect from January 1, 2020, and the Government will consult on the proposals in early 2019;
- Legislation will be introduced to replace Ireland's current limited exit tax regime with an ATAD-compliant exit tax, to take effect no later than January 1, 2020;
- Legislation will be introduced in Finance Bill 2019 to fully implement the EU's DAC6 Directive on the mandatory disclosure of tax planning arrangements;
- Regulations will be issued before July 2019 to implement the EU's Dispute Resolution Mechanism Directive;
- The Government will review Ireland's general anti-abuse rule to ensure that it is consistent with the ATAD; and
- The Government will consult in early 2019 on the alternative options of moving to a territorial tax regime or conducting a substantial review and simplification of the rules for the computation of double tax relief.

Donohoe explained that: “It is vital to have a consensus-based, globally agreed approach to international tax. Tax rules need to continue to evolve to match the modern world, and that evolution can best take place through international agreement at the OECD and the BEPS Inclusive Framework. Ireland will continue to foster economic activity in Ireland, the EU, and beyond by adapting and evolving our corporate tax regime while maintaining our key 12.5 percent rate.”

“This Roadmap demonstrates the Government’s commitment to continuing the significant progress already made to strengthen Ireland’s corporation tax system now and in the years to come.”

Netherlands Considers Changes To Tax Ruling Practice

The Dutch Government is seeking views from the public on how its advance cross-border tax ruling policies can be improved, with a view to ensuring that companies benefiting from such rulings have sufficient economic substance in the Netherlands.

In an announcement by the Ministry of Finance on August 31, Secretary of State for Finance Menno Snel said that while advance tax rulings are an important tool to provide businesses with clarity over their tax positions, there is a debate as to whether such rulings should be granted to firms that "make a limited contribution to the real economy."

"That is why various options have been mapped out for a tightening of the so-called substance requirements," he explained.

Snel confirmed that substance tests must already be met in some cases of companies seeking a tax ruling, but not all. Such tests include that at least half of the company's board reside in the Netherlands.

One option being explored as part of the consultation is the introduction of a new rule requiring that a minimum number of employees perform "relevant work" in the Netherlands. Another option under consideration would exclude companies "largely located in countries on a so-called black list of tax havens" from applying for advance rulings.

Additionally, the Government is considering whether time limits should apply to tax rulings, and seeking views on how the rulings process can be made more transparent.

The consultation concludes on September 20, 2018, with the Government's plan expected to be submitted to Parliament later in the year before a final version of the proposed changes is made known in January 2019.

EU Publishes Details Of Decision Against Luxembourg Tax Ruling

The European Commission has published the non-confidential version of its decision that Luxembourg granted undue tax benefits to energy firm Engie worth around EUR120m (USD138.9m).

An in-depth investigation of Luxembourg's dealings with Engie was launched in September 2016. The Commission announced its decision on June 20, 2018, and made public its letter to Luxembourg explaining the judgment on September 4.

According to the Commission, tax rulings granted by Luxembourg allowed two Engie group companies to avoid paying taxes on almost all their profits for about a decade. The Commission said in June that Luxembourg's tax treatment of two intra-group financing structures implemented by Engie did not reflect economic reality and that the tax rulings issued by Luxembourg endorsed an inconsistent treatment of the same transaction both as debt and as equity.

The non-confidential version of the Commission's communication to Luxembourg stated that it "considers that the tax treatment endorsed by the contested tax rulings constitutes a selective advantage." The document added that "the advantage granted to Engie on the basis of the contested tax rulings would not be available to other undertakings in a legal and factual situation comparable to Engie in the light of the objective" of Luxembourg's tax system.

The Commission concluded that Luxembourg's tax treatment of Engie constitutes illegal state aid. "That aid results in a reduction of charges that should normally be borne by Engie in the course of its business operations and should therefore be considered as granting operating aid to Engie," it explained.

The Commission stated that the "tax treatment granted on the basis of the contested tax rulings relieves Engie of a tax liability it would otherwise have been obliged to bear in their day-to-day management of normal activities."

The Commission has directed Luxembourg to recover the "incompatible and unlawful aid." It estimated Engie to owe around EUR120m in unpaid tax.

EU Still Pursuing New Digital Tax

The European Commission is continuing to push for the adoption of a digital services tax.

Speaking to reporters after a meeting of European finance ministers, Commission Vice-President Valdis Dombrovskis argued that the EU "needs a modern taxation system, which reflects the developments in our economies." He explained that all those who spoke at the meeting "agreed that it is important that digital companies pay their fair share."

Dombrovskis said that a long-term solution on digital taxation is being sought at an international level, with the OECD and the G20 the preferred channels through which this could be achieved. However, in the meantime, the Commission has proposed an interim solution of a digital services tax.

Dombrovskis stressed that the Commission "fully supports the Austrian Presidency in its efforts to swiftly adopt our proposal for an interim solution." He said that the Presidency has kept the issue of digital taxation "high on the agenda" and that progress "is being achieved."

Dombrovskis revealed that "many member states" had given "positive signals" during the meeting. The Commission "look[s] forward to turning words into deeds."

The Commission has proposed the introduction of a temporary three percent excise tax on turnover from certain online activities. The Commission's preferred long-term solution is reform of the corporate tax rules to ensure that profits are registered and taxed where businesses have significant interaction with users through digital channels.

Argentina Announces Taxes On All Exports

The Argentinian Government has published a decree in the official gazette providing for a tax on exports of all goods from Argentina.

The decree, published on September 4, 2018, places a temporary tax of up to 12 percent of the customs value of exports and is effective from the decree's publication date. The tax is levied in addition to existing taxes on exports and expires at the end of 2020.

The export tax is limited to ARS0.04 (USD0.10) per US dollar of the taxable value of exports of primary products, such as agricultural produce and minerals, and ARS0.03 per US dollar on all other exports.

Greece Signals End To Austerity With Tax Cut Plan

Greek Prime Minister Alexis Tsipras plans to reduce corporate tax as part of package of tax relief measures, including also cuts to property tax and value-added tax.

Tsipras told a business conference in Thessaloniki on September 9 that the tax cuts have been made possible because Greece, which exited its nine-year baliout program in August 2018, is exceeding its budgetary targets.

According to Tsipras, the Government will seek to cut property tax in 2019, before reducing the rate of value-added tax to 22 percent in 2021. The standard rate of VAT in Greece is currently 24 percent.

The Government would also reduce the rate of corporate tax, from its current 29 percent level to 25 percent by 2022, he said.

Tsipras also suggested that decreasing the tax-free allowance for individual taxpayers, due to take effect in 2020 as part of an earlier agreement with Greece's creditors, may no longer be required.

Aruba Working With IMF On New Consumption Tax Regime

Aruba's Prime Minister, Evelyn Wever-Croes, said recently that her government is working with the International Monetary Fund (IMF) on tax reform plans, including the introduction of a new indirect tax system.

Wever-Croes also confirmed that the crisis levy, implemented earlier in the year, is a temporary measure implemented to shore up the island's finances ahead of the planned tax reform. The levy was imposed on July 1, 2018, and increased the rates of turnover tax and health tax.

IMF representatives are currently in Aruba for two weeks to provide technical assistance. Wever-Croes said there have already been several meetings between her government and the IMF, and an assessment will be undertaken by the IMF on progress made by Aruba's government over past months in order to "validate the current direction of tax reform."

Wever-Croes said that once the IMF's assessment is completed her government will be ready to announce the introduction of a new indirect tax system, as well as other tax reforms.

India Reports Massive Expansion Of Individual Taxpayer Base

India's Central Board of Direct Taxes has reported a 71 percent increase in the number of personal income tax returns e-filed during the 2018 fiscal year compared with 2017.

The agency received 54m income tax returns electronically, up substantially from just 31m in FY2017. The CBDT noted that 33.7m returns were received from salaried employees, up from 21.9m in FY2017.

Surabhi Ahluwalia, Commissioner of Income Tax at the CBDT, stated that: "The increase in the number of returns reveals a marked improvement in the level of voluntary compliance of taxpayers which can be attributed to several factors, including the impact of demonetization, enhanced persuasion, and education of taxpayers, [and new fines for the] late filing of returns. This is indicative of an India moving steadily towards a more tax compliant society and reflects the impact of continuous leveraging of technology to improve taxpayer service delivery."

Australian MPs Call For Review Of Tax System

A committee of Australian MPs has called on the Government to carry out a complete review of the tax system by 2022.

On September 10, the House of Representatives Standing Committee on Tax and Revenue published its report on Taxpayer Engagement with the Tax System. It issued 13 recommendations.

The committee said that, "under Australia's self-assessment model, more should be done to make tax obligations easier for taxpayers to understand and simpler to comply with."

The committee's chief recommendation was that the Government undertake a review of the tax system. This review should make recommendations "on how to simplify the present tax system, in order to reduce both the quantum of tax law and improve comprehension."

According to the committee, a review would be timely given "the rapidly evolving digital environment, new commercial and financial platforms, increasing data volumes, identity and authentication threats, and significant demographic and labor market challenges," all of which impact tax revenue and compliance.

"Any future blueprint of Australia's tax system should follow the principles of simplification, transparency, sustainability, and minimizing of compliance burdens," it advised.

The last major review of the Australian tax system was conducted between 2008-2010.

Other recommendations made included that:

- The Treasury should consider an Australian Business Number (ABN) withholding tax system at source for all industries, with the potential for the rates to be industry-specific;
- Australia's work-related deductions scheme should be reformed and a standard deduction concept introduced, with individuals able to claim above the set amount by providing full substantiation through a tax return process;
- The Australian Taxation Office (ATO) should continue to expand the availability of technical initiatives such as pre-filing, simplified electronic lodgement systems for businesses and individuals, and online assessment tools;
- The ATO should examine and report on the results of its behavioral insights programs and activities;
- The ATO should make greater use of behavioral insights techniques, such as randomized controlled trials, before fully implementing any new initiatives, to determine whether any such changes are better than current practices;

- The ATO should review the functionality of its contractor assessment tool for accuracy and utility;
- The ATO should consider adopting a Regulatory Philosophy to codify the principles on which it will administer tax laws and engage with taxpayers;
- The ATO should develop a framework which clearly outlines the rights and obligations of both the ATO and the taxpayer;
- When implementing and changing its management programs, the ATO should include a service level agreement with end users, especially tax agents;
- The ATO should engage with all service providers according to the principle of competitive neutrality, allowing taxpayers the ultimate choice of which channel of access or service to use, and which channel is in their best interests; and
- The ATO should adopt a roadmap for the abolition of paper-based returns, but for the foreseeable future maintain paper-based returns and the distribution of paper publications on request for those taxpayers who choose to file in this way.

Australia Planning Improvements To MAP Case Handling

The OECD has published its first peer review report on Australia's compliance with new international standards on the effective resolution of tax treaty-related disputes.

Under Action 14 of the BEPS project, countries have committed to implement a minimum standard to strengthen the effectiveness of the Mutual Agreement Procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and provides a mechanism through which countries can resolve disputes related to the interpretation and application of tax treaties.

Peer reviews are carried out in two stages. Stage 1 assesses countries against the terms of reference of the minimum standards. Stage 2 focuses on monitoring the implementation of any recommendations that resulted from Stage 1.

The OECD has published its Stage 1 report on Australia. The report noted that Australia has a relatively large tax treaty network, with around 50 treaties, and an established MAP program. All of Australia's tax treaties contain a provision relating to MAP.

The OECD said that Australia has a "small MAP inventory, with a modest number of new cases submitted each year." There were fewer than 45 cases pending on December 31, 2017. Of these cases, approximately 60 percent related to allocation/attribution cases.

The OECD concluded that Australia partially meets the Article 14 minimum standard and that where it does not meet the standard it is either considering or actively addressing these shortcomings. To be fully compliant, Australia will need to amend and update a significant number of its tax agreements, the OECD said.

It said that approximately 70 percent of Australia's treaties do not contain the equivalent of the minimum standard requirement that competent authorities may be permitted to consult together for the elimination of double taxation for cases not provided in the tax treaty. Around 40 percent of Australia's agreements neither contain a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law nor alternative provisions to set a time limit for making transfer pricing adjustments.

The OECD also explained that almost 30 percent of Australia's treaties do not allow taxpayers to submit a MAP request to the state of which they are a national, where their case comes under the non-discrimination provision. It added that the timeline to file such a request is also shorter than the required three years.

The OECD noted that Australia has signed the Multilateral Instrument to automatically implement BEPS-related changes in the case of specified treaties. In the case of agreements not covered by the Multilateral Instrument, Australia intends to negotiate bilaterally with partner states to bring the agreements into line with the minimum standard.

Australia was found to meet the minimum standard on the prevention of disputes and some of the requirements regarding the availability of and access to MAP. The OECD observed that the Australian Taxation Office "adopts a pragmatic approach to resolve MAP cases in an effective and efficient manner."

Australian Hybrid Mismatch Rules Receive Royal Assent

Australia's new hybrid mismatch rules have received Royal Assent and will generally apply from January 1, 2019.

The rules are designed to deter the use of certain hybrid arrangements that aim to exploit differences in the tax treatment of a company or financial instrument under the income tax laws of two or more countries to achieve double non-taxation or a long-term tax deferral. The rules also contain a targeted integrity provision that applies to certain deductible interest payments (or payments under a derivative), made to an interposed foreign entity, where the rate of foreign income tax on the payments is 10 percent or less.

The rules will apply to payments that give rise to hybrid mismatch outcomes as follows:

- Deduction/non-inclusion mismatches, where a payment is deductible in one jurisdiction and non-assessable in the other jurisdiction;
- Deduction/deduction mismatches, where the one payment qualifies for a tax deduction in two jurisdictions;

- Imported hybrid mismatches, whereby receipts are sheltered from tax directly or indirectly by hybrid outcomes elsewhere in a group of entities or a chain of transactions.

The rules will generally apply to income years starting on or after January 1, 2019, and to certain payments made after that date.

The structured imported mismatch rule will apply to income years starting on or after January 1, 2019. The direct and indirect imported mismatch rules will apply to income years commencing on or after January 1, 2020, to align with the EU's introduction of new hybrid mismatch rules.

Limited transitional arrangements will apply to Tier 1 regulatory capital issued by banks or insurance companies, and will impact frankable distributions.

The Australian Taxation Office will publish guidance to support taxpayers impacted by the new rules. It has to date published draft practical compliance guidance.

Australian PM Planning New SME Tax Changes

Australia's new Prime Minister has said his Government is working on plans to help improve the tax competitiveness of small businesses.

Former Treasurer and now Prime Minister Scott Morrison had been at the forefront of the Government's two-year battle to pass a package of company tax cuts. He had sought to increase the turnover threshold for access to the small business tax rate and to reduce the headline rate to 25 percent for all firms by 2026. In August, the Senate rejected the Government's proposals, despite a last-minute offer by the Government to exclude the big banks from the lower rate.

Morrison told reporters that he respected the Senate's decision. His Government "will not be taking the full Enterprise Tax Plan forward that we presented to the Parliament."

However, Morrison did add that his Cabinet will be "bringing forward a new competitive tax plan for small- and medium-sized businesses."

Last year, Morrison succeeded in passing legislation to lower the SME rate from 28.5 percent to 27.5 percent from the 2016-17 tax year. The legislation also increased the ceiling turnover for the rate from AUD2m (USD1.5m) to AUD10m for 2016-17, to AUD25m for 2017-18, and to AUD50m from 2018-19.

The headline company tax rate is 30 percent.

Russia Mulling Exempting Gold Trading From VAT

Russia is reportedly considering removing value-added tax on supplies of gold to encourage taxpayers to repatriate their offshore holdings.

Russia's Deputy Finance Minister was quoted by Sputnik news agency as saying that the proposal is in response to calls from banks for the exemption. The minister reported that individuals had sought advice on repatriating funds to Russia but that they wanted to instead invest money returned into gold bullion, rather than keeping the funds in the banking system in cash, but must currently pay VAT at 18 percent.

Alexey Moiseev was quoted by the agency as saying: "We receive appeals, including from banks, which say that customers are ready to pay significant sums, billions of rubles, to buy gold, while the client wants to be able to take a couple of bars when he needs it. If this measure allows we even return capital worth tens of billions [of rubles], it will be justified. You can see that the state pays much attention to the repatriation of capital. It turned out that a number of citizens would like to repatriate their capital, but invest it not in the banking system but in gold bars. This is a personal right, but the VAT is now an obstacle for this."

Romania To Cut VAT On Services For Tourists

Romania's Tourism Ministry on September 3, 2018, confirmed that the country will move forward with the introduction of a lower rate of value-added tax on hotel stays, meals, and tourism services.

According to the Ministry, the rate on hotel and other accommodation services will be lowered from nine percent to five percent. Restaurants will also benefit from the lower rate, except for supplies of alcoholic beverages, as will sports and entertainment venues.

UK Property Management Firms Told To Correct VAT Error

The UK tax agency, HM Revenue and Customs, has issued a warning to property management companies that they are not eligible for an Extra Statutory Concession (ESC) that provides for a VAT exemption for domestic service charges.

HMRC has newly released Revenue and Customs Brief (6/2018) and an accompanying VAT information sheet on the matter. The brief explains when ESC 3.18 may be applied and what property management and similar companies must do if they have wrongly applied the concession and therefore not declared the correct amount of VAT due or recovered an incorrect amount of input tax.

The concession came into effect from April 1, 1994. It provides that if a landlord is contractually obligated to provide services to all occupants of a common estate, they may choose to use the concession to treat these supplies, when made to a freeholder, as exempt from VAT.

ESC 3.18 applies only when residential leaseholders and freeholders pay a mandatory service charge for the same common services on a common estate. Its purpose is to allow the same VAT treatment of these service charges for all of those living on the estate.

Leaseholders and tenants are exempt from paying VAT on these charges as the charge is directly linked to an exempt supply of an interest in land. Freeholders do not have this link, so for them, these charges are normally taxable at the standard rate of VAT.

Landlords often use property management companies, or companies offering similar services, to fulfil their legal obligations to the occupants of an estate. The property management company obtains goods and services on behalf of the landlord and charges a management fee for providing such a service. This management fee is taxable at the standard rate of VAT and is not covered by ESC 3.18, HMRC pointed out. As such, property management companies, or similar, cannot use the concession.

HMRC pointed out that the Upper Tribunal (Lands Chamber) decision of September 15, 2015, in the case of Mrs Janine Ingram (2015) UKUT 0495(LC) confirmed HMRC's view of how the concession operates.

HMRC revealed that it is aware of a number of property management and similar service companies which provide goods and services to landlords of residential buildings but are not correctly accounting for VAT.

HMRC has clarified that these companies cannot use the concession to:

- Treat their supplies as if made to the occupant rather than the landlord;
- Recharge costs borne on behalf of the landlord, back to the landlord;
- Recharge staff or personnel costs to the landlord.

From November 1, 2018, all property management companies, and companies supplying similar goods and services in similar situations, which have not correctly applied ESC 3.18, must correctly account for VAT, as explained in VAT information sheet 07/18.

OECD Releases New Transfer Pricing Country Guides

The OECD has published new transfer pricing country profiles for Costa Rica, Greece, South Korea, Panama, Seychelles, South Africa, and Turkey. In addition, it has also updated the information contained in Singapore's profile. Country profiles are now available for 52 countries.

The OECD continues to publish and update the transfer pricing country profiles for OECD and all interested members of the Inclusive Framework on BEPS to reflect the current state of each country's legislation and practice regarding the application of the arm's length principle and other key transfer pricing aspects. The transfer pricing country profiles include information on transfer pricing methods, the comparability analysis, intangible property, intra-group services, cost contribution agreements, transfer pricing documentation, administrative approaches to avoiding and resolving disputes, safe harbors, and other implementation measures as well as to what extent the specific national rules follow the OECD Transfer Pricing Guidelines.

The information was provided by country authorities in response to a questionnaire to ensure its accuracy.

The OECD explained that the transfer pricing country profiles reflect the revisions to the Transfer Pricing Guidelines resulting from the 2015 Reports on Actions 8-10 Aligning Transfer Pricing Outcomes with Value Creation and Action 13 Transfer Pricing Documentation and Country-by-Country Reporting of the OECD/G20 Project on Base Erosion and Profit Shifting (BEPS), in addition to changes incorporating the revised guidance on safe harbors approved in 2013 and consistency changes made to the rest of the OECD Transfer Pricing Guidelines.

Sweden Announces Anti-BEPS Package

The Swedish Government has announced additional measures to tackle aggressive tax avoidance, tax evasion, and financial crime.

In a statement issued on September 4, 2018, the Government revealed that the proposals will strengthen controlled foreign company (CFC) rules, ensure that Sweden exchanges information on financial account information with more countries, and provide the Swedish tax authority with extra powers to combat financial crime, including tax fraud.

Sweden is to broaden the scope of its CFC regime by including transactions with a number of territories, including Malta.

The proposal also includes other changes to the CFC rules that will ensure Sweden transposes the EU's Anti-Tax Avoidance Directive into law fully by December 31, 2018, with the exception of the exit tax rules, which will be transposed by December 31, 2019.

Finally, the proposals extend the tax authority's law enforcement activities to several other types of criminal behavior, including identity fraud and counterfeiting, where such crimes are related to the authority's existing activities in the area of money laundering. These measures are intended to enter into force on January 1, 2019.

BELGIUM - TURKEY

Into Force

On August 3, 2018, the amending protocol to the DTA between Belgium and Turkey s entered into force.

CHAD - UNITED ARAB EMIRATES

Signature

On September 4, 2018, Chad and the United Arab Emirates signed a DTA.

HONG KONG - LITHUANIA

Into Force

On August 31, 2018, the DTA between Hong Kong and Lithuania entered into force.

HONG KONG - SAUDI ARABIA

Into Force

On September 1, 2018, the DTA between Hong Kong and Saudi Arabia entered into force.

JAPAN - LITHUANIA

Into Force

On August 31, 2018, the DTA between Japan and Lithuania entered into force.

SINGAPORE - GABON

Signature

On August 28, 2018, Singapore and Gabon signed a DTA.

VIETNAM - MACAU

Ratified

On August 27, 2018, Vietnam ratified its DTA with Macau.

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

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/

30th Latin American Tax Law Conference

11/4/2018 - 11/9/2018

IBFD

Venue: Radisson Montevideo Victoria Plaza, Plaza Independencia, 11100 Montevideo, Uruguay

Key speakers: TBC

https://www.ibfd.org/IBFD-Tax-Portal/Events/30th-Latin-American-Tax-Law-Conference

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

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

Current Issues in International Tax Structuring and Tax Planning - The Chinese Outbound Perspective

11/7/2018 - 11/8/2018

IBFD

Venue: Intercontinental Beijing Sanlitun Hotel, No. 1 South Sanlitun Road, Chaoyang District, Beijing, China

Key speakers: Jan de Goede (IBFD), Shiqi Ma (IBFD), Premkumar Baldewsing (IBFD), Abe Zhao (Baker & McKenzie), among numerous others https://www.ibfd.org/Training/Current-Issues-International-Tax-Structuring-and-Tax-Planning-Chinese-Outbound-Perspective

9th IBFD International Tax Conference

11/8/2018 - 11/8/2018

IBFD

Venue: Intercontinental Beijing Sanlitun Hotel, No. 1 South Sanlitun Road, Chaoyang District, Beijing, China

Key speakers: Paolo Valerio Barbantini (Italian Revenue Agency), Shiqi Ma (IBFD), Premkumar Baldewsing (IBFD), Lei Cai (JD Group), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/9th-IBFD-International-Tax-Conference

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

International Taxation Conference 2018

12/6/2018 - 12/8/2018

IBFD

Venue: ITC Maratha, Sahar Andheri, Mumbai 400099, Maharashtra, India

Key speakers: Mukesh Butani (BMR Legal), Murray Clayson (International Fiscal Association), Marc Levey (Baker & McKenzie), William Morris (PwC), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/International-Taxation-Conference-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

11/19/2018 - 11/19/2018

CIS Wealth

Venue: Convention and Exhibition Centre "Parkovy", 16a Parkova Road, Kiev, Ukraine

Tatyana Shevtsova (Crowe Horwath AC Ukraine), Anatoliy Guley (Ukrainian Interbank Currency Exchange) among numerous others

https://ubf.international/

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

Introduction to GCC VAT

3/3/2019 - 3/5/2019

IBFD

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

Key speakers: Reggie Mezu (Baker McKenzie Habib Al Mulla), Jordi Sol (IBFD), Mohamed Faysal Charfeddine (Aujan Group), Saira Menon (PwC), among numerous others

https://www.ibfd.org/Training/Introduction-GCC-VAT

WESTERN EUROPE

Commerce & Industry Conference 2018

9/19/2018 - 9/19/2018

Chartered Institute of Taxation

Venue: Freshfields Bruckhaus Deringer, Northcliffe House, London, EC4Y 0BQ, UK

Chair: Robert De La Rue (RSM)

https://www.tax.org.uk/commerceandindustry2018

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 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

Indirect Taxes Annual Conference 2018

10/3/2018 - 10/3/2018

Chartered Institute of Taxation

Venue: Etc Venues County Hall, London, SE1 7PB, UK

Key speakers: Mike Cunningham (HM Treasury), Nel Hargrave (HMRC), Andrew Hitchmough QC (Pump Court Tax Chambers), Hui Ling McCarthy QC (11 New Square), among numerous others

https://www.tax.org.uk/indirecttaxes2018

International VAT Expert Academy

10/4/2018 - 10/5/2018

IBFD

Venue: Hyatt Regency Düsseldorf, Speditionstraße 19, 40221, Düsseldorf, Germany

Key speakers: Dr. Aleksandra Bal (IBFD), Bert Gevers (Loyens & Loeff), Ronny Langer (Küffner Maunz Langer Zugmaier), Fernando Matesanz (Spanish VAT Services), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/International-VAT-Expert-Academy

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

Putting Learning into Practice - Addressing the Challenges of International Tax Law

10/8/2018 - 10/9/2018

IBFD

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

Key speakers: Prof. Ruth Mason (IBFD), Dr. Leopoldo Parada (IBFD), Dr. Joanna

Wheeler (IBFD), Dr. Svetislav Kostic (IBFD), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/Putting-learning-practice-Addressing-Challenges-International-Tax-Law

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

Beyond Borders: International Tax Into 2020

11/7/2018 - 11/10/2018

Taxlinked.net

Venue: Amathus Beach Hotel, Limassol, Cyprus

Key speakers: Alex Cobham (Tax Justice Network), Jeremy Cape (Squire Patton Boggs), Aisling Donohue (Andersen Tax), Thomas Jacobsen (Papilio Services Ltd.), among numerous others

http://unbouncepages.com/taxlinked-international-tax-conference-2018/

The 7th Annual OffshoreAlert Conference Europe

11/12/2018 - 11/13/2018

OffshoreAlert

Venue: Grange St.Paul's Hotel, 10 Godliman St, London EC4V 5AJ, UK

Key speakers: Antonio Flores (Lawbird), Simon York (HMRC), Gretchen King (Vantage Intelligence), Mary Inman (Constantine Cannon), among numerous others

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

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

Global VAT - Specific Countries

11/15/2018 - 11/16/2018

IBFD

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

Key speakers: Bhavna Doshi (Independent consultant), Toon Beljaars (Uber), Vanessa Bacchin Cardo (Unilever), Svetlin Krastanov (Tax Academy Ltd.), among numerous others

https://www.ibfd.org/Training/Global-VAT-Specific-Countries-2

Principles of International Taxation

11/19/2018 - 11/23/2018

IBFD

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

Key speakers: Premkumar Baldewsing (IBFD), Hans Pijl (Independent tax lawyer), Carlos Gutiérrez Puente (IBFD), Ruxandra Vlasceanu (IBFD), among numerous others

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

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

International Tax, Legal and Commercial Aspects of Mergers & Acquisitions

11/28/2018 - 11/30/2018

IBFD

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

Key speakers: Rens Bondrager (Allen & Overy LLP), Femke van der Zeijden (PwC), Frank de Beijer (Liberty Global), Danyel Slabbers (PwC), among numerous others

https://www.ibfd.org/Training/International-Tax-Legal-and-Commercial-Aspects-Mergers-Acquisitions-0

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

Advanced VAT Optimization

12/6/2018 - 12/7/2018

IBFD

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

Key speakers: TBC

https://www.ibfd.org/Training/Advanced-VAT-Optimization

Transfer Pricing and Intra-Group Financing

12/10/2018 - 12/11/2018

IBFD

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

Key speakers: Antonio Russo (Baker & McKenzie), Alejandro Zavala Rosas (Baker & McKenzie), Rezan Ökten (VEON), Omar Moerer (PwC), among numerous others

https://www.ibfd.org/Training/Transfer-Pricing-and-Intra-Group-Financing-0

Transfer Pricing Masterclass

2/14/2019 - 2/15/2019

IBFD

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

Key speakers: TBC

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

Current Issues in International Tax Planning

2/27/2019 - 3/1/2019

IBFD

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

Key speakers: Jan de Goede (IBFD), Annemiek Kale (Arla Foods), Clive Jie-A-Joen (Simmons & Simmons), Jeroen Kuppens (KPMG Meijburg & Co), among numerous others

https://www.ibfd.org/Training/Current-Issues-International-Tax-Planning-1

International Tax Planning Association Meeting

3/20/2019 - 3/22/2019

ITPA

Venue: Kempinski Hotel Bahía, Autovía del Mediterráneo, km 159, 29680 Estepona, Málaga, Spain

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

https://www.itpa.org/meeting/estepona-march-2019/

US Corporate Taxation

4/1/2019 - 4/3/2019

IBFD

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

Key speakers: John G. Rienstra (IBFD), Michael Lebovitz (PwC), among numerous others

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

THE AMERICAS

A listing of recent key international tax cases.

United States

On August 16, 2018, the United States Court of Appeal for the Eighth Circuit overturned a 2016 decision by the US Tax Court in favor of medical device manufacturer Medtronic in a long-running case centering on the firm's transfer pricing arrangements.

The case revolves around the transfer pricing method used to evaluate Medtronic's inter-company finance arrangements, with the Court of Appeals ruling that the Tax Court erred in not applying the correct transfer pricing method when calculating the arm's length royalty rates for Medtronic's intercompany licenses.

Medtronic's parent company, Medtronic US, and its distributer, Medtronic USA, Inc., are located in the United States, and its manufacturing division, Medtronic Puerto Rico Operations Co. (Medtronic Puerto Rico), is located in Puerto Rico.

Medtronic's 2002 consolidated tax return used the comparable uncontrolled transactions (CUT) transfer pricing method to determine the royalty rates paid on its intercompany licenses. This method, the appeal court observed, evaluates whether the amount charged for a controlled transfer of intangible property was arm's length by reference to the amount charged in a comparable uncontrolled transaction.

However, in auditing the return, the IRS was concerned that Medtronic was shifting too much profit from its devices and leads to Puerto Rico in an attempt to avoid tax in the US. Using the residual profit split transfer pricing method, the IRS concluded that 90 percent of Medtronic's devices and leads profit should be allocated to the United States operations and 10 percent to the Medtronic Puerto Rico operations.

To resolve the audit, Medtronic and the IRS entered into a Memorandum of Understanding in which Medtronic Puerto Rico agreed to pay royalty rates of 44 percent for devices and 26 percent for leads on its intercompany sales. However, the IRS and Medtronic could not agree on how the Memorandum should apply to Medtronic's royalty income for the 2005 and 2006 tax years, with the IRS determining that the comparable profits method - not the CUT method - was the best way to determine an arm's length price for Medtronic's intercompany licensing agreements for those two years. Accordingly, the IRS concluded that the rate paid by Medtronic Puerto Rico was too low, resulting in tax deficiencies for 2005 and 2006.

Medtronic disputed the IRS's conclusions, and eventually filed suit in the US Tax Court, arguing that the CUT method, not the comparable profits method, was the best method for determining an arm's length price. The Court rejected both parties' royalty rate valuations, but held that the IRS's allocations were "arbitrary, capricious, or unreasonable." The court also found that the comparable profits method "downplayed" Medtronic Puerto Rico's role in ensuring the quality of the devices and leads, and that it did not reasonably attribute a royalty rate to Medtronic's profit.

The Tax Court ultimately decided that Medtronic's CUT method was the best way to determine an arm's length royalty rate for intercompany agreements, but made a number of adjustments which led to the lowering of the outstanding tax owed by Medtronic, a decision that the IRS appealed.

Key to the appeal court's ruling was that the Tax Court applied the Pacesetter agreement as the best CUT to calculate the arm's length result for intangible property. This agreement was entered into by Pacesetter's parent company and Medtronic US in 1992 in an effort to settle several lawsuits regarding patent and license use. As part of the agreement, the parties cross-licensed their pacemaker and patent portfolios.

However, in its decision, the appeal court said that the Tax Court's factual findings "are insufficient to enable us to conduct an evaluation of that determination." The appeal court went on to conclude that:

"The tax court did not address in sufficient detail whether the circumstances of the settlement between Pacesetter and Medtronic US were comparable to the licensing agreement between Medtronic and Medtronic Puerto Rico. The Pacesetter agreement resolved litigation between the parties, and the Tax Court did not decide whether it was one created in the ordinary course of business."

"Additionally, the Tax Court did not analyze the degree of comparability of the Pacesetter agreement's contractual terms and those of the Medtronic Puerto Rico licensing agreement."

"In the absence of findings regarding the degree of comparability between the controlled and uncontrolled transactions, we cannot determine whether the Pacesetter agreement constituted an appropriate CUT."

"The Tax Court also did not evaluate how the different treatment of intangibles affected the comparability of the Pacesetter agreement and the Medtronic Puerto Rico licensing agreement. The Pacesetter agreement was limited to patents and excluded all other intangibles, including 'any technical know-how or design information, manufacturing, marketing, and/or processing information or know-how, designs, drawings, specifications, software source code or other documents directly or indirectly pertinent to the use of the Licensed patents.' The Medtronic Puerto Rico licensing agreement, on the other hand, did not exclude such intangibles."

"Finally, the Tax Court did not decide the amount of risk and product liability expense that should be allocated between Medtronic US and Medtronic Puerto Rico."

"In the absence of such a finding, we lack sufficient information to determine whether the Tax Court's profit allocation was appropriate."

"Accordingly, we vacate the Tax Court's January 25, 2017, order and remand the case for further consideration in light of the views set forth in this opinion."

http://media.ca8.uscourts.gov/opndir/18/08/171866P.pdf

US Court of Appeals for the Eighth Circuit : *Medtronic, Inc. & Consolidated Subsidiaries v. Commissioner of Internal Revenue*

THE AMERICAS

United States

The US Court of Appeals for the Ninth Circuit has announced that it will revisit the landmark ruling in Altera on October 16, 2018.

In a recent update posted on its website, the Court said the case (No. 16-70496 and 16-70497) will be reargued at 14:00 local time in Courtroom 1, 3rd Floor Rm 338, James R Browning US Courthouse, San Francisco.

The Court withdrew its ruling in this case in early August, to allow a reconstituted panel to confer on the matter. The decision to revisit the outcome follows the death of one of the judges on the three-member panel, Stephen Reinhardt, on March 29, 2018. Earlier, in a footnote accompanying the decision in favor of the IRS, the Court said: "Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death."

Reinhardt's vote was crucial in the 2-1 decision in favor of the IRS. The Court could now reverse its decision, if newly assigned judge Susan Graber sides with judge Kathleen O'Malley, who dissented.

In its withdrawn ruling, the Court found, among other things, that the Treasury Department had acted lawfully under the Administrative Procedure Act when issuing regulations that provided for a "purely internal" method of allocating costs among related parties (and specifically among cost-sharing groups) for transfer pricing purposes. The ruling would have empowered the IRS to make adjustments to taxpayers' transfer pricing dealings in circumstances where unrelated parties do not enter into the same transactions – where a comparability analysis is impossible.

Although the tax at stake for Altera Corp (now part of the Intel Group) is said to be relatively minor, a ruling for the IRS would have huge implications for the tax affairs of tech firms in particular with regards their cost-sharing arrangements.

According to the court's calendar, just 20 minutes has been allocated to the matter.

https://www.ca9.uscourts.gov/calendar/view.php?caseno=16-70496

US Court of Appeals for the Ninth Circuit: *Case No. 16-70496 and 16-70497*

THE AMERICAS

United States

Swiss bank Basler Kantonalbank has agreed to pay penalties of USD60.4m to settle a long-standing tax dispute with the United States authorities.

The fine is part of a deferred prosecution agreement (DPA) approved on August 28 by the US District Court for the Southern District of Florida, the Department of Justice has announced.

According to the DoJ, BKB admits in the DPA and related court documents that between 2002 and 2012 it conspired with its employees, external asset managers, and clients to defraud the United States with respect to taxes, commit tax evasion, and file false federal tax returns.

The DoJ said that at its peak in 2010, the bank held approximately 1,144 accounts for US customers, with an aggregate value of approximately USD813.2m. Many - but not all - of these were undeclared accounts that were part of the conspiracy, the department said.

The USD60.4m fine consists of three parts. First, BKB agreed to pay USD17.2m in restitution to the Internal Revenue Service, which represents the unpaid taxes resulting from BKB's participation in the conspiracy. Second, BKB agreed to forfeit USD29.7m to the United States, representing gross fees (not profits) that the bank earned on its undeclared accounts between 2002 and 2012. And, third, the bank agreed to pay a fine of USD13.5m.

The DoJ said that the penalty amount "reflects BKB's thorough internal investigation and cooperation with the United States, as well as the bank's extensive efforts at remediation, and its waiver of any claim of foreign sovereign immunity."

Under the DPA, prosecution against the bank for conspiracy will be deferred for an initial period of three years to allow BKB to demonstrate good conduct.

This is the fourth recent non-prosecution deal concluded by the DoJ after similar arrangements were made with Neue Privat Bank, Swiss asset management firm Mirelis Holding, and Zurcher Kantonalbank.

https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-basler-kantonalbank

US District Court for the Southern District of Florida: *US Department of Justice vs. Basler Kantonalbank*

WESTERN EUROPE

Germany

European Court of Justice (ECJ) Advocate General Michal Bobek has released an opinion on a case concerning the interpretation of the Court's existing case-law on taxpayers' eligibility to the margin scheme for travel agents and whether a reduced rate of VAT can concurrently apply to supplies falling within scope of the regime.

The case – C-552/17 – concerns Alpenchalets Resorts GmbH, which rents houses from their owners and then lets them for holiday purposes to its customers. On arrival, the owners or their agents provide further services to the individual customers, such as cleaning of the accommodation and, in some cases, a laundry and 'bread roll' service.

AG Bobek said that, for taxpayers, the margin scheme for travel agents is one of the most complex areas of value-added tax law to comply with due to a number of rulings from the European Court of Justice that provide somewhat conflicting guidance on eligibility. He concluded in opining that the margin scheme should apply to travel agents broadly providing that they satisfy the conditions set out in the EU VAT Directive in acting in their own name when providing services, that they use the supplies of third parties, and not act as an intermediary. He said there should be no need for multiplicity of services providing that there is one bought-in service provided to the consumer that is either of transportation or of accommodation.

He said the ECJ should rule that "the special scheme for travel agents applies to a supply of a service which consists in the provision of one bought-in service provided that the bought-in service is accommodation or transport. In that situation, whether some other services (bought-in or in-house) are provided in addition is irrelevant." As such, the distinction between principal and ancillary supplies, discussed by the Court in earlier cases, becomes irrelevant too.

Replying to a second question from the referring court – the Federal Finance Court, Germany – he said that a reduced rate of taxation cannot apply to a supply of accommodation once it is established that the service at issue constitutes a travel service (instead falling under the margin scheme for travel agents).

He said under Article 307 of the VAT Directive a service provided by a travel agent constitutes a single service. "The logical consequence of that legal fiction is that such a service is different from its respective components," and therefore a travel service is not a service that is listed as a supply that may be subject to a reduced rate under Article 98 of the EU VAT Directive.

He said: "In sum, should the Court be of the view that the 'one bought-in service is enough' rule is to be applied, I suggest that the applicability of the special scheme for travel agents depends solely on whether bought-in accommodation or bought-in transport is provided, with no additional conditions as to what a trader may hypothetically offer in terms of advice on top of that. If, in 1992, the ‘information and advice’ service was a (never established or proven) hypothesis, in 2018, it is simply unrealistic.”

He said: “With the exception of Star Coaches (C-220/11), the Court has never in fact interpreted or applied the special scheme as being limited to supplies composed of at least two bought-in supplies. On the contrary, the Court’s approach has been rather generous, interpreting that scheme broadly. That is true not only as regards the substantive multiplicity (of services) but also as regards the geographical multiplicity. In that respect the Court held that the geographical multiplicity (namely, that the travel agent buys supplies in different member states) is not an indispensable requirement for the special scheme to apply and that that scheme also applies for services provided within a single member state. The latter statement was made despite the Court acknowledging, in essence, that the geographical multiplicity was the main raison d’être of the scheme.”

He added that “in view of the diversity of services in the travel industry, requiring at least two bought-in supplies for the special scheme to apply would likely exclude from the scope of that scheme those traders who have developed travel businesses based on ‘mixed’ (bought-in and in-house) supplies. Furthermore, especially if connected with the applicability of the ancillary/principal logic to that assessment, which in cases of requirement of multiplicity could not really be excluded, the definition of what would fall under the special scheme for travel agents would run the risk of being excessively narrow.”

The counter argument to this second point is the danger of over-inclusion, he said. Adding: “In such a complex legal landscape, it appears advisable to confirm and clarify the solution that has already been in place for several decades, while leaving it naturally to the legislature to opt, should it prove necessary, for a different regime. All in all, it is perhaps fair to admit that, despite the heralded objective of simplification, the implementation of that ideal in the specific context of the special scheme for travel agents remains rather remote from that stated ideal. That particular scheme has become one of the most complex areas of VAT. In the light of the above, my conclusion concerning the first question posed in the present case is that Article 306 of the VAT Directive shall be interpreted as meaning that the special scheme for travel agents applies to a supply of a service which consists in the provision of one bought-in service, provided that that bought-in service is accommodation or transport.”

On the issue of reduced rated treatment, he concluded: “I admit that the supply consisting in provision of accommodation may, as a result of the ‘one bought-in service only’ rule, receive different tax treatment depending on the way in which that supply is provided (whether it is provided by a travel agent falling under the special scheme or not). However, there are clear limits to such an argument, in particular in the context of VAT and special regimes. If one wished to achieve perfect equality and neutrality in all aspects, one would hardly have special regimes in the first place. Without wishing to sound too formalistic, the formal status of the service provider indeed matters in such situations, even if the economic nature of the service is the same. Thus, VAT law simply treats differently the same services, provided on the one hand by the owner (with or without the help of an intermediary), and, on the other, by a travel agent acting in its own name.”

“In the light of the above my conclusion concerning the second question referred is that Article 98 of the VAT Directive, read in combination with Annex III, point (12) to that directive shall be interpreted as meaning that the supply of services that is subject to the special scheme for travel agents under Article 306 et seq. of the same directive cannot be subject to a tax rate reduction for the provision of holiday accommodation.”

This opinion was released on September 5, 2018.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=205381&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=336506

European Court of Justice: *Case C-552/17: Alpenchalets Resorts GmbH v Finanzamt München Abteilung Körperschaften*

WESTERN EUROPE

Greece

Reversing its previous decision on the matter, the European Commission concluded on August 9 that a tax on admission fees to public and private casinos in Greece from 1995 to 2012 does not involve state aid, in line with decisions by the European courts.

Under Greece’s system of casino levies, all casinos in Greece have been required to charge a regulated admission fee to customers. Casinos then have to pass on 80 percent of the admission fee to the Greek state as a tax, while retaining the remaining 20 percent as remuneration for issuing tickets and covering expenses. Until November 2012, the general regulated admission fee was EUR15 (USD17.37). However, state-owned casinos were subject to a lower regulated admission fee of EUR6.

Following a complaint by a private casino operator, the Commission opened a formal investigation into the differentiated tax levied on admissions to public and private casinos in Greece. In May 2011, the Commission found that the measure constituted incompatible state aid in favor of public casinos, and ordered Greece to recover the unlawful aid.

However, the decision was overturned by the General Court of the European Union in September 2014, a ruling which was subsequently upheld by the Court of Justice in October 2015.

The Commission's newly issued decision reflects the findings of the European courts and concludes that the differentiated tax levied on admissions to public casinos and private casinos did not confer a selective advantage to public casinos. According to the Commission, this is because the amounts due to be paid to the Greek state by private and public casinos corresponded to the same percentage (80 percent) of the different regulated admission fees charged to customers by the two categories of casinos. Furthermore, in November 2012, the differentiation between admission fees for private and public casinos in Greece was abolished and a EUR6 admission fee was set for all casinos, the Commission noted.

http://europa.eu/rapid/press-release_MEX-18-4941_en.htm

European Court of Justice: *SA.28973: Measures to certain Greek Casinos*

Dateline September 13, 2018

Although I tend to steer clear of hackneyed phrases (I prefer to do blue sky thinking, preferably outside of the box), there's one saying that generally is a very good rule for life – **fail to prepare and prepare to fail**.

In respect of taxation, preparation and planning have long been integral to a successful business or investment strategy, no more so than in today's post-BEPS, uber transparent world. The tax headlines are littered with seemingly well-prepared companies with well-staffed tax departments, embroiled in long, expensive disputes with the tax authorities. So woe betide any taxpayer who jumps into the world of international trade and commerce without having given thought to the tax consequences.

However, sometimes, taxpayers can find themselves in an impossible position, planning for outcomes that are unknown. In Europe, both the **United Kingdom** and the **European Union** have been urging businesses to prepare for the possibility of a **no deal Brexit**. Which must be a bit like asking them to plot a course on a map which has had all the names of the roads, towns and cities deleted. You'll end up somewhere, but goodness knows where!

Both camps are reassuring businesses that it won't come to this worst-case scenario, and that some kind of **trade agreement** will be reached before the Article 50 countdown reaches zero on March 29 next year. But such an outcome is looking increasingly optimistic. I don't want to plunge into the more general debate about the merits of Brexit in the first place. Besides, I haven't brought my flak jacket. But surely, if achieved, this trade deal would win some sort of world speed record. Bilateral and multilateral trade negotiations tend to be **slogs rather than sprints** (it's no coincidence that former WTO Director General Pascal Lamy was a marathon runner). And neither camp looks particularly well-prepared to undertake such a feat. Funny that isn't it? Business are being asked to prepare for something that governments are largely unprepared to deliver.

On to more mundane matters now. And if there was an award for the most impressive tax statistic of the week (the ceremony's a low-key affair), then surely it must go to **India**, where the **number of personal income tax payers jumped** by a gargantuan 71 percent from 2017 to 2018. However, I wouldn't get too excited by that. That's probably only an increase from two to three. I know, I know. That's 50 percent. But you get my point. India is starting from such a low base to begin with, it doesn't take an especially large increase in the tax-paying population to look like a surge.

According to the Central Board of Direct Taxes, it **received 54m income tax returns electronically**, up substantially from just 31m in FY2017. In a country where more than 800m people are said to be of working age. But credit where credit's due I suppose; that's still an impressive return on an investment in a compliance campaign that involved, to use the CBDT's words, “enhanced persuasion." Now there's a creepy sounding euphemism if ever I've heard one. Presumably, that's a step up from merely “persuasion." I shudder to think what the next stage would be.

Anyway, the CBDT will have to use all the powers of persuasion it can muster if it is to achieve the sort of individual tax compliance rates seen in the Western economies. For a country whose territory includes the Himalayas, recent results represent the first steps to base camp.

It's been something of a tax stat-heavy week, what with the release on September 5 of the **OECD's Tax Policy Reforms 2018 report**. But there were no especial surprises to be had. Confirmation that corporate tax rates continue to fall, but not quite as fast as they did around the time of the financial crisis, was expected, as was the finding that governments have pushed standard rates of VAT about far as they dare, have left social security taxes stubbornly high and unreformed (despite all the talk about the need to reduce the labor tax wedge), and are taxing smokers, drinkers, and sugar junkies into changing their funhealthy habits.

The revelation that **personal income tax cuts** for those on low and middle incomes have become something of a trend was somewhat interesting. But glancing through the executive summary of the report's findings, another stat jumped out. And that was the **wide difference in the level of taxation on immovable property**. At the lower end of the scale, such taxes account for only about 0.3 percent of gross domestic product in Estonia. Surprisingly, and perhaps belying its claims to be a lean and mean, investment-friendly low-tax economy, at the other end of the scale was the UK, where immovable property tax revenues are the equivalent of approximately 4.5 percent of GDP. They do say an Englishman's home is his castle. Maybe he should think of downsizing.

The Jester