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GLOBAL TAX WEEKLY
a closer look

ISSUE 217 | JANUARY 5, 2017

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

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

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

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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

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a closer look

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Cyprus Tax Roundup 2016

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Introduction

Although the changes have been fewer than in 2015, tax professionals in Cyprus have had plenty of new developments to keep them busy during 2016, including several new or substantially modified double tax agreements and a reformed intellectual property box regime. The main changes are summarized in the following paragraphs.

Double Taxation Agreements (DTAs)

Deferral of the provisions of the 2010 Protocol regarding shares in companies holding immovable property in Russia

As 2016 drew to an end, the Cyprus Ministry of Finance announced that the Russian government had agreed to defer the introduction of new provisions allowing for source-based taxation of capital gains on shares in "property-rich" Russian companies, which were due to take effect on January 1, 2017.

Under the 1998 double taxation agreement between Cyprus and Russia, gains on disposals of shares are taxable only in the country of residence of the person disposing of the shares. Since Cyprus does not impose any capital gains tax on disposals of shares in companies unless they own immovable property in Cyprus, this makes Cyprus a very advantageous location for holding shares in Russian companies.

The Protocol to the 1998 double taxation agreement, which was signed in 2010, provided that gains on the disposal of shares in companies which derive their value principally from immovable property in Russia (so-called "property-rich" companies) would be subject to tax in Russia after a transitional period, which was due to expire at the end of 2016. Shares in other companies were not affected.

However, the application of this provision of the Protocol has now been deferred until similar provisions are introduced into Russia's double taxation agreements with other European countries, and disposals of shares in property-rich companies will continue to be taxable only in the country of residence of the person disposing of the shares, in the same way as other shares. According to the official announcement, an additional Protocol is being prepared in order to formalize the deferral.

Entry into effect of new DTAs with Guernsey and Switzerland

On January 1, 2016, the new DTAs with Guernsey and Switzerland, both of which were signed in 2014 and entered into force in 2015, took effect. Further details of the DTAs can be found in previous issues of *Global Tax Weekly*.[1]

Entry into force of DTAs with Bahrain, Georgia and Latvia

Ratification of the DTAs with Bahrain and Georgia, which were signed in 2015, and with Latvia, which was signed in May 2016, was completed during 2016 and the DTAs entered into force on April 26, January 4, and October 27, 2016, respectively. These are the first DTAs between Cyprus and the countries concerned, as neither Georgia nor Latvia adopted the 1982 Cyprus–USSR agreement when they became independent. The DTAs will take effect from the beginning of 2017. They closely follow the 2010 OECD Model Tax Convention; further details of the individual agreements can be found in previous issues of *Global Tax Weekly*.[2]

Signature Of New DTAs And Protocols

During 2016, in addition to signing the DTA with Latvia referred to above, Cyprus signed new DTAs with Jersey and India. The DTA with Jersey is the first between the two countries: while Jersey is not large in economic terms, it is an important financial center and the DTA will be a valuable addition to Cyprus's extensive treaty network. The new agreement with India, which was signed in November, was ratified very expeditiously and will replace the existing 1994 DTA with almost immediate effect.

Jersey

The DTA will come into force once it has been ratified in accordance with both parties' domestic legal procedures and will have effect from the beginning of the following year.[3] The 2004 agreement on taxation of savings income between Cyprus and Jersey will continue in force, but the DTA will be more beneficial to taxpayers once it takes effect.

The new agreement closely follows the 2010 OECD Model Convention, with only minor modifications, and the Protocol to the agreement clarifies the information exchange provisions. Dividends, interest and royalties are taxable only in the state of residence of the recipient. Capital gains derived from the alienation of immovable property may be taxed in the state in which the property is situated; all other gains, including gains on disposal of shares in "property-rich" companies, are taxable only in the state in which the disponor is resident.

The exchange of information article reproduces Article 26 of the OECD Model Convention verbatim. However, unusually, the exchange of information provisions will take effect eight taxable years prior to the entry into force of the agreement. A protocol to the DTA provides robust safeguards against abuse of the information exchange provisions by requiring the contracting party that requests information to fulfill specified procedures to demonstrate the foreseeable relevance of the information to the request. No request is to be submitted unless the party making the request has reciprocal procedures and means of obtaining similar information, and every request must be accompanied by the comprehensive details prescribed in the protocol.

India

There had been pressure from India to renegotiate the 1994 agreement between the two countries since the early 2000s, as the Indian authorities believed that the provisions on taxation of capital gains were vulnerable to abuse in the form of "round-tripping," a method of tax evasion where money leaving India was recycled back into India in the form of foreign direct investment via a third country.

Apparent deadlock in the negotiations seems to have been a factor in the Indian authorities designating Cyprus as a notified jurisdictional area under Section 94A of the Indian Income-tax Act 1961 in 2013, leading to increased administrative burdens for Cyprus companies operating in India. Following the Indian tax authorities' success in renegotiating the DTAs with Mauritius and Singapore, which contained similar provisions, it was inevitable that the Cyprus DTA would soon follow, and a new DTA was signed on November 18, 2016.[4]

As was widely expected following similar changes to India's agreements with Mauritius and Singapore, the new DTA provides for source-based taxation of gains from the alienation of shares. However, investments undertaken before April 1, 2017 are grandfathered, with taxation rights over gains on the disposal of such shares at any future date remaining solely with the state of residence of the disponor.

Ratification procedures were completed within a month of signature, and the new DTA entered into force on December 14, 2016. This means that the agreement will have effect in Cyprus in respect of tax withheld at source for amounts paid on or after January 1, 2017, and in respect of other taxes for years of assessment beginning on or after January 1, 2017.

In India, where the tax year begins on April 1, the agreement will have effect in respect of tax withheld at source for amounts paid on or after April 1, 2017, and in respect of other taxes for years of assessment beginning on or after that date.

Simultaneously with the agreement entering into force, on December 14, 2016, the Indian tax authorities issued Notification No. 114/2016, rescinding the designation of Cyprus under section 94A of the Income-tax Act 1961 as a notified jurisdictional area. The rescission has retrospective effect from November 1, 2013.

Reform Of The Intellectual Property Box Regime

In October 2016, the Cyprus Parliament passed Law 118(I) of 2016, which amends the Income Tax Law to bring its provisions on taxation of income from the use or sale of intangible assets into line with the "modified nexus" approach. This approach allows taxpayers to benefit from an intellectual property taxation regime, commonly known as an intellectual property (IP) box, only to the extent that they can show material relevant activity, including a clear connection between the rights which create the IP income and the activity which contributes to that income. Regulations issued under the law, which will have retrospective effect from July 1, 2016, provide detailed guidance on the calculations and application of the new IP regime.

Transitional arrangements for IP assets developed prior to June 30, 2016

The existing IP box regime, which was introduced in 2012, provides for 80 percent tax exemption of income from the use of a wide range of intangible assets. Coupled with Cyprus's low corporate income tax of 12.5 per cent, it gives an effective tax rate on such income of 2.5 per cent or less.

Taxpayers already benefiting from the existing scheme may continue to claim the same benefits on all assets within the scheme at June 30, 2016 until June 30, 2021, subject to certain conditions regarding assets acquired from related parties between January 2, 2016 and June 30, 2016. Assets acquired in this period from a related party will qualify for benefits only until the end of the 2016 tax year, unless at the time of their acquisition they were benefiting under the Cyprus IP box regime or under a similar scheme for intangible assets in another state.

New arrangements for IP assets developed from July 1, 2016

The arrangements for assets developed after July 1, 2016, follow the modified nexus approach. Qualifying assets are restricted to patents, software and other IP assets which are legally protected. IP rights used to market products and services, such as business names, brands, trademarks and image rights, do not fall within the definition of qualifying assets.

Relief is geared to the cost incurred by the taxpayer in developing the IP through its research and development (R&D) activities. Costs of purchase of intangible assets, interest, costs relating to the acquisition or construction of immovable property, and amounts paid or payable directly or indirectly to a related person are excluded from the definition of qualifying expenditure.

As was the case under the existing scheme, 80 percent of the overall profit derived from the qualifying intangible asset is treated as deductible expense, preserving the effective tax rate of less than 2.5 percent on such income.

Other Amendments

Other amendments made by the new law include the introduction of capital allowances for all intangible assets other than goodwill and assets qualifying for the existing IP regime. The capital cost of the assets will be tax deductible, spread over the useful life of the asset in accordance with generally acceptable accounting principles, with a maximum useful life of 20 years, and a balancing allowance or a balancing charge on disposal of the asset.

In addition, relief under Articles 35 and 36 of the Income Tax Law in relation to relief from double taxation will not be allowed if the taxpayer has chosen to claim losses in accordance with Article 13(9).

Conclusion

The year 2016 has seen Cyprus's DTA network continue to grow, and by the beginning of 2017 DTAs with 58 countries will be in effect. The signature of the new agreement with India, one of the world's largest and fastest-growing economies, and the restoration of normal tax relations are particularly important. While the revised DTA no longer provides exemption from capital gains tax on investments made after April 1, 2017, it places Cyprus on no less advantageous a footing than Mauritius and Singapore in this regard. Furthermore, by bringing to an end the notified jurisdictional area designation, it will eliminate the bureaucratic burdens this imposed.

The amendments to the IP box regime secure the existing generous benefits for IP developed before June 30, 2016 until June 30, 2021. While the range of assets and the categories of expenditure qualifying for relief after July 1, 2016, are more restricted than under the previous rules, Cyprus's IP box regime still represents a very attractive option for taxpayers, with an effective tax rate of less than 2.5 percent on qualifying income.

Endnotes

1. Guernsey: *Global Tax Weekly*, No. 95, September 04, 2016; Switzerland: *Id*, No. 94, August 28, 2014.
2. Bahrain: *Global Tax Weekly*, No. 127, April 16, 2015; Georgia: *Id*, No. 142, July 30, 2015; Latvia: *Id*, No. 189, June 23, 2016.
3. A full analysis of the new DTA with Jersey can be found in *Global Tax Weekly*, No. 198, August 25, 2016.
4. A full analysis of the new DTA with India can be found in *Global Tax Weekly*, No. 213, December 8, 2016.

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New UK Non-Dom Tax Changes in April 2017 – Last Chance To Act

by Claire Harris, Tim George, and Sophie Dworetzsky, Withers

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Introduction

Following two formal consultations and much informal debate, we now have (most of) the much-anticipated legislation in respect of the changes to the taxation of non-UK domiciliaries. The Government's response to the second consultation on these changes was published on December 5, 2016, and it is clear that the Government has taken into account some of the key points brought up in the consultation process – the proposed changes to the taxation of trusts in particular has seen an about-face in approach. While we are still awaiting some further detail on certain points, it is clear that there will be no further movement on points of principle now, and therefore the following represents the likely final position.

Taxation Of Individuals

Probably two of the most helpful measures coming in as one time opportunities as part of the package of changes are cleansing and rebasing. These were confirmed and expanded in the draft legislation published on December 5.

Rebasing

This enables those who will become deemed domiciled under the 15/20-year-rule test in April 2017 to elect which assets they wish to be rebased to their market value at that date, effectively wiping out any accumulated gain.[1]

This is restricted in its application but is of potentially very significant benefit to those who are able to take advantage of it. There are four main conditions which must be met for it to apply:

- The assets were located outside the UK throughout the period from March 16, 2016 or, if later, the date the individual acquired the asset, to April 5, 2017;
- The assets were held directly by the individual on April 5, 2017;
- The individual paid the remittance basis charge in any tax year before the 2017/18 tax year; and
- The individual remains deemed domiciled under the 15/20-year rule at all times until the disposal of the assets.

These conditions mark a significant and helpful softening since the Consultation Document was published in August, which indicated that only assets held directly outside the UK as at July 2015 would benefit from rebasing. The fact that assets held directly outside the UK between March 16, 2016 and April 5, 2017, as well as assets acquired up to April 5, 2017, are now included means that more assets will be able to benefit from this opportunity.

It also means non-doms who will become deemed domiciled in April 2017 should actively consider holding onto assets standing at a gain on April 5, to benefit from rebasing.

A meaningful and glaring omission from assets that can be rebased are assets that are subject to income tax on disposal. This means that, for example, interests in non-reporting status funds (such as hedge funds) cannot benefit from rebasing. People with significant hedge fund investments might want to consider redeeming or otherwise triggering a rebasing of the assets between now and April, if they will not benefit from the remittance basis after April.

Cleansing Of Mixed Bank Accounts

Another helpful measure confirmed in the draft Finance Bill provisions is the cleansing opportunity. This effectively enables any non-dom who has been taxed on the remittance basis, and not just those who are subject to the new deemed domicile rules from April 2017, to segregate funds from within a mixed account. So, for example, an account containing a mixture of income, capital and gains can be separated out into its component parts, so that in future

the most tax efficient parts can be remitted first. It is important to note that cleansing only applies to cash.

There remains the question of how much detail will be needed in terms of records to determine the component parts of a mixed fund. The legislation is silent on this point, and it therefore seems sensible to assume that any element of a mixed fund that can be identified can be segregated but that it will not be necessary to be able to identify every element of a mixed fund.

Individuals – Next Steps

Individuals should consider the following planning points before April 2017.

- Review which assets should be rebased – including potentially those standing at a loss, as this can be set against onshore gains, and remembering that assets that are rebased cannot also be contributed to trust.
- Liquidating structures such as companies in advance of April so that assets are held directly and can benefit from rebasing (of course other tax impacts should be considered).
- Redeeming or triggering a rebasing of non-reporting status fund investments.
- Collating records on mixed funds.
- Transferring assets, *e.g.*, between spouses offshore if one will benefit from rebasing and the other will not.
- Ensuring that if the remittance basis charge hasn't been paid in previous years, it is paid for this tax year if that will enable someone to benefit from rebasing/cleansing – of course it will be necessary to balance the cost of the charge and the benefit of rebasing/cleansing.
- Consider holding assets until April 6, 2017, such that they are rebased, and then selling them and cleansing the sale proceeds.

In all cases it will be important to ensure that tax and investment interests are aligned as closely as possible, and where, for example, there is an incentive to sell any asset or investment before April that would otherwise be rebased, both options are carefully considered.

Trusts – Still An Effective Shelter

One point of continuity since the changes were first announced has been that non-UK assets held in trusts settled by non-UK domiciliaries (who are not yet deemed domiciled) will continue to be treated preferentially for tax purposes.

Individuals who will become deemed domiciled from April 2017 will want to consider the creation (or further funding) of excluded property trusts, to protect non-UK assets from charges to inheritance tax and to permit the effective tax-free roll-up of non-UK income and all gains. (A different treatment will apply to UK residential property.[2])

Distributions

The treatment of distributions has improved from earlier proposals. One of the key concerns in the rules as they were presented in the August 2016 consultation paper was that making a distribution to the settlor or his family might "taint" the trust for the life of the trust, thus losing the protected status mentioned above. It has been confirmed that this will not be the case, in fact:

- As currently, UK source income will be taxable on UK resident settlors of settlor interested trusts, regardless of their domicile status.
- The details of the rules relating to non-UK income are yet to be published, but it seems clear that non-UK income will not be taxed on the settlor on an arising basis even after the settlor becomes deemed domiciled (as long as he remains non-domiciled under the general law). Instead, the settlor will be subject to income tax on benefits received by himself or by a "close family member" if they are not already taxable in that family member's hands. Close family members are the settlor's spouse or civil partner, cohabitee and minor children, but not adult children or minor grandchildren.
- Deemed domiciled settlors will also not be taxed to capital gains tax on an arising basis. Capital gains tax will instead be charged on the basis of the capital payments made from a trust, utilizing the current "matching rules" which match capital payments made to beneficiaries against any untaxed gains stockpiled in the trust.
- The general rules remain:
  - If the beneficiary is UK resident and domiciled (or deemed domiciled), he will be subject to tax on the payment on an arising basis;
  - If the beneficiary is UK resident but non-domiciled (and non-deemed domiciled), then he will be taxed according to his tax status – if he is a remittance basis user, there will be no tax unless the funds are remitted to the UK;
  - If the beneficiary is non-UK resident, there will be no tax to pay (but see below for further details on capital payments made to non-residents).
- However, if the beneficiary is a "close family member" of the settlor, then the settlor will be taxed on the capital payment in the cases mentioned above where the beneficiary is not taxed in that year – *i.e.*, where the close family member is either non-resident or is a

non-domiciled remittance basis user who does not remit the funds. This applies regardless of the domicile status of the settlor, albeit that non-domiciled remittance basis users will be taxed on that basis.

- To prevent avoidance, the Government is changing the way in which distributions to non-UK resident beneficiaries are treated – from April 2017, payments to non-residents will still not be subject to tax, but they will not "wash out" the stockpiled gains within the trust, meaning that trust gains will remain available to be matched against payments to UK resident beneficiaries in the future. The inability to wash out gains will apply to all offshore trusts whatever the residence/domicile status of the settlor.

Additions

It is clear that if a settlor adds new funds to a trust once he has become deemed domiciled, the trust will no longer benefit from protected treatment, such that the settlor will be taxed on an arising basis on non-UK income and all gains realized by the trustees going forwards. The same is true if additions are made from another trust of which the settlor is either the settlor or a beneficiary, if the transfer is made after the settlor has become deemed domiciled. However, concern had been expressed that an addition to a trust by another person could also taint the trust – it is clear that this will not be the case.

The Government has confirmed that additions which are made to meet trust expenses relating to taxation or administration of the trust, which are not otherwise payable from trust income, will not taint the trust.

"Recycling" Benefits

The new "close family member" rules could potentially have enabled avoidance by way of a distribution being made to a non-resident or remittance basis user who is not a close family member, who then gifts or lends the funds back to UK resident beneficiaries without triggering a charge to tax. In order to prevent avoidance by this channel, the Government will tax the UK resident recipient in respect of any funds received via this route within three years of the original distribution from the trust.

Valuations

New statutory rules will also be introduced for valuing non-financial benefits received from all offshore trusts – for example, the use of chattels, property or interest-free loans. This will be based on the official rate of interest multiplied by the value of the asset in question, less any payments actually made by the recipient (rolled-up interest will not decrease this annual charge).

Trusts – Next Steps

- Existing trust structures should be reviewed to ensure they will remain fit for their intended purposes following the introduction of the new rules.
- Non-domiciliaries should consider settling new trusts (or adding to existing trusts) before April 2017. Trusts settled before a person becomes deemed domiciled remain effective for inheritance tax protection (subject to the rules in relation to UK residential property). Since trusts will not lose their protected status except in so far as benefits are received, they also remain effective vehicles for income and capital gains tax purposes.
- Consideration should be given to washing out gains by making distributions to non-UK resident beneficiaries before April 6, 2017.
- Consider separating existing trusts before April 6, 2017, to create specific trusts for beneficiaries with different tax profiles or to hold specific classes of assets – *e.g.*, "dry" trusts to hold non-financial assets – which will enable bespoke tax planning going forwards.
- Consider importing trusts to the UK where income and gains will be distributed: the inheritance tax shelter will remain provided the trust assets remain offshore.

Endnotes

1 *See Global Tax Weekly*, No. 202, September 22, 2016.

2 *Id*, No. 215, December 29, 2016.

The CRS: Automatic Information Exchange As Standard

by Stuart Gray, Senior Editor, Global Tax Weekly

Last month, the OECD announced that jurisdictions committed to the Common Reporting Standard (CRS) are well on their way to exchanging financial account information automatically with fellow signatories this year. This article looks at the nuts and bolts of the new standard, and considers the consequences for taxpayers and reporting entities.

Introduction

The effective exchange of information (EoI) between governments has long been seen by the OECD and the EU as an important weapon in the ongoing fight to eradicate cross-border tax evasion. With well over 1,000 automatic EoI relationships now in place under the CRS, that goal looks well in sight – although, as explored later in this article, transparency may come at a price.

Traditionally, information about an individual or business has been sent from one tax authority to another on request, based on evidence that tax fraud or some other crime has taken place. Therefore, countries' commitments to exchange information "automatically" represents something of a step change in international tax enforcement.

The EU could be said to have led the way in the field of automatic EoI for the purposes of tax law enforcement with the Savings Tax Directive, which came into force in July 2005 (and has since been superseded by the administrative assistance directive). More recently, the US unleashed the Foreign Account Tax Compliance Act (FATCA) on the world, representing the first global program for the automatic exchange of individual financial account information for tax purposes. In fact, FATCA was the inspiration behind the OECD's CRS – hence, the CRS is referred to informally as "GATCA."

While the CRS sounds like a fresh initiative, and is a major breakthrough for the OECD in its fight against tax evasion, it uses existing information exchange protocols as its legal basis, namely the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[1] In joining the recently formulated Multilateral Competent Authority Agreement (MCAA) under Article 6 of the Convention,[2] jurisdictions commit to automatically exchange tax information with other nations' tax authorities.

This method was chosen for the CRS as it is seen to be the most efficient way to facilitate global EoI, rather than using the existing framework of EoI provisions contained in double tax avoidance agreements, tax information exchange agreements, and other bilateral and multilateral tax agreements.

As the introduction to the Standard for Automatic Exchange of Financial Account Information states: [3]

> "The advantage of standardisation is process simplification, higher effectiveness and lower costs for all stakeholders concerned. A proliferation of different and inconsistent models would potentially impose significant costs on both government and business to collect the necessary information and operate the different models. It could lead to a fragmentation of standards, which may introduce conflicting requirements, further increasing the costs of compliance and reducing effectiveness. Finally, because tax evasion is a global issue, the model needs to have a global reach so that it addresses the issue of offshore tax evasion and does not merely relocate the problem rather than solving it."

Therefore, the Multilateral Convention was chosen as the vehicle for the CRS because it provides for all forms of administrative cooperation, contains strict rules on confidentiality and proper use of information, and permits automatic EoI. Another of its advantages is that it has global reach. Nevertheless, while the CRS is a multilateral agreement, EoI will still take place bilaterally.

A Brief History Of The CRS

Against a backdrop of rising public anger about tax avoidance and evasion, G20 finance ministers endorsed automatic exchange as the new tax transparency standard on April 19, 2013. In June that year, the G8 welcomed the OECD Secretary General's report titled "A Step Change in Tax Transparency," which set out the concrete steps that needed to be undertaken to put a global model of automatic exchange in practice.[4] This report stated in its Executive Summary:

> "Vast amounts of money are kept offshore and go untaxed to the extent that taxpayers fail to comply with tax obligations in their home jurisdictions. Jurisdictions around the world, small and large, developing and developed, OECD and non-OECD, stand united in calling for further action to address the issues of international tax avoidance and evasion.
>
> And change is taking place. A major breakthrough towards more transparency was accomplished in 2009 with information exchange upon request becoming the international standard and the restructured Global Forum on Exchange of Information and Transparency for Tax Purposes starting to monitor the implementation of the standard through peer reviews.
>
> Now, there is another step change in international tax transparency driven by developments around the globe, including in the United States and Europe, with unprecedented political support for automatic exchange of information. In April 2013 the G20 Finance Ministers and Central Bank Governors endorsed automatic exchange as the expected new standard."

The report analyzed how jurisdictions could build on the recent developments to implement automatic exchange in a multilateral context, and it set out the key success factors for an effective model for automatic EoI. Four concrete steps were proposed:

- Enacting broad framework legislation to facilitate the expansion of a country's network of partner jurisdictions;
- Selecting (or where necessary entering into) a legal basis for EoI;
- Adapting the scope of reporting and due diligence requirements and coordinating guidance; and
- Developing common or compatible IT standards.

The report's Executive Summary went on to state:

> "With more and more jurisdictions joining the Convention on Mutual Administrative Assistance in Tax Matters there exists a clear legal basis for comprehensive automatic exchange with strict safeguards protecting confidentiality. Bilateral tax treaties also provide such a legal basis and within the European Union, Directives provide a specific legal framework for automatic exchange of information regarding interest income and certain other types of income between its [28] members. This report notes that a global

> solution also means a global standard to minimize costs for businesses and governments, while at the same time enhancing effectiveness, maintaining confidence in open markets and best serving society at large. A proliferation of inconsistent models is in nobody's interest."

The G20 leaders committed to automatic EoI as the new global standard in September 2013, and on February 23, 2014, the group's finance ministers endorsed the CRS as the standard for automatic exchange of tax information. In May 2014, the OECD Declaration on Automatic Exchange of Information in Tax Matters was rubber-stamped by all 34 member countries along with several non-member countries. More than 65 jurisdictions publicly committed to implementation, with more than 40 (known as "early adopters") having committed to a specific and ambitious timetable leading to first automatic EoI in 2017.

The OECD Council approved the Standard for Automatic Exchange of Financial Account Information (hereinafter, "the Standard") on July 15, 2014, following which the OECD released the full version on July 21, 2014.[5] The Standard calls on governments to obtain detailed account information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis.

On September 22, 2014, the Global Forum on Transparency and Exchange of Information for Tax Purposes delivered a Roadmap to the G20 Development Working Group to develop country participation in the new Standard. This Roadmap is part of the efforts to curb multinational tax avoidance and offshore tax evasion in developing countries.

The Current State Of Play

Jurisdictions committed to automatic exchanges under the CRS have agreed to conduct their first exchanges by September 2017 or September 2018. On December 22, 2016, the OECD announced that significant progress had been made towards meeting the first of these deadlines.

According to the OECD, at the end of 2016, more than 1,300 bilateral relationships were in place across the globe, most of them based on the MCAA. With respect to the jurisdictions exchanging as of 2017, 1,133 out of the 1,459 possible bilateral exchange relationships were established at this point. The 326 non-activated exchange relationships were mainly due to the fact that six jurisdictions were not yet in a position to provide a full set of notifications, the OECD explained.

Two more rounds of activations are scheduled to take place in March and June 2017, which will allow the remaining 2017 and 2018 jurisdictions to nominate the partners with which they will undertake automatic exchanges in the coming months. The next update on the latest bilateral exchange relationships will be published before the end of March 2017, with updates to follow on a periodic basis.

In total, 101 jurisdictions have agreed to start automatically exchanging financial account information in September 2017 and 2018, under the CRS. These are listed in the Annexe below.

The Standard And The Model Competent Authority Agreement

The Standard consists of two components: the CRS, which describes the due diligence procedures that must be followed by financial institutions to identify reportable accounts; and the MCAA, which contains the detailed rules on the EoI. The CRS will need to be translated into domestic law, whereas the MCAA can be executed within existing legal frameworks such as Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters or the equivalent of Article 26 in a bilateral tax treaty.

The MCAA consists of a number of "whereas" clauses and eight sections, and provides for the modalities of the exchange.[6] The whereas clauses contain representations on domestic reporting and due diligence rules, confidentiality, safeguards, and the existence of the necessary infrastructure for an effective exchange relationship. The MCAA also covers the type of information to be exchanged, and the time and manner of exchange.

The CRS shares certain technical similarities with FATCA, but there are some key differences, mainly that US-specific rules have been removed from the CRS. For instance, FATCA is based on US citizenship, a concept fundamental to the US tax system, whereas the CRS is based on residence. Also, unlike FATCA, the CRS does not provide for thresholds for pre-existing individual accounts, but it includes a residence address test, building on the EU Savings Directive. Additionally, the CRS has special rules dealing with certain investment entities where they are based in jurisdictions that do not participate in automatic exchange under the Standard.

The Standard calls for the technical reporting format to be standardized so that information can be captured, exchanged, and processed "quickly and efficiently in a cost effective manner and secure and compatible methods of transmission and encryption of data must be in place."

Information Exchange

Under the Standard, jurisdictions obtain financial information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. This information will cover various categories of income and/or assets.

The CRS has broad scope to limit opportunities for taxpayers to circumvent the model by shifting assets to places that it cannot reach. As such, the financial information to be reported with respect to reportable accounts includes interest, dividends, account balances, income from certain insurance products, sales proceeds from financial assets, and other income generated with respect to assets held in the account, or payments made with respect to the account.

Reportable accounts include accounts held by individuals and entities (including trusts and foundations), and the Standard includes a requirement that financial institutions "look through" passive entities to report on the relevant controlling persons.

The financial institutions covered by the Standard include custodial institutions, depository institutions, investment entities, and specified insurance companies, unless they present a low risk of being used for evading tax and are excluded from reporting.

The specific information to be exchanged by financial institutions includes the following:

- The name, address, tax identification number (TIN), and date and place of birth (in the case of an individual) of each reportable person and, in the case of any entity that is an account holder and that, after application of due diligence procedures, is identified as having one or more controlling persons that are reportable persons, the name, address, and TIN of the entity, and the name, address, TIN, and date and place of birth of each reportable person;
- The account number (or functional equivalent in the absence of an account number);
- The name and identifying number (if any) of the reporting financial institution;
- The account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account;
- In the case of any custodial account:
  - The total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each

case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period; and
  - The total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the reporting financial institution acted as a custodian, broker, nominee, or otherwise as an agent for the account holder;
- In the case of any depository account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period; and
- In the case of any account not described in the sections covering custodial or depository accounts, the total gross amount paid or credited to the account holder with respect to the account during the calendar year or other appropriate reporting period with respect to which the reporting financial institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the account holder during the calendar year or other appropriate reporting period.

Confidentiality And Compliance Concerns

Naturally, the OECD has made assurances that the Standard contains specific rules on the confidentiality of the information exchanged, and that the underlying international legal exchange instruments already contain safeguards in this regard.

It is stated in the preface to the Standard that, before entering into a reciprocal agreement to exchange information automatically with another country, "it is essential that the receiving country has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is only used for the purposes specified in the instrument." Where these standards are not met (whether in law or in practice), countries will not exchange information automatically.[7]

However, some observers are not so convinced. The OECD itself admits that the current timetable for the CRS to become operative is "ambitious," and the organization has been accused of failing to assess the system's risks before the scheme is fully implemented, especially with regard to data protection (in view of the significant amount of information collected and potentially available to be "hacked").

And in terms of compliance concerns, it is not only the clients of financial institutions that will be impacted by the CRS; the financial institutions themselves will bear significant costs as they

effectively act as the eyes and ears of the world's tax authorities. Recent research suggests there is "a large gap in preparedness" for reporting requirements under the various multilateral automatic EoI programs, including the CRS, FATCA, and the UK FATCA-equivalent regime with its Crown Dependencies and Overseas Territories (UK CDOT).

Aberdeen Group, on behalf of Sovos Compliance, carried out a survey of 100 leaders of financial institutions subject to the CRS, in which 64 percent of respondents said their organization is "significantly prepared" to cope with the demands of automatic EoI. However, the report showed that less than half of filings under FATCA, which has been effective for more than two years and upon which the CRS is substantially based, are accurate and complete.

"This research shows that financial institutions are far less prepared for FATCA, CRS, and [UK CDOT] compliance than they feel and are putting themselves at risk of significant impact to their profit margins due to fines and the costs of compliance support," observed Nick Castellina, Vice President and Research Group Director of Business Planning and Execution at the Aberdeen Group.

Conclusion

The legal mechanisms upon which the new global automatic EoI relationships rest are now well established, thanks to such instruments as the Multilateral Convention and FATCA. But they are mechanisms that have yet to be fully tested and evaluated in terms of their real-world effectiveness, and as far as automatic EoI on a global scale is concerned, it remains to be seen whether the machinery will cope in practice as well as in theory.

The only sure way to know is if rates of international tax evasion decrease to a substantial degree. Similarly, the questions about data security, privacy and rising compliance costs and risks for companies in the finance and banking industries will be answered one way or another when global EoI is up to speed in the next couple of years.

The OECD is clearly confident that the CRS and automatic EoI is the way ahead to strike a severely wounding blow to tax evasion, if not quite a fatal one, despite these concerns. And the OECD's recent announcement about the growing number of information exchange relationships suggests there is strong support for the CRS among governments.

As the OECD itself observed in its statement, widespread support for the international standard for the automatic exchange of financial account information in general, and the CRS in

particular, "reflects the determination of jurisdictions around the world to deliver on their political commitment to fight tax evasion." And while this state of affairs exists, there is going to be significant political momentum behind the CRS.

Annexe 1: Jurisdictions Committed To Automatic Exchanges

As at July 26, 2016, the following 54 jurisdictions have committed to undertake their first automatic exchanges of financial account information by September 2017:

> Anguilla, Argentina, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Cayman Islands, Colombia, Croatia, Curaçao, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montserrat, the Netherlands, Niue, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Trinidad and Tobago, Turks and Caicos Islands, and the United Kingdom.

As at July 26, 2016, the following 47 jurisdictions have committed to undertake their first automatic exchanges of financial account information by September 2018:

> Albania, Andorra, Antigua and Barbuda, Aruba, Australia, Austria, The Bahamas, Bahrain, Belize, Brazil, Brunei Darussalam, Canada, Chile, China, Cook Islands, Costa Rica, Dominica, Ghana, Grenada, Hong Kong (China), Indonesia, Israel, Japan, Kuwait, Lebanon, Macao (China), Malaysia, Marshall Islands, Mauritius, Monaco, Nauru, New Zealand, Panama, Qatar, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Saudi Arabia, Singapore, Sint Maarten, Switzerland, Turkey, United Arab Emirates, Uruguay, and Vanuatu.

Endnotes

1 http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page1

2 http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf

3 http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf (at p. 7).

4 https://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf

[5] *Supra*, note 3.

[6] *Supra*, note 2.

[7] *Supra*, note 3, p. 3.

Nigeria Moves To Ratify New Double Tax Treaties

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Recently, a public hearing was held to receive comments on the Double Tax Treaties Nigeria has signed with Spain, Sweden and South Korea.

Ratification is required by Section 12(1) of the Nigerian Constitution, which precludes treaties from having the force of law until they have been enacted into law by the National Assembly.

Overview

The legislature has commenced the process of ratifying three avoidance of double tax treaties (DTTs) with Spain, South Korea and Sweden signed on November 18, 2004, November 6, 2006, and June 23, 2009, respectively. The treaties generally follow the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention.

Some Key Provisions Of The Treaties

Scope

The treaties apply to taxes on income and capital. In Nigeria, these include the Personal Income Tax, Companies Income Tax, Capital Gains Tax, Petroleum Profit Tax, Education Tax, and other taxes on income and capital.

Permanent Establishment (PE)

All the treaties include a service PE where employees furnishing services over six months in any 12-month period can create a PE.

Interest

Interest payable to a beneficial owner will be subject to a maximum tax rate of 10 percent.

Dividends

The reduced tax rate for dividends is 7.5 percent provided the recipient is the beneficial owner and has a minimum 10 percent shareholding; otherwise the rate will be 10 percent.

Royalties

A maximum tax rate of 7.5 percent is imposed on royalties. However, under the Nigeria–Spain treaty, the maximum rate is 3.75 percent for non-corporate beneficial owners.

Immovable Property

The source country has taxing rights on income derived from immovable properties and gains from direct or indirect sale of a property-rich entity. Capital gains on the disposal of shares is currently tax exempt in Nigeria.

Observations

OECD BEPS Agenda

On November 24, 2016, the OECD with over 100 participating countries, including Nigeria, issued a Multilateral Treaty (MT) in line with Action 15 of the Base Erosion and Profit Shifting (BEPS) project to modify bilateral treaties. The MT seeks to tackle BEPS issues such as treaty abuse, hybrid mismatches, and PE avoidance, and offers more options for dispute resolution, among other provisions. The MT will be signed in 2017, and once adopted by Nigeria could potentially amend all existing DTTs, including these three.

Takeaway

Nigeria currently has only a handful of in-force DTTs, so the recent effort to expand the treaty network is a positive development.

Based on the Central Bank of Nigeria's data on capital importation for the last five years, only six of the countries with which Nigeria has DTTs are in the top 50 FDI source countries. While Nigeria seeks to expand its treaty network, focus should be on significant trading partners, and there should be a speedy process for ratifying agreed DTTs.

Topical News Briefing: Berne After Reading

by the Global Tax Weekly Editorial Team

Jurisdictions all over the world have been obliged to adjust their tax regimes in response to international pressure for fairer and more transparent tax systems. And adjusting to this new environment is something that Switzerland in particular has had to get used to.

As a country that was almost synonymous with the term "banking secrecy," it has been well documented how Switzerland has found itself on the sharp edge of global efforts to improve transparency, having made politically controversial changes to domestic laws on administrative assistance. It has also signed numerous information exchange agreements, notably with the US and the EU, while its private banks have been subject to a special tax compliance program in the former.

Switzerland hasn't just had to compromise on privacy. Even before the OECD's base erosion and profit shifting project was conceived, it was under pressure from the EU to change its corporate tax laws. The EU has long complained that aspects of its cantonal corporate tax regimes, particularly the use of holding, domiciliary, and mixed companies, encouraged multinationals to shift profits out of high-tax EU member states and into low-tax Swiss cantons.

Not being a member of the EU, Switzerland was easily able to fend off the EU's calls for change, and regular bilateral meetings on the issue in the 2000s eventually fizzled out. However, as in the field of tax transparency, once Switzerland accepted calls for change in this area, events moved fast. And by 2014, Switzerland had adopted the EU Code of Conduct on Business Taxation, under which countries must commit to rolling back "harmful" tax measures and promise not to introduce new ones.

This process culminated in the approval of new legislation known as Corporate Tax Reform Law III, which was approved by the National Council on June 14, 2016, and which abolishes corporate tax arrangements that are no longer in keeping with international standards.

While these reforms aren't set to be introduced until 2019, there is already a feeling that Switzerland's competitive edge is no longer as sharp as it used to be. This was a sentiment which came out in a survey by KPMG of 850 foreign-owned multinationals with operations in Switzerland,

which concluded that multinationals' "decision to locate their key value drivers in Switzerland is inextricably linked to their tax planning." Only 42 percent of respondents to the KMPG survey believed that a competitive tax system will be one of Switzerland's main advantages over the medium term.

But perhaps it is too early to call the demise of Switzerland as one of the world's most favored tax jurisdictions. Crucially, cantons will maintain their freedom over their corporate tax rates, and there are signs that these will be reduced to compensate for the loss of tax-privileged legal regimes. The reform also allows cantons to apply a higher reduction for R&D expenditure, and enables them to introduce targeted capital tax deductions.

Indeed, the IMF certainly doesn't see Switzerland's tax status changing that much in the near future. As reported in this week's issue of *Global Tax Weekly*, the IMF expects only a slight increase in the tax burden on foreign companies, and predicts that other factors will ensure that Switzerland remains attractive to foreign investors. And while many countries are wondering how they will afford the additional social costs of aging societies, the Fund also forecasts that the country's medium-term fiscal goals can be met without "an undue increase in taxes."

So Switzerland can look to the future with a fair amount of confidence, if the IMF's analysis is to be believed. Nevertheless, with international tax standards continuing to evolve, and with the OECD as determined as ever to rid the world of financial secrecy laws, recent changes to the Swiss tax regime are unlikely to be the end of the matter, but more the end of a difficult chapter.

Tax Plans Compared (December 2016) Corporate Tax

by Jonathan S. Brenner, Mark D. Allison, Richard W. Skillman, Kirsten Burmester and Peter A. Barnes, Caplin & Drysdale, Chartered

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Introduction

It is widely expected that Congress will address tax reform early in its 2017 session. This article summarizes President-elect Trump's proposal and Speaker of the House Paul Ryan's proposal on key corporate tax provisions applicable to US domestic and multinational corporations. Estate, gift and generation-skipping tax proposals (including possible changes to the treatment of basis at death), as well as income tax proposals relevant to high net worth individuals (including the treatment of income from pass-through entities) are addressed in separate articles.[1]

While President-elect Trump's plan is light on details, and Speaker of the House Paul Ryan's plan, "A Better Way," [2] is more clearly defined, both plans address a number of specific areas of US corporate tax law. This article provides a general high-level summary of certain aspects of each plan's approach to US corporate tax reform.

Corporate Tax Rate

Both Trump's proposal and Ryan's proposal would reduce the corporate tax rate. The rate, currently 35 percent, would be reduced to 15 percent under Trump's plan and 20 percent under Ryan's plan.

Capital Investments

Under the current US system, corporate investments/expenditures in tangible and intangible assets are generally depreciable or amortizable (*i.e.*, their cost deducted) over a number of years, with the length of such period depending on the type of asset. Ryan's plan would allow corporations to take an immediate expense deduction for investments in tangible and intangible property, but not land. Trump's plan would allow corporations "engaged in manufacturing in the US" to elect to immediately expense their capital investments (but would require them to relinquish the ability to deduct net interest expense). We read Trump's plan as expensing only investments in assets related to a manufacturing business.

Net Interest Expense Deduction

Under the current system, corporations can generally deduct their net interest expense on indebtedness. The Ryan plan would eliminate this deduction (*i.e.*, interest paid will only be allowed as a deduction against interest received, with an indefinite carryforward of any excess). The Trump plan would only eliminate this deduction for manufacturing businesses that elect to immediately expense their capital investments (*see* "Capital Investments" above).

Net Operating Losses (NOLs)

The current system allows a corporation to carry back NOLs to its two prior taxable years and carry forward NOLs to its 20 subsequent taxable years. Ryan's plan would disallow the NOL carryback, but would allow NOLs to be carried forward indefinitely. The amount of the carryforward usable in any year would be capped, however, at 90 percent of net taxable income for that year (as is currently the case under the corporate AMT). Ryan's plan would also increase the amount of any NOL carryforward by an inflation adjusted amount. Trump's plan does not address corporate NOLs.

Deductions And Credits

Both plans would eliminate so-called "special interest" corporate deductions and credits. Neither plan specifies precisely which credits and deductions will be preserved, other than the Research and Development credit.

Alternative Minimum Tax (AMT)

Both Trump's plan and Ryan's plan would eliminate the corporate AMT.

Earnings Of Foreign Subsidiaries

The current system has a comprehensive system of rules (the "subpart F rules") for determining when earnings of a foreign subsidiary of a US corporation are subject to current US income tax and when such tax can be deferred. Both plans would amend these rules significantly.

Both plans would provide for an immediate, mandatory, deemed repatriation of existing foreign earnings held abroad, but would apply reduced rates of taxation to such earnings. Trump's plan would apply a 10 percent rate; Ryan's plan would apply an 8.75 percent rate to the deemed repatriation of cash or cash equivalents, and a 3.5 percent rate to other assets. Companies would pay the resulting tax liability over an eight-year period.

The plans do not currently address whether foreign tax credits will be allowed against the US tax imposed on the deemed repatriation. To the extent such credits are allowed, we would expect that they would be subject to a haircut based on the reduced US rate applicable to such deemed repatriation. In this regard, it is important to consider the fact that while the deemed repatriation proposed by the plans would not generally result in non-US taxation, the actual repatriation of cash to the US may give rise to foreign withholding taxes.

We note that the deemed repatriation will have collateral effects on the financial reporting of public companies. Most US multinationals have not booked a deferred tax liability with respect to most earnings retained offshore and, thus, we would expect that the mandatory deemed repatriation, even at a reduced rate, will be a hit to earnings in the year the legislation is enacted even if the tax is payable over multiple years.

Going forward, Trump's plan would generally end deferral for earnings of foreign subsidiaries and retain the foreign tax credit. Ryan's plan, on the other hand, would replace the US's existing worldwide system of US corporate taxation with a territorial system, and allow for a full exemption on dividends paid to the United States by foreign subsidiaries. The Ryan plan provides that it would do away with "the bulk of" the subpart F rules, but would retain the foreign personal holding company rules, which generally provide for current US taxation of certain passive income earned abroad. We would expect that legislation will in fact tax all income of foreign subsidiaries on a current basis, but that active income will be subject to a preferential rate to avoid shifting such income to zero-tax jurisdictions. We expect the PFIC rules to remain in place.

Finally, we note that some prior Republican tax proposals, including the House Republican Proposal in June 2016, gave some consideration to completely replacing the US's current income tax system with a "destination-based cash flow tax" (a "DBCFT"). While a detailed discussion of a DBCFT is outside the scope of this article, we note that the DBCFT is a rather complex subtraction-method VAT that would have widely differing consequences to different industries and would likely have material macro-economic consequences. Moreover, transitioning from an income based system to a DBCFT would be a challenging endeavor.

Procedural Hurdles To Passage

There are two procedural rules that could stand in the way of tax reform. Both impact only the Senate consideration of a bill. Right now, it takes 60 votes to stop a filibuster. In addition, the Senate might adhere to the "Byrd Rule," which requires a 60-vote majority to pass any bill that has a negative impact on revenue outside of the ten-year revenue window. However, both of these rules are procedural and could be changed in the next Congress.

Even with these rules in place, there are several potential paths to passage. First, a tax reform bill could have sufficient bipartisan support to garner a 60-vote majority. Second, the bill is likely to be in the form of a budget reconciliation act, which is not subject to filibuster. Consequently, we can envision several options leading to enactment of a comprehensive tax reform bill.

Effective Date Considerations

There are several possible effective dates for a tax reform bill. With respect to changes in the corporate tax rate, the tax code already includes a provision that automatically provides a "blended" income tax rate – a weighted average of the old rates and the new rates – for the year of transition when tax rates change mid year, although Congress could override that in legislation. More generally, a bill could be effective retroactively to January 1, 2017. Alternatively, a bill passed during the year could be made effective on January 1, 2018, but it seems unlikely that Congress would want a full year to pass without the benefit of the reforms they enact. That raises the possibility of a mid-year, "date of enactment" effective date.

Endnotes

1 *See* http://www.caplindrysdale.com/possible-repeal-of-the-estate-tax-in-2017 and http://www.caplindrysdale.com/tax-plans-compared-december-2016-individual-income-tax

2 https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-Snapshot.pdf

Developing Countries Welcome Publication Of Transfer Pricing Handbook

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Background

On December 23, 2016, the World Bank Group published a transfer pricing handbook, "Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners".[1]

The Handbook, which comprises eight chapters (outlined below), does not purport to be a substitute or an alternative to the existing OECD Guidelines and UN Manual. Rather, the Handbook draws on the practical lessons learned by the World Bank Group and other international organizations in working with governments around the globe to design and implement transfer pricing rules. In this regard, the Handbook provides technical guidance and country examples to assist policymakers and practitioners with the design, implementation and administration of transfer pricing rules based on international practices.

Importantly, in the current international tax environment, the Handbook recognizes the need to balance revenue collection and investment climate objectives. In this context, the Handbook explores the key practical challenges faced and the solutions adopted by developing countries in implementing transfer pricing rules based on international practices, while highlighting the importance of providing access to mechanisms for avoiding and resolving transfer pricing disputes.

Areas Covered By The Handbook

Chapter 1: Transfer Pricing, Corporate Strategy, and the Investment Climate

This chapter discusses approaches to regulating transfer pricing, the costs and benefits thereof, and the necessary pre-conditions for a country to successfully implement transfer pricing rules

that appropriately balance revenue collection objectives and investment climate considerations. Importantly, for multinationals monitoring transfer pricing trends globally, this chapter concludes that "… for the majority of countries, developed or developing, the practical difficulties associated with the implementation of the arm's-length principle will generally be significantly outweighed by the advantages of adopting the arm's-length principle …"

Chapter 2: The International Legal Framework

This chapter explains the role of tax treaties and other international instruments and sources of guidance in shaping transfer pricing rules and practices. The important role of tax treaties in providing a mechanism for eliminating double taxation is highlighted, along with a discussion as to the differing role the OECD Guidelines can play in shaping and interpreting transfer pricing legislation, influencing practice and their consideration by the judiciary.

Chapter 3: Drafting Transfer Pricing Legislation

This chapter provides practical guidance on drafting transfer pricing legislation based on the arm's length principle. It begins by discussing the importance of formulating an appropriate policy, and then discusses how that policy can be implemented, drawing on numerous country examples.

Chapter 4: Applying the Arm's-Length Principle

This chapter provides practical guidance for application of the arm's length principle. It draws on the OECD Guidelines, while at the same time using country-specific examples to illustrate key concepts and different approaches.

Chapter 5: Selected Issues in Transfer Pricing

This chapter contains high level overviews of selected issues in transfer pricing, such as: intragroup services, financial transactions, transfer pricing and customs valuation *etc*. References are made throughout to useful publications, guidance and tools.

Chapter 6: Promoting Taxpayer Compliance through Communication, Disclosure Requirements, Transfer Pricing Documentation, and Penalties

Transfer pricing documentation and disclosure requirements are proliferating globally. This chapter aims to provide guidance as to the different approaches that can be adopted by countries, along with explanations as to the advantages and disadvantages of each.

Chapter 7: Avoiding and Resolving Transfer Pricing Disputes

This chapter recognizes that transfer pricing disputes can be costly and time consuming for all parties involved. The importance of clear and sufficiently detailed legislation and guidance in ensuring consistency and reducing uncertainty is highlighted, along with the role of safe harbors and advance pricing agreements as tools for avoiding transfer pricing disputes. Importantly, given the increased focus on transfer pricing globally and expectations of an increase in disputes in the wake of BEPS, the crucial role of the Mutual Agreement Procedure (MAP) in helping avoid economic double taxation, not only as a dispute resolution mechanism but "also as a form of quality control for transfer pricing administration", is highlighted.

Chapter 8: Developing a Transfer Pricing Audit Program

This chapter provides practical guidance to tax administrations on setting up a transfer pricing audit program. It covers institutional arrangements and the use of risk-based assessment, among other things.

Conclusion

In the current international tax environment, the publication of this Handbook is a positive development for multinationals with operations, or looking to establish operations, in one or more developing countries. As an ever-increasing number of countries look to implement or amend transfer pricing legislation, promoting them to do so in a manner that is consistent with international principles is paramount to ensuring certainty, avoiding widespread economic double taxation and avoiding unnecessarily high costs of doing business.

Endnotes

1 https://openknowledge.worldbank.org/handle/10986/25095

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Topical News Briefing: Riding To The Tax Code's Rescue?

by the Global Tax Weekly Editorial Team

The recent assertion by the White House that the US economy was "rescued" under the administration of President Barack Obama, as reported in this week's issue of *Global Tax Weekly*, would have raised quite a few eyebrows stateside.

It may well be the case that the vast majority of individual taxpayers in the US have received a tax cut over the past eight years. But if asked to defend its record on improving the US tax system, the Obama administration appears to be on much shakier ground.

Indeed, by all accounts, most taxpayers would probably agree that the US tax regime has become more complex and less user-friendly over the past few years. Certainly, the growing complexity of the tax regime has been flagged up as one of the National Taxpayer Advocate's top concerns in most of her recent annual reports to Congress.

Businesses would also contend with Jack Lew's recent assertion that the Treasury Department has "made a lot of progress on business tax reform" during his tenure as Treasury Secretary. The US has the highest statutory rate of corporate tax in the OECD, and many argue that the tax system encourages companies to shift their activities overseas.

Nevertheless, in defense of the current administration, for the majority of Obama's two terms, there was a virtual blockade of all but the most pressing tax reform proposals, notably the annual extension of more than 50 temporary tax provisions, in an often bitterly divided Congress.

Moreover, the administration has recently highlighted how fiscal and political constraints afforded little room for the kind of comprehensive tax reform that many have been calling for over a number of years. For example, Lew suggested in a recent television interview that there is no revenue-neutral way of cutting individual income tax unless some or all individual tax deductions are also eliminated, for example the charitable deduction or the mortgage interest deduction – deductions that are generally popular with taxpayers.

As Lew said, seeking to repeal such cherished deductions "either becomes a policy problem or a political problem." And given that the removal of most deductions forms a key part of the

Republicans' tax reform plans soon to be considered under a new administration, it will be interesting to see if these political problems can finally be overcome.

Taiwan's VAT On Online Retailers Becomes Law

On December 28, Taiwan's President Tsai Ing-wen signed into law the amendment to the Value-added and Non-value-added Business Tax Act to impose tax on foreign online sellers' supplies to Taiwanese consumers.

The amendment is intended to raise additional revenues and level the playing field for Taiwanese bricks-and-mortar retail and service businesses.

The Ministry of Finance is to draw up the required tax regulations and procedures. In addition, it is to establish a website for simplified business registration and for filing VAT returns and paying VAT.

Foreign online suppliers selling cross-border goods and electronic services to end consumers will have to register for tax in Taiwan through a permanent establishment, or appoint a VAT or non-VAT tax representative. The permanent establishment or agent will be required to file the necessary bi-monthly tax returns. Significant penalties will be imposed for non-compliance.

New Zealand Retailers Call For GST On Foreign Online Suppliers

New Zealand retailers have called for legislation requiring foreign companies to register for GST, saying that avoidance of the tax by multinationals is costing the government at least NZD200m (USD138m) a year in lost revenue.

"There are massive foreign retailers operating in New Zealand today and making online sales to Kiwis who don't pay GST or duty to the government on most items they sell to New Zealanders," said Greg Harford at trade association Retail NZ. "This deprives the government of hundreds of millions of dollars in tax revenue every year, and means that foreign firms have a competitive advantage when selling to New Zealanders."

Retail NZ said that New Zealand-based companies selling online or in retail shops have to charge up to 25 percent more than big foreign internet retailers.

Australia is introducing legislation requiring foreign companies that sell physical goods to Australians to register for GST from July 2017.

"GST registration of offshore suppliers may not be a perfect solution – but the top 20 global etailers account for two-thirds of all goods being sold to New Zealanders from overseas, and the introduction of a GST registration requirement for offshore retailers would be a significant step forward in tightening the net on tax avoidance," said Harford.

Costa Rica Urged To Adopt VAT

The International Monetary Fund has urged Costa Rican lawmakers to agree on much-needed consumption tax and income tax reforms.

The report said the country has increased its income tax revenues and approved laws to tackle tax evasion. Corporate tax reforms are also before Congress.

However, the country's lawmakers have yet to green light the implementation a value-added tax in place of the current general sales tax, with the adoption of the levy beset by delays.

Colombia Mulls Value-Added Tax Hike

Colombia is due to hike its value-added tax rate to 19 percent from 16 percent.

The measure was included in a tax reform bill that was recently approved by Congress. The hike would come into effect from 2017.

The VAT rate increase would be accompanied by tax cuts for companies and more stringent penalties for tax evaders.

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IMF: Switzerland Need Not Hike Taxes Drastically

Switzerland's measures to end the preferential tax arrangements for foreign companies will reduce tax revenues in the country, according to an Article IV report by the IMF.

Under reforms set to be introduced in 2019, Switzerland will harmonize corporate income tax rates at cantonal level, with a rate of about 14 to 15 percent.

While the unification of rates could boost investment by small and medium-sized firms, it is "likely lead to some revenue loss," the report said, and the tax burden on foreign companies is to increase slightly.

The IMF said "other factors" will continue to ensure Switzerland remains attractive to foreign investors.

To buoy the nation's finances, in early 2017 Switzerland is expected to agree an increase of about 1 to 1.5 percent to the VAT rate, alongside a higher retirement age for women under plans to bolster pension provisions.

The report concluded that the country's medium-term fiscal goals can be met without "an undue increase in taxes."

Obama 'Rescued' US Economy With Tax Cuts

According to a report on his time in office, US President Barack Obama "stabilized an economy in crisis and laid the groundwork for long-term growth," partly through the provision of tax relief and tax cuts.

The report, entitled "Economic Rescue, Recovery, and Rebuilding on a New Foundation," states the Obama Administration "provided tax relief that gave the typical American family a tax cut of USD3,600 over [its] first four years – helping to restart job growth – and further cut taxes for low-income working families and families with college students."

In particular, the Administration "made permanent tax cuts for 98 percent of Americans as part of the bipartisan fiscal cliff agreement in January 2013, while allowing tax cuts to expire for those with the highest incomes – which will reduce deficits by more than USD800bn over the next ten years – [and] made permanent expansions to tax credits for working and middle-class families, providing a tax cut averaging about USD1,000 to roughly 24m families each year."

The report also states that the child tax credit (CTC) and the earned income tax credit (EITC)

were expanded and made permanent for low-income working families: "together, the EITC and CTC improvements reduce the extent or severity of poverty for more than 16m people – including about 8m children – each year."

Furthermore, the report notes that an expiration date was placed "on dozens of business tax breaks that have been extended repeatedly for years without much scrutiny, which would save more than USD200bn over the next decade, [and] made the research and experimentation tax credit permanent, bringing certainty to companies investing in innovation."

IMF To Improve Fiscal Guidance For Countries

The IMF is aiming to provide more consistent guidance to countries on the fiscal space available to either cut taxes or increase spending.

A new paper released by the Fund puts forward a set of tools to assess available fiscal space in a way that is broadly comparable across countries and provides IMF staff, and policymakers, with "a consistent approach to assessing available space as an input to inform decisions about fiscal policy."

The IMF explained that the concept of fiscal space can be defined as the ability of a government to raise spending or lower taxes without endangering market access and debt sustainability.

The new framework will be applied initially in Article IV consultations of about 40 major economies. These Article IV reports are released annually for nations, reviewing performance in the past 12 months and putting forward policy recommendations, including on tax and spending.

Germany Targets Offshore Tax Avoidance

The German Government has adopted draft anti-avoidance legislation intended to make it more difficult for domestic taxpayers to avoid tax through the use of "mailbox companies in tax havens."

The draft bill, approved by the Cabinet on December 21, contains more stringent reporting obligations for German taxpayers with foreign financial interests, and financial institutions managing foreign investment structures for their clients.

Under the proposals, taxpayers must make a disclosure to tax authorities if they have a stake of 10 percent or more in an entity such as a company or fund that is located outside the EU and European Free Trade Association (EFTA) area, or a stake worth at least EUR150,000 (USD156,800), irrespective of whether the participation is held directly or indirectly. Failure to report such "business relationships" could be punishable by fines of up to EUR25,000.

The draft legislation also places an obligation on financial institutions to report to the financial authorities certain structures they have established or administer on behalf of clients in non-EU and non-EFTA "third countries." Failure to do so could attract fines of up to EUR50,000.

Additionally, the bill standardizes reporting obligations for direct and indirect holdings in foreign entities, and synchronizes the deadline for information reporting with the deadline for tax returns.

German taxpayers with a controlling interest in foreign entities will be required to maintain records for at least six years under the proposed changes. In addition, the draft legislation extends the statute of limitations in cases of tax evasion from five to ten years.

If the bill is approved by parliament in its existing form, the changes will be introduced on January 1, 2018.

On the same date, the Cabinet also announced that Germany will sign the multilateral instrument to align tax treaties with the OECD's BEPS recommendations. The instrument – developed under Action 15 of the BEPS project – will transpose BEPS recommendations into over 2,000 tax treaties worldwide, and implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms.

US DoJ Completes Swiss Bank Program

On December 29, 2016, the US Department of Justice (DoJ) announced it had reached final arrangements with the financial

institutions meeting the requirements of its Swiss Bank Program.

The Program, which was originally signed by the US and Switzerland in August 2013, has provided a path for Swiss banks to cooperate in the DoJ's investigations into the use of foreign bank accounts to evade US taxes.

Four categories of Swiss financial institutions were delineated by the Program. Category 1 included Swiss banks already under investigation when the Program was announced and therefore not eligible to participate. Category 2 was reserved for those banks that advised the DoJ by December 31, 2013, that they had reason to believe they had committed tax-related criminal offenses in connection with undeclared US-related accounts.

In exchange for a non-prosecution agreement, and the payment of appropriate penalties, Category 2 banks have made a complete disclosure of their cross-border activities; have provided detailed information on accounts in which US taxpayers have a direct or indirect interest; are cooperating in tax treaty requests for account information; are providing detailed information on other banks that transferred or accepted the undeclared funds; and must cooperate in any related criminal and civil proceedings for the life of those proceedings.

Banks eligible for Category 3 of the Program are those that established with the DoJ that they did not commit tax or monetary offenses and have an effective compliance program in place. Upon satisfying the necessary requirements, Category 3 banks have received a non-target letter pursuant to the terms of the Program.

Finally, Category 4 banks have been able to demonstrate that they have met certain criteria for deemed-compliance with the reporting requirements under the US Foreign Account Tax Compliance Act (FATCA). Category 4 banks have also been eligible for a non-target letter.

The DoJ confirmed that appropriate arrangements have now been made with all the Swiss bank categories. Between March 2015 and January 2016, the DoJ executed non-prosecution agreements with 80 Category 2 Swiss banks and collected more than USD1.36bn in penalties. Between July and December 2016, four banks and one bank cooperative satisfied the requirements of Category 3, making them eligible for non-target letters. No banks qualified under Category 4 of the Program.

"The completion of the resolutions with the banks that participated in the Swiss Bank Program is a landmark achievement in the Department's ongoing efforts to combat offshore tax evasion," Principal Deputy Assistant Attorney General Caroline Ciraolo concluded. "We are now in the legacy phase of the Program, in

which the participating banks are cooperating, and will continue to cooperate, in all related civil and criminal proceedings and investigations."

"The completion of the examination of Category 3 and 4 banks in the Swiss Bank Program marks another milestone in the continued success of this valuable criminal compliance effort," Chief Richard Weber of the Internal Revenue Service's (IRS's) Criminal Investigation (CI) commented. "IRS-CI will continue to partner with DoJ in pursuing those who facilitate or engage in international income tax evasion."

In January 2016, it was disclosed that, in addition to the Swiss banks' penalties, more than 54,000 taxpayers had already come forward to pay to the IRS more than USD8bn in taxes, interest, and penalties.

"The DoJ is committed to aggressively pursuing tax evasion, and the Swiss Bank Program has been a central component of that effort," US Attorney General Loretta Lynch said. "Through this initiative, we have uncovered those who help facilitate evasion schemes and those who hide funds in secret offshore accounts."

Acting Associate Attorney General Stuart Delery added that "the information and continuing cooperation we have required the banks to provide in order to participate in the program is allowing us to systematically attack offshore tax avoidance schemes."

UK Introduces New Penalties For Tax Evasion 'Enablers'

"Enablers" of offshore tax evasion in the UK face tough new sanctions that came into force on January 1, 2017.

As part of new powers announced in the 2015 Budget, individuals or corporates who deliberately help others to evade paying tax could be fined up to 100 percent of the tax they helped evade or GBP3,000 (USD3,686), whichever is highest. HM Revenue & Customs (HMRC) will also be able to publicly name the enabler.

"The raft of measures we have introduced to tackle avoidance and evasion will create a level playing field for the vast majority of people and businesses who play fair and pay what is due," said Financial Secretary to the Treasury Jane Ellison.

This year, the Government will also introduce a new corporate criminal offense of failing to prevent the facilitation of tax evasion. In addition, companies will be held liable if an individual acting on its behalf as an employee or contractor facilitates tax evasion.

Meanwhile, taxpayers who do not correct past evaded taxes by September 30, 2018, face new penalties under new legislation. The Government is also consulting on a new requirement for businesses and individuals who create

complex offshore financial arrangements that bear the hallmarks of enabling tax evasion to notify them to HMRC.

The Treasury said that since 2010, HMRC has secured over GBP130bn in additional compliance revenues as a result of actions to tackle tax evasion, tax avoidance, and non-compliance. It has also secured more than GBP2.5bn from offshore tax evaders.

Over 50 Countries To Automatically Exchange Tax Data: OECD

Over 50 jurisdictions have committed to automatically exchange tax information under the OECD's Common Reporting Standard (CRS).

The OECD said there are now more than 1,300 bilateral relationships in place across the globe, with most of them based on the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (the CRS MCAA).

Countries will again be able to decide on further countries with which to automatically exchange tax-related information in two rounds in March and June 2017.

The OECD said that 101 jurisdictions have agreed to start automatically exchanging financial account information in September 2017 and 2018.

It said on December 22: "Today's second wave of activations of bilateral exchange relationships [which added 350 to the tally] is a further crucial step towards the timely implementation of the OECD-developed international standard for the automatic exchange of financial account information, the CRS, and reflects the determination of jurisdictions around the world to deliver on their political commitment to fight tax evasion."

Swiss Bank Reaches German Tax Settlement

Zurich Cantonal Bank, Switzerland's largest cantonal bank, has reached an "amicable" agreement with the German authorities to settle a dispute relating to undeclared accounts held by German taxpayers.

In a brief statement released on December 27, the bank disclosed that a one-off payment of EUR5.7m (USD6m) will be made to the judicial authorities in Cologne "in connection with untaxed assets of German customers."

According to the statement, the agreement has legal force in all German states.

The bank also said that the agreement covers "affected employees" of the bank.

South Korea Plans Tax Changes To Boost Growth

Within its proposed policy framework for 2017, the South Korean Ministry of Strategy and Finance has announced various tax changes to counteract the jurisdiction's continued economic uncertainties, including measures to create jobs and support new growth industries.

For example, to encourage the commencement of job-creating investments, there will be an extra 2 percent corporate tax credit for posts created in projects started in 2017. In addition, the corporate tax credit for regular positions created will be raised from KRW5m (USD4,160) to KRW7m per employee (from KRW2m to KRW3m for large conglomerates).

It was also disclosed that a temporary-worker support package will be introduced in the second half of the year. This should increase the corporate tax credit for transferring workers from temporary positions to permanent positions, from KRW2m per transfer to KRW5m.

Research and development (R&D) tax credits are to be increased and expanded across more industrial sectors. The Government proposes to grant the 30 percent credit currently provided to small and medium-sized companies also to large and medium-sized companies in new growth sectors (presently only 20 percent).

The industrial areas where the R&D tax credit will be available include artificial intelligence and robotics, next generation electronic information devices and communication systems, bio-health innovation, new energy industry and environment, and future automobile, air, and aerospace technology.

The Government's tax measures also include a strengthening and widening of the tax base on financial instruments. In particular, from April 2018, it is intended that the threshold will be lowered so that shareholders with a stake of 1 percent or KRW1.5m in shares (previously KRW2.5bn) listed on the Korea Composite Stock Price Index (KOSPI) will be subject to capital gains tax (CGT) on transfers. That threshold will be reduced to KRW1bn in April 2020.

In addition, while only KOSPI 200 futures and options are subject to CGT under the current arrangements, KOSPI 200 equity-linked warrants are to be taxed with effect from April 1, 2017.

The tax exemption thresholds on interest and dividends from long-term deposit-type insurance investments (of ten years or more) are also to be lowered, and the tax base on earnings from these financial instruments will be extended to those linked with derivatives, as well as those that have not originally been structured by South Korean financial institutions,

but are sold by them (*e.g.*, overseas low-interest bonds with a forward exchange rate).

Finally, to protect household incomes, the Government plans to expand child tax benefits to families with two or more children, from families with three or more; and to introduce marriage income tax breaks of KRW500,000 per person (KRW1m if both individuals are working).

Sweden Proposes Tax Break For Startups

The Swedish Government is to ease tax rules for startup companies to better enable them to recruit skilled workers.

Under the proposals, announced by the Finance Ministry on December 20, shares granted to employees as part of their pay packages would not be considered remuneration for tax purposes, and therefore would not attract social security contributions. These shares would then be taxable as a capital gain when sold.

Small and startup companies in Sweden, particularly in the technology sector, have long been calling for changes to the taxation of employee stock options, which are subject to income tax and social security contributions, for a combined rate of almost 70 percent.

Earlier in the year, Spotify co-founders Martin Lorentzon and Daniel Ek implored the Government to change these tax rules, stating the existing regime makes it "impossible" for Swedish companies to reward employees with stock options.

"In the US, stock options are taxed to the employee as income from capital at a rate of 15–20 percent, in Germany the level is 25 percent. In Sweden it is considered today as income from employment and thus taxed at 70 percent," they wrote.

The new rules would apply to companies that are no more than ten years old and employ no more than 50 staff.

The Government intends for the changes to be introduced on January 1, 2018, although the amendments first need state aid approval from the European Commission.

China Cut Tariffs On January 1

China introduced import and export duty changes from January 1 to boost innovation-driven development and put the country's tariff structure "more in line with the needs of international trade development."

The changes are said to be to encourage imports of advanced equipment, key spare parts, and essential energy and raw materials. For example, duty relief is now offered on integrated circuit test equipment, aircraft hydraulic actuators, parts for high-resolution digital cinema projectors, and thermal cracking furnaces.

China has also adjusted the tariffs on certain goods, such as tuna and arctic shrimp, to improve consumer choice, while import duties have been cut on materials used in pharmaceutical development, such as for anti-cancer and anti-diabetes medicines.

In addition, export tariffs have been eliminated on nitrogen, phosphate fertilizers, and commodities such as natural graphite.

Finally, import duties have been further lowered in 2017 in accordance with the terms of China's free trade agreements. In particular, tariffs have been lowered for further products from Hong Kong and Macau following the upgrading of their Closer Economic Partnership Arrangements. Annual tariff adjustments under the agreements with South Korea, Australia, New Zealand, Peru, Costa Rica, Switzerland, Iceland, and Pakistan have also taken effect.

EU–Ukraine Free Trade Deal Boosts Trade

The EU and Ukraine have hailed the benefits of the Deep and Comprehensive Free Trade Area (DCFTA) applied as part of their Association Agreement.

The EU and Ukraine held the third meeting of their Association Council on December 19. The Council underlined the importance of both the Association Agreement and the DCFTA.

The DCFTA has been provisionally applied since January 2016. The Association Council said the agreement has already increased the trade volume between the EU and Ukraine by 7.5 percent in the period October 2015–September 2016 compared to the previous year.

The DCFTA aims to boost trade in goods and services between the EU and Ukraine by gradually cutting tariffs and bringing Ukraine's rules in line with the EU's in certain industrial sectors and agricultural products. Once the DCFTA is fully implemented, Ukraine and the EU will eliminate respectively 99.1 percent and 98.1 percent of duties in trade value.

Ukraine has benefited from the EU's Generalised System of Preferences (GSP) since 1993. Following the provisional application of the DCFTA, these GSP preferences will be phased out at the end of 2017.

During the Association Council meeting, the EU noted the prospects for possible additional trade opportunities for Ukrainian exports to the EU beyond the trade concessions included in the DCFTA. It envisages these arising in the context of the European Commission's proposal for additional concessions in the form of autonomous trade measures.

Hungary Should Slash Personal Tax, Says Economy Minister

Hungary could follow up its recent decision to slash the rate of corporate tax with a similar tax cut on individual income, Economy Minister Mihaly Varga has suggested.

In an interview with Hungarian business daily *Világgazdaság* reported on December 23, Varga said that Hungary should consider reducing personal income tax to a "single-digit" figure if economic conditions permit.

"In my opinion, as we've reduced the corporate tax to 9 percent and brought the payroll tax down to the Central European average, it would make sense to cut the personal income tax," Varga told the publication, adding that a "single-digit flat rate system is the goal."

At present, personal income is generally taxed at a flat rate of 16 percent.

Legislation approved by parliament on December 13 reduced corporate tax to a flat rate of 9 percent effective from January 1, 2017. Previously, companies in Hungary were subject to corporate tax at 19 percent on annual income in excess of HUF500m (USD1.7m), and 10 percent on income up to this threshold.

Poland Withdraws 'Single Tax' Proposal

The Polish Government has decided not to proceed with a proposal to restructure the tax regime for self-employed taxpayers.

At present, self-employed taxpayers can opt to pay a 19 percent flat tax plus social security and health contributions, instead of normal progressive income tax rates of 18 percent and 32 percent.

A proposal first announced by Prime Minister Beata Szydlo in April 2016 would have combined the 19 percent flat tax and additional contributions into a single tax charge.

However, Deputy Prime Minister Mateusz Morawiecki announced on December 21 that following an analysis of the proposal by the Economic Committee of the Council of Ministers, the Government no longer intends to implement the "single tax" regime.

Morawiecki said the proposal for the single tax was "not well founded" and could have been detrimental to the self-employed and small businesses.

Wales To Be Granted Income Tax Powers

Wales could take on partial responsibility for setting income tax rates from April 2019 after

agreeing a "fair level" of long-term UK funding for the nation.

The new tax powers will enable the Welsh Government to raise or lower income tax rates by as much as 10 percent, compared with UK rates, uniformly across each band, without holding a referendum.

The agreement with the UK also enables Wales to set its own policy on stamp duty land tax and landfill tax.

"This package of measures paves the way for partial income tax devolution in Wales," said Mark Drakeford, the Welsh Government's Cabinet Secretary for Finance and Local Government. "But crucially it protects our budget from the range of undue risks that could arise following the devolution of tax powers from 2018 and provides additional flexibility to manage our resources."

The Welsh Assembly will decide on the devolution proposals in early 2017.

ATT Warns On UK's 'Sharing Economy' Tax Concession

The Association of Taxation Technicians (ATT) has warned the UK tax agency that taxpayers may unwittingly fall foul of UK tax rules after the introduction of a new concession for individual taxpayers with a very low business turnover from the so-called "sharing" or "micro-entrepreneur" economy.

The UK Government recently published draft legislation to introduce two annual allowances in the 2017 Finance Bill: a GBP1,000 (USD1,260) tax-free allowance for trading income; and a GBP1,000 tax-free allowance for income from property.

The intention of these allowances is to exempt from income tax small amounts earned by individuals from, for example, letting out property through Airbnb, or small-scale trading via a website such as eBay.

The ATT said the draft legislation had provided clarity on what types of businesses would benefit from the allowance.

It noted that "the Budget announcement in March 2016 had linked the new allowance to the 'sharing economy,' creating uncertainty as to which types of business would qualify. [The draft legislation makes] it clear that the new allowances will apply to all types of property and trading income of an individual but not to partnership income."

According to the ATT, the new rules, applicable from the 2017/18 tax year, mean that where such annual income does exceed GBP1,000, the individual will have the option in calculating their taxable profits of either deducting all their actual business expenses (in the usual way) or of deducting the fixed allowance of GBP1,000 (regardless of their level of actual expenditure).

Under the draft legislation, individuals with income of less than GBP1,000 from each activity will not have to notify HMRC that they are making use of the allowance. The ATT fears that this could result in individuals unintentionally failing to notify HMRC if their annual income subsequently exceeds the allowance. The ATT has recommended that there could possibly be a simple notification process in order for an individual to qualify for the allowance.

"We think that it would be sensible to consider making entitlement to the allowance conditional on notification to HMRC that an individual wishes to use it," said Michael Steed, Co-chair of the ATT's Technical Steering Group. "In that way, the individual would be far less likely to receive an enquiry from HMRC about their income from an apparently undeclared source of income and HMRC could safely disregard information about low levels of income received by someone who had notified their use of the allowance."

ARMENIA - VARIOUS

Ratified

According to preliminary media reports, Armenia completed its domestic ratification procedures in respect of DTAs with Belarus, Germany, India,and Sweden on December 13, 2016.

AUSTRALIA - GERMANY

Effective

The provisions of the new DTA between Australia and Germany became effective on January 1, 2017.

CANADA - MADAGASCAR

Signature

Canada and Madagascar signed a DTA on November 24, 2016.

CHILE - SWITZERLAND

Signature

Chile and Switzerland have signed an automatic TIEA, the Swiss Government confirmed on December 6, 2016.

CHINA - PAKISTAN

Signature

A third Protocol to China's DTA with Pakistan was signed on December 8, 2016.

CYPRUS - INDIA

Signature

Cyprus and India signed a DTA Protocol on November 18, 2016.

CZECH REPUBLIC - CHILE

Into Force

The DTA between the Czech Republic and Chile entered into force on December 21, 2016, the Czech Ministry of Finance announced on December 27, 2016.

GERMANY - AUSTRALIA

Into Force

The new DTA between Germany and Australia entered into force on December 7, 2016.

HONG KONG - ROMANIA

Effective

The DTA between Hong Kong and Romania became effective on January 1, 2017.

INDIA - SINGAPORE

Signature

India and Singapore signed a DTA Protocol on December 30, 2016.

ISLE OF MAN - TURKS AND CAICOS ISLANDS

Into Force

The TIEA between the Isle of Man and Turks and Caicos entered into force on December 29, 2016.

KAZAKHSTAN - SLOVENIA

Ratified

Kazakhstan's Senate on December 29, 2016 ratified a new DTA with Slovenia.

MONACO - LIECHTENSTEIN

Initialed

Monaco and Liechtenstein initialed a DTA on November 30, 2016.

RUSSIA - CYPRUS

Negotiations

Russia and Cyprus have agreed to delay bringing into effect a Protocol to their DTA, the Cypriot Ministry of Finance confirmed on December 29, 2016.

RUSSIA - SINGAPORE

Into Force

A Protocol to the DTA between Russia and Singapore entered into force on November 25, 2016.

SAINT KITTS AND NEVIS - UNITED ARAB EMIRATES

Signature

Saint Kitts and Nevis and the United Arab Emirates signed a DTA on November 24, 2016.

SWITZERLAND - LIECHTENSTEIN

Into Force

The DTA between Switzerland and Liechtenstein will enter into force on December 22, 2016.

SWITZERLAND - VARIOUS

Effective

Switzerland's revised DTAs with Albania and Norway became effective on January 1, 2016.

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

THE AMERICAS

Taxation of Financial Products and Transactions 2017

1/17/2017 - 1/17/2017

PLI

Venue: PLI New York Center, 1177 Avenue of the Americas, (2nd floor), entrance on 45th Street, New York 10036, USA

Chair: Matthew A. Stevens (EY)

http://www.pli.edu/Content/Seminar/Taxation_of_Financial_Products_and_Transactions/_/N-4kZ1z10p5p?ID=288675

6th Annual Institute on Tax, Estate Planning and the Economy

The Americas

1/23/2017 - 1/26/2017

STEP

Venue: Fairmont Hotel, 4500 MacArthur Blvd, Newport Beach, California, 92660, USA

Key speakers: Erin S. Fukuto (Albrecht & Barney), Kristin Yokomoto (Albrecht & Barney), Matthew T. McClintock (WealthCounsel LLC), Louis W. Pierro (Pierro, Connor & Associates, LLC), among numerous others

http://www.step.org/sites/default/files/STEP_OC_Brochure_2017_USsize_WEB_081116.pdf

International Tax Issues 2017

2/7/2017 - 2/7/2017

PLI

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

Chair: Michael A. DiFronzo (PwC)

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2017/_/N-4kZ1z10p5l?ID=288687

Consolidated Tax Return Regulations 2017

2/13/2017 - 2/14/2017

Practising Law Institute

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

Chair: Mark J. Silverman (Steptoe & Johnson LLP)

http://www.pli.edu/Content/Seminar/Consolidated_Tax_Return_Regulations_2017/_/N-4kZ1z10p5i?ID=288681

The Leading Forum For Transfer Pricing Professionals in the US and Beyond

2/21/2017 - 2/22/2017

Informa

Venue: The Biltmore Hotel, Miami, 1200 Anastasia Ave, Coral Gables, FL 33134, USA

Key speakers: Matthew Frank (General Electric), Brandon de la Houssaye (Walmart), Brian Trauman (KPMG), Katherine Amos (Johnson & Johnson), Michael Cartusciello (JP Morgan), among numerous others

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

Hot Issues in International Taxation

3/29/2017 - 3/30/2017

Bloomberg BNA

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

Key Speakers: TBC

https://www.bna.com/hot-issues_arlington2017/

International Tax and Estate Planning Forum: Around the Globe in 2017

5/4/2017 - 5/5/2017

STEP

Venue: Surf & Sand Resort, 1555 South Coast Highway, Laguna Beach, CA, USA

Key speakers: TBC

http://www.step.org/events/international-tax-and-estate-planning-forum-around-globe-2017

Transcontinental Trusts: International Forum 2017

5/4/2017 - 5/5/2017

Informa

Venue: The Fairmont Southampton, 101 South Shore Road, Southampton, SN02, Bermuda

Key speakers: TBC

http://www.iiribcfinance.com/event/transcontinental-trusts-bermuda

16th Annual International Mergers & Acquisitions Conference

6/6/2017 - 6/7/2017

International Bar Association

Venue: Plaza Hotel, 768 5th Ave, New York, NY 10019, USA

Key Speakers: TBC

http://www.ibanet.org/Conferences/conf774.aspx

ASIA PACIFIC

The 5th Offshore Investment Conference

2/8/2017 - 2/9/2017

Offshore Investment

Venue: Fairmont, 80 Bras Basah Rd, 189560, Singapore

Key Speakers: TBC

http://www.offshoreinvestment.com/pages/index.asp?title=The_5th_Offshore_Investment_Conference_Singapore_2017&catID=13805

MIDDLE EAST AND AFRICA

3rd IBFD Africa Tax Symposium

5/10/2017 - 5/12/2017

IBFD

Venue: Labadi Beach Hotel, No. 1 La Bypass, Accra, Ghana

Key speakers: TBC

http://www.ibfd.org/IBFD-Tax-Portal/Events/3rd-IBFD-Africa-Tax-Symposium#tab_program

WESTERN EUROPE

Court of Justice of the European Union: Recent VAT Case Law

1/11/2017 - 1/13/2017

The Institute for Austrian and International Tax Law

Venue: WU (Vienna University of Economics and Business), LC building on the New Campus, Welthandelsplatz 1, 1020 Vienna, Austria

Chairs: Donato Raponi (European Commission), Antonio Victoria-Sanchez (European Commission) and Michael Lang (WU)

https://www.wu.ac.at/en/taxlaw/conferences-seminars-lectures-events/recent-vat-case-law-conference/

Share Schemes & ERS

1/18/2017 - 1/18/2017

Informa

Venue: TBC, London, UK

Chair: David Pett (Pett Franklin & Co)

https://finance.knect365.com/share-schemes-and-ers/

Tax Treatment of Employment Related Securities

1/19/2017 - 1/19/2017

Informa

Venue: TBC, London, UK

Chair: Mahesh Varia (Travers Smith)

https://finance.knect365.com/tax-treatment-of-employment-related-securities/

Private Client Property Tax 2017

1/26/2017 - 1/26/2017

Informa

Venue: TBC, London, UK

Chair: Robert Smeath (New Quadrant Partners)

https://finance.knect365.com/private-client-property-tax/agenda/1

6th Annual IBA Tax Conference

1/30/2017 - 1/31/2017

International Bar Association

Venue: TBC, London, UK

Key Speakers: TBC

http://www.ibanet.org/Conferences/conf779.aspx

Global Transfer Pricing Conference

2/22/2017 - 2/24/2017

WU Transfer Pricing Center at the Institute for Austrian and International Tax Law

Venue: WU (Vienna University of Economics and Business), Welthandelsplatz 1, 1020 Vienna, Austria

Key speakers: Krister Andersson (Lund University, Joe Andrus (OECD), Piero Bonarelli (UniCredit), Melinda Brown (OECD), among numerous others

https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/transfer_pricing_center/TP_Conf/Global_TP_Conference_2017_-_Brochure_19.8..pdf

Tax Planning for Entertainers and Sports Stars 2017

2/23/2017 - 2/23/2017

Informa

Venue: TBC, London, UK

Chair: Patrick Way (Field Court Tax Chambers)

https://finance.knect365.com/tax-planning-for-entertainers-sports-stars/

Principles of International Taxation

2/27/2017 - 3/3/2017

IBFD

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

Key speakers: TBC

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

Landed Estates 2017

2/28/2017 - 2/28/2017

Informa

Venue: TBC, London, UK

Chair: Rhoddy Voremberg (Farrer & Co)

https://finance.knect365.com/landed-estates/

The 15th Annual Definitive Permanent Establishment & BEPS Mastercourse

3/1/2017 - 3/1/2017

Informa

Venue: TBC, London, TBC

Chair: Jonathan Schwarz (Temple Tax Chambers)

https://finance.knect365.com/permanent-establishment-beps-masterclass/

BEPs Action 15- Multilateral Convention

3/2/2017 - 3/2/2017

Informa

Venue: TBC, London, UK

Chair: Jonathan Schwarz (Temple Tax Chambers)

https://finance.knect365.com/multilateral-convention-beps-action-15/

22nd Annual International Wealth Transfer Practices Conference

3/6/2017 - 3/7/2017

International Bar Association

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

Key speakers: TBC

http://www.ibanet.org/Conferences/conf771.aspx

TP Minds International

3/6/2017 - 3/9/2017

Informa

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

Chair: Ruth Steedman (FTI Consulting)

https://finance.knect365.com/tp-minds-international-conference/agenda/1

2nd International Conference on Taxpayer Rights

3/13/2017 - 3/14/2017

The Institute for Austrian and International Tax Law

Venue: TBC, Vienna, Austria

Key Speakers: TBC

https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/eventsn/ITRC_RegistrationFlyer_101216.pdf

Global Tax Treaty Commentaries Conference

5/5/2017 - 5/5/2017

IBFD

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

Key speakers: Prof. John Avery Jones, Dr Philip Baker (QC Field Court Tax Chambers), Prof. Dr Michael Beusch (Federal Administrative Court), Prof. Mike Dolan (IRS Policies and Dispute Resolution and KPMG), among numerous others

http://www.ibfd.org/IBFD-Tax-Portal/Events/Global-Tax-Treaty-Commentaries-Conference#tab_program

THE AMERICAS

United States

The US Supreme Court (SCOTUS) has denied a review of its 1992 *Quill* decision restricting sales taxes on online sales, by not taking up a case against Colorado's internet sales notice and reporting law.

A listing of recent key international tax cases.

Quill, a Supreme Court ruling before the internet sales boom, established the "physical presence" test, whereby retailers are only required to collect sales tax in states where they also have bricks-and-mortar stores. It was additionally decided that only Congress has the authority to regulate inter-state commerce under the Commerce Clause of the US Constitution.

Colorado enacted a law in 2010 that imposed three obligations on online retailers that do not collect sales taxes – "non-collecting retailers." Under the law, such retailers have to send a "transactional notice" to Colorado purchasers informing them that they may be subject to Colorado's sales tax.

Additionally, online retailers must send an "annual purchase summary" to those who buy goods from the retailer totaling more than USD500, listing dates, categories, and amounts of purchases, to remind them of their obligation to pay sales taxes on those purchases, while they are also required to send the state government an annual "customer information report" listing their customers' names, addresses, and total amounts spent.

Subsequently, the Direct Marketing Association (DMA) brought a case against Barbara Brohl, in her capacity as Executive Director of the Colorado Department of Revenue, challenging the Colorado law and convinced a district court that it violates the Commerce Clause because it discriminates against, and unduly burdens, interstate commerce.

In 2015, the Appeals Court decided, to the contrary, that the Colorado law does not contravene *Quill*, as "the notice and reporting requirements of the Colorado law do not constitute a form of tax collection," In August this year, the DMA petitioned SCOTUS to pick up the case.

Brohl cross-petitioned explicitly asking SCOTUS to reconsider *Quill*. Her petition argued that "courts and commentators agree that the rule lacks doctrinal justification, given that States may impose other regulations on businesses that lack a physical presence within the regulating State's borders. And, with the explosion of e-commerce to a multi-trillion dollar industry, the physical presence rule has caused a startling revenue shortfall in many States."

By refusing to consider both petitions, SCOTUS has not taken up an opportunity to repeal *Quill*, even though, in the Appeals Court, Justice Anthony Kennedy had noted that "there is a powerful case to be made that a retailer doing extensive business within a state has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the internet," and suggested that "it is unwise to delay any longer a reconsideration of the [Supreme] Court's holding in Quill."

Nevertheless, SCOTUS may soon be provided with another opportunity to re-examine at *Quill*, as the Ohio Supreme Court's decision last month to uphold the state's commercial activity tax (CAT) may be presented to it.

The CAT has been imposed since 2005 on every business with "taxable gross receipts" in Ohio, determined as orders of goods initiated online by Ohio consumers and transported into Ohio by an out-of-state seller. However, the tax only applies if a business has USD500,000 or more in annual gross sales in the state.

The Ohio Supreme Court determined that, while a physical presence in a state may be required to impose an obligation to collect sales taxes on an out-of-state seller, that requirement does not apply to "business-privilege taxes," such as the CAT. It also found that Ohio's USD500,000 annual sales threshold for the CAT means that a seller has a "substantial nexus" to that state.

The Colorado and Ohio cases are the latest elements in the ongoing battle by states to impose sales tax on online sellers. While there have been delays in proposals, such as the Marketplace Fairness Act, for bipartisan federal legislation in the US Congress to resolve the issue, states and their courts appear to be taking a larger role.

http://www.scotusblog.com/case-files/cases/direct-marketing-association-v-brohl-2/

US Supreme Court: *Direct Marketing Association v. Brohl (16-267)*

WESTERN EUROPE

European Union (EU)

A planned free trade agreement between Europe and Singapore must be jointly approved by the EU and its member states, an Advocate General (AG) of the European Court of Justice (ECJ) has opined.

AG Eleanor Sharpston stated that not all parts of the agreement fall within the EU's exclusive competence, and therefore the agreement cannot be concluded without the participation of all member states.

On September 20, 2013, the EU and Singapore initialed the text of a Free Trade Agreement (the "EUSFTA"). The EUSFTA provides that it is to be concluded as an agreement between the EU and Singapore, without the participation of the member states.

The European Commission is seeking an Opinion from the ECJ under Article 218(11) of the Treaty on the Functioning of the EU on the allocation of competence between the EU and the member states as regards the EUSFTA.

According to a statement from the ECJ:

> "This procedure allows a member state, the European Parliament, the Council, or the Commission to ask the Court to give its view on whether an agreement between the EU and a third country is compatible with the Treaties. Where the Opinion is adverse, the agreement must be amended (or the Treaties revised) before it can enter into force."

The Commission argues that the EU has exclusive competence to conclude the agreement. The European Parliament generally agrees with the Commission. The Council and the governments of all member states that submitted written observations contend that the EU cannot conclude the agreement on its own because certain parts of the EUSFTA fall within the shared competence of the EU and the member states, and even the exclusive competence of the member states.

In her Opinion, issued on December 21, 2016, AG Sharpston opined that the EUSFTA can only be concluded by the EU and the member states acting jointly.

She added that, in her view, the EU has no external competence to agree to be bound by that part of the EUSFTA that terminates bilateral agreements concluded between certain member states and Singapore. In her view, that competence belongs exclusively to the member states concerned.

While the AG noted that difficulties may arise from a ratification process involving all member states alongside the EU, she stated that such a consideration cannot affect the question of who has competence to conclude the agreement.

The ECJ is expected to deliver its decision in 2017.

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160147en.pdf

European Court of Justice: *Advocate General's Opinion in Opinion procedure 2/15*

France

The European Commission has referred France to the European Court of Justice (ECJ) for failing to comply with a previous judgment on the taxation of dividends.

The dispute concerns the refund of tax paid in France by companies with subsidiaries in other EU member states, under the "advance payment of tax" mechanism. The Commission has taken the view that France is not complying with a 2011 ECJ ruling on three specific points.

It stated that the French regime does not take into account the tax already paid by non-French subsidiaries, and limits the system of tax credits to one third of the dividend redistributed by a non-French subsidiary. According to the Commission, this limit constitutes a difference in the treatment between companies receiving dividends originating in other member states and those receiving dividends of French origin.

Finally, the Commission said that in order to restrict the right of the companies to a refund, France maintains requirements that evidence be provided. By doing so, France does not comply with the criteria laid down by the ECJ in its previous judgment, the Commission argued.

The Commission sent France a letter of formal notice on November 27, 2014, followed by a reasoned opinion on April 29, 2016. It announced that as France has not yet complied, it is now bringing the matter before the Court.

The press release announcing the Commission's referral to the ECJ was published on December 8, 2016.

http://europa.eu/rapid/press-release_IP-16-4216_en.htm?locale=en

European Court of Justice: *Commission v. France*

Germany

The European Court of Justice (ECJ) has provided a preliminary opinion in a case that arose because a taxpayer contested the import VAT which the German authorities claimed at the same time as customs duties as a result of goods being unlawfully removed from customs supervision when the relevant customs procedure (transit) had not ended correctly.

The case in particular looked at how Germany's rules on free zones impacted the VAT treatment of the scenario.

Textiles that had entered the customs territory of the EU the previous day at Frankfurt am Main airport and been presented to customs were declared and released for the external Community transit procedure.

The consignee of the goods was a company based in the free port of Hamburg. However, the goods never reached the customs office of destination. Investigations during the inquiry procedure established that they were unloaded at the consignee's premises within the Hamburg free port, the seal having been broken, and sent by sea to Finland and then re-exported to Russia.

The following year the Customs Office of Giesen issued a notice of assessment of customs duty and import VAT both to the authorized consignor and to the consignee.

As the chargeable event in respect of the customs debt occurred in a free zone (*i.e.*, the Hamburg free port), which the national legislation does not regard as being "territory of the country" for VAT purposes, the referring court sought an opinion from the ECJ asking whether the goods were imported or not and, consequently, whether import VAT became due.

In essence, the referring court sought to ascertain what the legal effects on import VAT might be regarding the fact that German law considers certain free zones to be "foreign territory." Specifically, the referring court asked whether, in general, the entry of goods into one of these free zones means that they have not entered EU territory and that, as a result, import VAT cannot be said to be due.

The ECJ stated in its preliminary opinion that when a customs debt under Article 203(1) of the Community Customs Code is incurred due to the removal from customs supervision of goods in a free zone, this gives rise to the chargeable event and import VAT becoming chargeable if it is reasonable to presume that the goods were able to enter the EU's economic network, which it stated is a matter for the national court to determine.

The preliminary opinion was released on December 13, 2016.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=186178&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=406813

European Court of Justice: *Wallenborn Transports SA v. Hauptzollamt Giesen (Case C-571/15)*

Ireland

The European Court of Justice (ECJ) has ruled that Aer Lingus and Ryanair benefited from illegal state aid in the form of reduced air passenger tax rates.

The ECJ found that the airlines that were able to benefit from the reduced rate enjoyed a competitive advantage of EUR8 (USD8.36) compared with airlines that paid the standard rate. It has ordered Ireland to recover a sum of EUR8 per passenger for each of the flights concerned.

In July 2009, Ryanair asked the European Commission to examine the air travel tax imposed by Ireland on airlines. Ryanair alleged that some of its competitors had derived a financial advantage from the fact that they operated a significant number of flights to destinations located less than 300km from Dublin airport. For such journeys, the tax was set at EUR2 per passenger. Other flights departing from Ireland were subject to a rate of EUR10 per passenger.

In July 2012, the Commission concluded that the application of a lower rate for short-haul flights constituted state aid incompatible with the internal market. It ordered the recovery of that aid from the beneficiaries (which included Aer Lingus and Ryanair). It argued that the amount of aid corresponded to the difference between the lower rate of EUR2 and the standard rate of EUR10.

Aer Lingus and Ryanair challenged the decision before the General Court of the EU. In February 2015, the General Court partially annulled the Commission's 2012 decision on the ground that the Commission had failed to show that the advantages enjoyed by the airlines was, in all cases, EUR8 per passenger. The Commission then lodged an appeal with the ECJ.

The ECJ has now concluded that "the airlines that were able to benefit from the reduced rate enjoyed a competitive advantage of EUR8 by comparison with airlines that paid the standard rate."

It explained: "The advantage in question did not consist in the fact that those airlines were able to offer more competitive prices than their competitors. It resulted quite simply from the fact that those companies had to pay a lower amount than they would have had to pay if their flights had been subject to the standard rate."

The ECJ added that "there was nothing to prevent the beneficiaries of the aid from increasing by EUR8 the price of their tickets that were subject to the lower rate so as to enjoy economic benefits corresponding to the difference between the lower and standard rates."

It therefore rejected the argument put forward by Aer Lingus and Ryanair that as they were no longer in a position to recover the amount of EUR8 from their customers, their obligation to repay that sum would be equivalent to an additional tax or a discriminatory penalty.

This decision was reported in an ECJ press release dated December 21, 2016.

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160142en.pdf

European Court of Justice: *Commission v. Aer Lingus Ltd, Ryanair Designated Activity Company and Ireland (C-164/15 P and C-165/15 P)*

Spain

The European Court of Justice (ECJ) has upheld two decisions by the European Commission regarding the legitimacy of a Spanish law on the tax amortization of financial goodwill for foreign shareholding acquisitions in Spain.

The ECJ's ruling confirmed the Commission's earlier finding that, by allowing companies to deduct the financial goodwill arising from shareholdings in foreign companies from their corporate tax base, the Spanish measure gave those companies a selective advantage over their competitors in breach of EU state aid rules.

In reaching its decision, the ECJ set aside an earlier ruling by the General Court from November 2014.

According to the Spanish law on corporation tax, where a company that is taxable in Spain acquires a shareholding in a "foreign company" of at least 5 percent and holds it without interruption for at least one year, the goodwill resulting from that shareholding may be deducted through amortization of the basis of assessment for the corporation tax for which the undertaking is liable. The law states that, to qualify as a "foreign company," a company must be subject to a similar tax to the tax applicable in Spain, and its income must derive mainly from business activities carried out abroad.

Spanish tax law does not allow the goodwill resulting from the acquisition of a shareholding in a company established in Spain by a company which is taxable in Spain to be entered separately in the accounts for tax purposes. By contrast, Spanish tax law also provides that goodwill may be amortized where undertakings are grouped together.

In an announcement on October 15, 2014, the Commission had stated that the measure provided the beneficiaries with a selective economic advantage which cannot be justified under EU state aid rules, and which must now be repaid to the Spanish state.

Three Spanish companies – Autogrill España, Banco Santander, and Santusa Holding – subsequently brought an appeal before the General Court, asking for the Commission decisions to be annulled.

However, the ECJ ruled that the General Court had "erred in law" with its conclusion that the measure at issue was not selective because the Commission had not identified a particular category of undertakings exclusively favored by the tax measure concerned.

The latest ruling means that the Commission decisions of October 2009 and January 2011 are reinstated, including Spain's obligation to recover the aid granted under the measure.

This decision was reported in an ECJ press release dated December 21, 2016.

http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160139en.pdf

European Court of Justice: *Commission v. World Duty Free Group; Commission v. Banco Santander SA et al. (C-20/15 P; C-21/15 P)*

Dateline January 5, 2017

Costa Rica was recently chastised by the International Monetary Fund for repeated failures to overhaul its tax system and replace its general sales tax with a much more internationally familiar **value-added tax** system. On the first issue, the IMF probably has a point. Tax reform might mean that the country loses some of the more attractive features of its tax system, like territorial taxation. But lingering uncertainty, caused by successive years of legislative paralysis on this matter, is probably worse. However, as to the IMF's second point, I would advise Costa Rica to look long and hard before it plunges into a VAT.

It is certainly the case that countries without VATs and similar taxes (*e.g.*, GSTs) are vastly outnumbered by those jurisdictions with such tax regimes in place. And there are plenty of arguments in favor of them. VATs can help to broaden national tax bases so that there is less pressure to tax incomes, with more of the burden falling on consumption, which many economists argue leads to much less economic distortion. The invoice and credit system underpinning VATs can also help companies maintain cash flow, which is particularly helpful for small firms.

Nevertheless, things can get very complicated very quickly when governments start introducing multiple VAT rates and exemptions. And unless VAT legislation is watertight and drafted in such a way that it is not open to interpretations, all sorts of absurdities can ensue.

The **United Kingdom**, in particular, has form in this area. In the UK, food is generally zero-rated, but some foods are "luxuries" or are considered "catering" and subject to the standard rate. So, in the not-too-distant past, we have seen long-running battles between HM Revenue & Customs and taxpayers over the classification of teacakes (a cake or a biscuit?), Pringles (a potato chip or not a potato chip?), and pasties (hot takeout food, or merely "food"?).

More recently, HMRC was forced to issue a whole brief for publishing houses, wholesalers and retailers to clarify the scope of the zero-rate for coloring and dot-to-dot books, which, curiously, are now finding a large audience among adults keen to relive their childhoods. And while such cases might seem ridiculous, even amusing, to the casual observer, they have huge ramifications for affected VAT-payers, not to mention the time and money spent by the respective parties contesting such disputes through the tax tribunals and courts.

As if coping with one country's VAT regime wasn't hard enough though, imagine trying to reckon with up to 28, as **intra-EU traders** must. In theory, the EU has a single VAT area. But member states are allowed to charge up to two lower rates in addition to their standards rates. Consequently, there are more than **70 separate VAT rates** across the EU, plus various other permitted derogations from the VAT directive. In other words, a complicated mess.

The EU VAT regime was recently named among the **top-three barriers** to the spread of e-commerce in the EU, which is why, as mentioned in this column last month, the EU is rightly taking steps to ease the compliance burden for e-commerce businesses, especially **small and micro businesses**.

And since its landmark announcement on December 1, it has followed up with consultations on the business-to-business selling rules, exemptions for small businesses, and VAT rates. All of this could lead to more harmonization of the VAT rules in the EU. But while this might sound like an eminently sensible enterprise at first, inevitably there will be winners and losers.

The European Commission would dearly love to do away with **lower VAT rates** so that member states are permitted to levy only one standard rate. This could help to iron out VAT anomalies, distortions and disputes, and raise substantial revenues for member states, although taxpayers in sectors subject to lower rates could be disadvantaged. Similarly, many taxpayers may grumble if greater VAT harmonization led to more coordination of **registration thresholds**. These currently vary greatly, from as low as DKK50,000 (approximately EUR6,700) in Denmark, and up to GBP83,000 (approximately EUR98,000) in the UK.

However, most taxpayers and tax professionals who have experienced the EU VAT regime would probably agree that changes are sorely needed. It would be tragic, however, if the Commission and the European Council contrived the make a bad situation worse for small businesses. Therefore, the Commission should consider very carefully the feedback it receives from taxpayers in the extensive consultative process that will run between now and early spring 2017. What the Commission proposes next could ultimately make or break many small companies selling goods and services across EU borders.

Large companies have plenty of compliance issues to be getting on with too – largely because of changes brought about by the BEPS project. Indeed, **country-by-country reporting requirements**, which are spreading rapidly across the globe, have been described by many senior tax and business advisors as a "game-changer" in the field of transfer pricing, itself a major focus of BEPS.

Surveys show that a great deal of affected companies are scrambling to align their systems with the new rules. So just imagine if **CbC reports were made public**. That would certainly represent something of a paradigm shift in tax transparency. Supporters of such proposals – which include the European Commission – argue that, with reputations such a valuable currency these days, tax avoidance would be discouraged because the public would be able to see how a company conducts its financial affairs, and where it pays its taxes.

On the other hand, companies subject to CbC reporting regimes would, as the **French Constitutional Court** concluded recently, be put a major competitive disadvantage to those that aren't, while opening up themselves and their employees to other risks. What's more, how many people are going to fully understand such complex financial data? Not many, I suspect. And if this is the case, what value would public CbC reports really have?

With Germany's Wolfgang Schäuble and other European finance ministers skeptical about public CbC reporting, there is by no means a consensus on this issue. We also await the position of the **incoming US administration** on CbC reporting, and BEPS in general (although it's probably safe to assume that Republicans are cautious over many aspects of BEPS, judging by the comments of senior party figures in the past couple of years).

But with tax transparency arguably never higher on the political agenda and in the public consciousness all over the world, this will continue to be a hotly debated topic in 2017, even if most members of the general public – who are supposed to benefit the most from increased transparency – probably couldn't make head nor tail of a CbC report in the first place.

The Jester