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a closer look

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a closer look

Global Tax Weekly – A Closer Look

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The Affordable Care Act: Impact On International Assignments

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In 2010, the United States passed legislation which introduced sweeping changes to the landscape of US health care and imposed requirements for coverage. This legislation, which is commonly referred to as the Affordable Care Act ("ACA"), presents a myriad of complex issues related to internationally mobile employees.[1] In particular, as employers prepare to meet their 2015 year end ACA reporting requirements, special attention should be given as to how employees on assignment to or from the US should be reported.

As background, the ACA has two primary requirements for health care insurance coverage: the individual mandate, and the employer mandate. Although these two mandates are closely related, the requirements for each are unique and do not align precisely. In the simplest terms, the individual mandate requires that all US persons maintain

health insurance coverage throughout the year for themselves and members of their household. The employer mandate requires that large employers offer coverage to employees and their dependents.[2]

Overview Of ACA Requirements

In order to address the complications that an international assignment can add to ACA coverage and reporting, it is critical to understand the general concepts of the individual and employer mandates, including what constitutes an acceptable health care plan, which individuals and companies are subject to these requirements, when an exemption may apply, and the reporting requirements placed on large employers.

Minimum Essential Coverage

For a company to satisfy the employer mandate, it must offer its full-time employees coverage which is considered minimum essential coverage (MEC) and is deemed to be affordable to the individual. Coverage is deemed to be affordable when employee premiums do not exceed a certain percentage of income. This requires the employer to closely monitor the cost of the plan and, in some cases, anticipated total wages of the individual.[3] Similarly, individuals must maintain MEC to fulfill the individual mandate.

The definition of MEC is the same for both groups and includes:

- US-government programs;[4]
- Plans offered through state or federal exchanges;[5]
- Employer-sponsored self-insured plans;[6]
- Employer-sponsored insured plans;[7] and
- Insured expatriate group health plans.[8]

Other types of health care coverage not listed above generally are not considered MEC, except for plans which have specifically applied to and received approval from the Secretary of Health and Human Services (HHS). As of July 2015, HHS has approved ten plans for MEC, including the Swiss National Health Insurance System.[9]

Applicable Individuals

Although the general rule that large employers must provide coverage to full-time employees seems consistent with the requirement that individuals must maintain coverage, there are disparities in who is considered an applicable individual for the purposes of both requirements, which can create confusion when trying to apply the two mandates concurrently.

Employers are required to provide MEC to full-time employees and their dependents, or face a penalty.[10] The determination of who is considered a full-time employee requires a thorough analysis of the hours worked by the employee, typically calculated by "looking back" to the prior year of service.[11] For the purposes of determining full-time status, only hours of service related to work performed in the US are included.[12] Therefore, an individual working outside the US would not be considered a full-time employee and the employer is not required to offer that individual coverage. When an employee transfers into or out of the US during a given year, using hours from the preceding year can produce odd results. For example, if a full-time employee transfers from the US to another country in January, the employer could be subject to ACA penalties for failing to offer the employee coverage that year even if the employee does not return to the US. To address this issue, the regulations include specific rules for international transfers which in many cases allow them to be treated as new hires.[13]

The individual mandate generally applies to all US citizens and residents, but does not apply to individuals who are nonresident aliens.[14] Similar to the exclusion of non-US hours for the employer mandate, the individual mandate includes several exceptions for individuals who live outside the US.

The first is an exemption which applies to any month in which an individual is considered to be an "exempt noncitizen," which requires that the individual is not a US citizen and is not present in the US for at least one day during the month.[15] Therefore, individuals who move into or out of the US during a given year will generally be able to qualify for an exemption for the months in which they were not living in the US, provided they are not a US citizen.

There is also an exception for US citizens or residents residing outside the US, based on qualification for the foreign earned income exclusion.[16] The foreign earned income exclusion is available to US citizens who have their tax home in a foreign country and are a *bona fide* resident of that country for an entire taxable year. It is also available to US citizens or residents who meet the physical presence test by remaining outside the US for 330 days in a rolling 365-day period, which can span multiple tax years.[17] For any month in which an individual is eligible for the foreign earned income exclusion, that individual is deemed to have MEC for the given month. This treatment applies regardless of whether the individual chooses to claim the benefits of foreign earned income exclusion on the individual income tax return.

The individual mandate requires that coverage is maintained for the individual's entire household, which includes the taxpayer's spouse if filing a joint return and also any dependents. The final ACA regulations clarify that a dependent includes any individual who qualifies to be claimed as a dependent on the tax return, regardless of whether that individual is actually claimed.[18]

Reporting Requirements

The ACA requires that both employers and individuals report compliance with their respective mandates. Reporting for the individual mandate takes place on the individual income tax return and began with the 2014 tax year. Individuals either indicate that they have full year coverage directly on the Form 1040 or, if they did not have full year coverage, complete an additional schedule to show months in which an exemption or penalty applies. If an individual does not have coverage or qualify for an exemption for any month, a penalty is calculated for that month, referred to as a shared responsibility payment.[19]

Beginning in 2015, large employers are required to provide a statement providing health insurance offer and coverage information to all full-time employees.[20] This reporting requires quite complex and detailed tracking of employees, offers of coverage, hours worked, and the cost of coverage. Employers must consider all of these factors and make determinations on how to accurately complete the forms using the proper codes, considering every month and every full-time employee, to satisfy the reporting requirements.

Employers are also required to provide a statement to any individual who enrolls in the employer's self-insured health plan, regardless of the individual's status as a full-time employee.[21] For example, an individual working outside the US may not have any hours for purposes of being considered a full-time employee and, accordingly, the US employer may not be required to provide that individual with coverage under the employer mandate. However, if the US company chooses to offer coverage to that individual or his family through its self-insured plan and any of them actually enroll in the plan, then the employer is required to report that coverage. This same rule applies to retirees, board members, or other non-employees who enroll in an employer's self-insured health plan.

Application Of ACA Requirements

As discussed above, the individual and employer mandates are complicated even in the purely domestic context. Employees on international assignments can present a variety of unique considerations. These complications arise for both assignments to and from the US.

The following examples illustrate how the ACA requirements apply to these mobile employees.

Permanent Transfer To The United Kingdom

Gary, a US citizen, transfers to the United Kingdom (UK) on a permanent basis on January 1 and begins employment with the local UK company, consequently ending employment with the US company. Similar to the other employees of the UK company, Gary receives health care coverage through the UK National Insurance system, a government-run plan. Gary qualifies for the foreign earned income exclusion under the *bona fide* residence test, but chooses not to claim the benefits of the exclusion on his return and instead claims a foreign tax credit for taxes paid to the UK.

What are Gary's individual ACA requirements? Absent application to and approval from HHS, the UK National Insurance plan will not qualify as MEC. However, since Gary qualifies for the foreign earned income exclusion for the full year, he is deemed to have MEC for that period and is not subject to a shared responsibility payment.

What are the ACA requirements to Gary's employer? Neither the US nor the UK company is subject to ACA reporting requirements. Gary is not considered a full-time employee since substantially all hours are worked outside the US, and neither Gary nor any member of his family enrolls in a self-insured plan of Gary's employer.

US Green Card Holder On Assignment In Brazil

Pam is a citizen of Argentina and a US Green Card holder. She is employed by a US company and is sent on a two-year assignment to Brazil beginning January 1. Throughout the year Pam has extensive travel back to the US and receives health insurance through an expatriate group plan that is fully insured. Pam is married with one child; her spouse and child remain in the US during her assignment and continue to receive coverage through the US company's self-insured plan.

What are Pam's individual ACA requirements? Although Pam is living outside the US for the full year, she is not eligible for the *bona fide* residence test of the foreign earned income exclusion as she is not a US citizen. She also does not qualify for the physical presence test based on her travel to the US during the year. Therefore, Pam does not qualify for an exception to ACA requirements and needs to maintain MEC to avoid a penalty. Pam's coverage under the expatriate group health plan will qualify as MEC.

What are the ACA requirements to Pam's employer? Even though Pam remains an employee of the US company, she is not considered a full-time employee of the US company for purposes of the ACA mandate because her hours of service primarily take place outside the US; therefore, the US company is not required to provide her or her dependent child coverage. Because the expatriate group health plan that Pam and her family enrolled in is fully insured, the insurance company (rather than Pam's employer) must issue Pam a statement of coverage.

Canadian Secondment To The US

Mary is a Canadian citizen who has not worked any hours in the US. On May 1, she starts a three-year assignment to the US. She remains employed by the Canadian company and is assigned to work for the US company. To avoid creating a permanent establishment of the Canadian company in the US, the Canadian employer enters into a secondment agreement with the US company. This agreement gives the US company control over Mary's activities while in the US. Mary's spouse and two children move to the US as well, but Mary does not claim her children as dependents on the return and does not apply for Individual Taxpayer Identification Numbers (ITINs) for them.

From January through April, Mary and her family receive insurance through the Canadian universal health care system. After their arrival in the US, Mary and her family receive coverage from the US company's self-insured plan. Mary establishes US residency as of May 1 and files a dual-status arrival tax return.

What are Mary's individual ACA requirements? For the first four months of the year, Mary qualifies as an exempt noncitizen, provided she had at least one day outside the US in each month. She is not subject to the individual mandate for these months and will report the exemption on her tax return. Mary remains an exempt noncitizen for those months even if she chooses to make an election to file her return as a full year resident.

Mary is required to maintain coverage for her entire household for May through December, even though her children are not claimed as dependents on the return. The coverage she and her family receive from the US company is considered MEC. When reporting both the coverage and the exemption for her family, Mary should follow the instructions with the tax return for reporting coverage for individuals who do not have a social security number or ITIN. If Mary had instead remained on the Canadian government health care plan, this coverage would not be considered MEC and a penalty would be due.

What are the ACA requirements to Mary's employer? Mary's employer is required to offer her affordable coverage for the period May through December. The determination which company is considered the common law employer for US purposes is based on the facts and circumstances of the situation. In this case, the US company is determined to be Mary's common law employer and be subject to ACA information reporting requirements. The US company will issue Mary a statement reporting the coverage for her and her family; they will follow the instructions on the reporting form for reporting children with no social security number or ITIN.

Mexico Business Traveler

Adrian is a Mexican citizen with frequent business travel to the US. He spends approximately one week per month working in the US, but remains employed in Mexico and receives health care coverage from the Mexican company. Adrian is considered a US nonresident alien.

What are Adrian's individual ACA requirements? As a full year nonresident alien, Adrian is not subject to the individual mandate. In addition, there is no mechanism to report health care coverage, exemptions or penalties on the Form 1040NR.

What are the ACA requirements to Adrian's employer? Adrian is not considered a full-time employee of either the Mexican or US companies based on his hours of service; neither company is required to offer him coverage under the employer mandate.

Conclusion

As 2015 is the first reporting year for the employer mandate, nearly all large employers will face a variety of challenges in achieving compliance with the reporting requirements. These requirements are complicated further for international employees and their employers; however, the issues are manageable with proper preparation and attention.

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Endnotes

1 The Patient Protection and Affordable Care Act, Public Law 111-148, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111-152, enacted on March 30, 2010, are collectively referred to as the "Affordable Care Act."

2 A large employer is generally defined as one which employed an average of at least 50 employees during the prior year. The rules regarding the counting of employees and service for purposes of this threshold are complex and are not addressed in detail in this publication. Consultation with a tax advisor should be sought if further guidance is needed.

3 Treas. Reg. §54.4980H-5(e)(2)(ii) provides a safe harbor definition for "affordability" in which coverage is deemed to be affordable if the employee's contribution does not exceed 9.5 percent of Form

W-2 wages from that employer. Other safe harbors are also available.

4 I.R.C. §5000A(f)(1)(A).

5 I.R.C. §5000A(f)(1)(C).

6 Treas. Reg. §1.5000A-2(c)(1)(ii) provides that an eligible employer-sponsored plan includes "a self-insured group health plan under which coverage is offered by, or on behalf of, an employer to the employee" without regard to where the plan is located.

7 Treas. Reg. §1.5000A-2(c)(1)(i)(B).

8 79 Fed. Reg. 30,314, May 27, 2014; Expatriate Health Coverage Clarification Act, Public Law 113-235, enacted on December 17, 2014.

9 Centers for Medicare and Medicaid Services website: https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Downloads/MEC_PublicList_for-508_FINAL_07-10-15.pdf

10 I.R.C. §4980H.

11 I.R.C. §4980H(c)(4)(A) defines a full-time employee as one who works an average of 30 hours per week. Treas. Reg. §54.4980H-3 provides detailed instructions for determining full-time employees, including rules regarding the look-back period.

12 Treas. Reg. §54.4980H-1(a)(24)(ii)(C).

13 Treas. Reg. §54.4980H-3(c)(4)(vi).

14 Nonresident alien within the meaning of I.R.C. §7701(b)(1)(B).

15 Treas. Reg. §1.5000A-3(c).

16 I.R.C. §5000A(f)(4).

17 I.R.C. §911(d)(1).

18 Treas. Reg. §1.5000A-1(c)(2)(i).

19 I.R.C. §5000A(b) requires that the shared responsibility payment is included with the Federal income tax return. I.R.C. §5000A(c) includes instructions for calculating the shared responsibility payment with further clarification provided in Treas. Reg. §1.5000A-4.

20 I.R.C. §6056(a).

21 I.R.C. §6055(a) requires reporting by anyone providing MEC to an individual.

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Same Stock Different Price: Side Payments To Minority Shareholders

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I. Introduction

The approval of an acquisition transaction of a privately held company typically requires a majority vote by the company's shareholders. However, in certain circumstances, the majority shareholders may need the minority shareholders to approve the transaction as well. The minority shareholders' approval may be required under state law or by the company's incorporation documents, it may be desired to protect the company's reputation, or to ensure its continuing operations without interference. To secure the minority shareholders' approval of the transaction, the majority shareholders often pay the minority shareholders for their consent. Such payment is often referred to as a "side payment."[1]

Often, a side payment is made out of the acquisition consideration. The majority shareholders may agree to be paid less for their shares, while the minority shareholders receive more for theirs. For example, assume a company with one class of common stock whereby the majority shareholders hold 80 shares and the minority shareholders hold 20 shares. Further assume that buyer is willing to pay USD100 for the company, or USD1 per share. To secure the minority shareholders vote in favor of the contemplated transaction, the majority shareholders agree to receive USD70 for their shares, and have the minority shareholders receive USD30 for their shares.[2] The effect of the arrangement is that a USD10 side payment is made to the minority shareholders. The minority shareholders effectively receive USD1.50 per share for their stock, whereas the majority shareholders receive USD0.875: same stock, different price.[3] And the question arises – what is the proper tax treatment of a side payment to secure the minority shareholders' consent to a transaction?

Surprisingly, there is very little authority or guidance that deals with side payments. What little authority that exists is almost four decades old and the IRS position on this issue seems questionable, to say the least.

II. The IRS Position

The Internal Revenue Service's ("*IRS*") position seems to be that each shareholder is deemed to receive the amount it is entitled under state law in the transaction, and that the side payment is regarded a separate consideration unrelated to the transaction, the treatment of which is based on all facts and circumstances.

In Rev. Rul. 73-233,[4] a 60 percent majority shareholder made a side payment in the form of capital contribution of the target's stock to the target in anticipation of a tax-free merger. In order to meet the applicable merger laws of the state in which the target was incorporated, a two-thirds vote of the target corporation's shareholders in favor of the merger was required. The 40 percent minority shareholders demanded and received 50 percent of the merger consideration to agree to the merger. This allocation was implemented by having the majority shareholder make a capital contribution, immediately prior to the merger, of the required number of shares that would reduce his interest in the target to 50 percent (the "side payment").

The IRS, however, treated the majority shareholder as first receiving its state law-entitled 60 percent of the merger consideration, and subsequently transferring to the minority shareholders 10 percent of the merger consideration in exchange for voting in favor of the merger.

The IRS viewed the second step as a taxable sale.[5] The IRS allowed the majority shareholder a positive basis adjustment in his remaining shares equal to the fair market value of the shares exchanged with the minority shareholders. The minority shareholders were treated as receiving ordinary income equal to the fair market value of the additional shares they received, which then became their basis in those additional shares.[6] Rev. Rul. 73-233 seem to be implying that ordinary income treatment is appropriate, much as if the minority shareholders performed a service for the majority shareholder by agreeing to vote for the merger, and just so happened to receive additional shares, instead of cash, as consideration for the service.[7]

The IRS's position was also expressed in Rev. Rul. 79-10.[8] There, the IRS ruled that a non-pro rata liquidation should be treated as two separate transactions:

(i) A pro rata liquidation based on each shareholder's entitled interest in the corporation's assets giving rise to full payment in exchange for each shareholder's stock; and
(ii) A separate payment (the side payment) by the majority shareholder to the minority shareholders equal to the excess of the amount the

minority shareholders received over their pro rata share.[9]

However, the IRS's position in Rev. Rul. 73-233 and in Rev. Rul. 79-10 is questionable, at the very least. Provided that a side payment was indeed made in exchange of a property right relating to the minority shareholders' ownership in their stock (*e.g.*, to secure their vote for a transaction), the minority shareholders should be entitled to capital gain treatment on the entire amount paid for their stock, including the portion otherwise treated as the "side payment."[10]

Shareholders generally have two sets of rights inherent in the ownership of their stock. The first relates to economic rights – for example, the right to receive dividends, the right to liquidation proceeds, and the right to the potential increase in the value of the stock. The second relates to voting – for example, the right to vote for major decisions of the corporation, to vote for or elect the board of directors, *etc.* Both sets of rights are property rights that determine the total value of the stock.[11] The value of the stock is comprised of the value of the different rights inherent in the ownership of the stock. If a side payment were made to minority shareholders in respect of a right inherent in the ownership of the stock – for example, the right to vote for major decisions of the corporation – then that side payment would be made in respect of a property right, and not compensation for services, and would relate to the total value of the stock. As a result, it should result in capital gain treatment to the minority shareholder, and not ordinary income.[12]

Nonetheless, the IRS position seems to be that a side payment is treated as a separate transaction and that the federal tax consequences of that transaction will depend upon the underlying nature of the payments, which in turn depend upon all of the relevant facts and circumstances.[13] These facts and circumstances must be determined from all of the extrinsic and intrinsic evidence surrounding the transaction.[14]

III. The Tax Court View

The Tax Court view seems to be that a side payment may be related to consideration paid in exchange for stock, thereby resulting in capital gain.

In *Gidwitz Family Trust v. Commissioner*,[15] a minority shareholder received USD225,000 (the side payment) in settlement of a lawsuit against the controlling shareholder, who had agreed to grant the minority shareholder options. The options were orally promised by the controlling shareholder to induce the minority shareholder to approve a merger transaction. (This oral promise was the subject of the legal proceeding between the minority and the majority shareholders that resulted in the settlement amount.) The IRS argued that the side payment should be treated as consideration for the minority shareholder agreeing not to vote against the merger, thereby resulting in ordinary income.

The Tax Court, however, held that the sum received in settlement represented consideration for the minority shareholder's stock surrendered in the merger, and as a result should be taxable as gain realized from the sale or exchange of capital assets. The Tax

Court stated that "[t]he taxability of the settlement is controlled by the nature of the litigation … The nature of the litigation is, in turn, controlled by the origin and character of the claim which gave rise to the litigation."[16] The court concluded that because the underlying claim arose out of the purported inadequacy of consideration received in the merger, the settlement proceeds represented additional consideration that the taxpayers would have received in the underlying merger.[17]

IV. Conclusion

If a side payment relates to a minority shareholder's right inherent in the ownership of the stock – for example, the right to vote for a major transaction of the corporation (or refrain from blocking it) – then that side payment bears direct relation to the total value of the stock and should therefore result in capital gain treatment to the selling shareholder. And in any event, proper documentation should be crafted to memorialize the surrounding facts and circumstances as well as the terms of the side payment arrangement to strengthen a more taxpayer-friendly tax position.

Endnotes

1 An important distinction should be made between side payments and amounts paid to retain talented shareholders that are also employees. Retention payments are normally treated as compensation for services and are taxed at ordinary income rates. Retention payments are not dealt with in this article.

2 Assume that the buyer in this example is indifferent to the arrangement between the majority and the minority shareholders since the overall purchase price consideration remains the same.

3 But why not? If the fair market value of property is defined as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell and both parties have reasonable knowledge of relevant facts, then the same type of stock in the hands of different stockholders ***could*** be traded in the same transaction, at a different price, for example, as a result of a different negotiation positions, sensitivity, or willingness to move forward with the transaction. For the definition of fair market value, ***see e.g.***, Rev. Rul. 59-60, 1959-1 C.B. 237.

4 1973-1 C.B. 179.

5 More specifically, as a taxable sale under §1001. All section (§) references are to the Internal Revenue Code of 1986, as amended (the "*Code*"), and the Treasury Regulations ("*Treas. Reg.*") promulgated thereunder.

6 *See also* IRS Letter Ruling 200043004 (8/1/00) (similar transaction to qualify subsidiary for a §355 spinoff).

7 What is also interesting is that the IRS treated the side payment as a capital transaction for the majority shareholder, but as a service giving rise to ordinary income to the minority shareholders. As a result, the majority shareholders would not be able deduct the side payment as an expense, whereas the minority shareholders would have to treat it as ordinary income. Such treatment seems to be self-serving and inconsistent.

8 1979-1 C.B. 140.

9 *See also* Rev. Rul. 76-454, 1976-2 C.B. 102 (a non-pro

rata distribution under a plan of complete liquidation made by a corporation having only one class of stock outstanding is treated as a pro rata distribution, the shareholders are considered to have received their pro rata share of the distribution, and the excess received over a shareholder's pro rata share is considered as payment, in a separate transaction, from shareholders receiving less than their pro rata share). *Cf*. Treas. Reg. § 1.351-1(b)(1) (section 351 transaction in which stock received by transferors disproportionately to values of property transferred will be given tax effect in accordance with the transaction's true nature; the transaction may be treated as if stock received proportionately, followed by a deemed transfer of some stock to make gifts, pay compensation, or satisfy transferor obligations).

10 Arguably, there may not be separate transaction, or a "side payment," to analyze, since the minority shareholders' consideration is related to the ownership of their stock and the inherent property rights that determine its total value.

11 *See e.g.*, Rev. Rul. 83-120, 1983-2 C.B. 170 (one factor to be considered in determining the value of a stock is whether the stock also has voting rights. Voting rights, especially voting control, could increase the value of the stock. This factor may be reduced in significance where the rights of one class of stockholders are protected under state law from actions by another class of stockholders, particularly where one class is given the power to disapprove a transaction).

12 *See* Ginsburg, Levin, and Rocap, ***Mergers, Acquisitions, and Buyouts*** (September 2015), 701.5 Recapitalization by T to Facilitate a "B" Reorganization.

13 Furthermore, unless the facts and circumstances suggest otherwise, the IRS's claim that a particular piece of consideration is somehow not in exchange for the target stock appears to be inconsistent with the current position of the IRS in other instances. *See* LTR 201105016 (February 4, 2011) (consent fee paid in connection with redemption of debt instrument treated as payment for debt); AOD 2012-008; 2013-32 IRB (August 8, 2013) (non-acquiescing to *Media Space, Inc.*, 135 T.C. 424, December 58,359 (2010), vacated and remanded); CA-2, 2012-2 USTC 50,564 (finding that a forbearance payment made to a corporation's preferred shareholders not to be a distribution with respect to stock.).

14 Rev. Rul. 79-10, *supra* note 8. See also GCM 37649 (August 25, 1978).

15 61 T.C. 664 (1974).

16 61 T.C., at 673 (citations omitted).

17 *See also David A. Delong*, 43 B.T.A. 1185 (1941) acq. 1941-1 C.B. 3. In *DeLong*, the taxpayer was a minority shareholder in a corporation. In order to induce him to sell his stock as a part of a corporate reorganization, the principal shareholder paid him cash in addition to the stock which he received under the plan of reorganization. The Court held the cash payment to be part of the consideration received in exchange for the stock; PLR 8427024, March 30, 1984.

Topical News Briefing: History Repeating

by the Global Tax Weekly Editorial Team

Almost one year to the day that the 11 eurozone countries decided to postpone a decision on the design of the proposed financial transactions tax (FTT), history appeared to repeat itself, when the FTT 11 (actually, now the FTT 10, for the time being at least) announced that they had failed to reach a final agreement on the tax at the recent meeting of eurozone governments.

The idea of a small tax on financial transactions such as trades in shares, derivatives, and currency conversions, the bountiful revenues from which could fund myriad good causes (hence the reason that such taxes have acquired the moniker of "Robin Hood" taxes) sounds fine in principle, and has widespread support among the public. However, transaction taxes are fiendishly difficult to put into practice, as the EU is finding out.

For a start, there are few, if any, precedents for a successful FTT. Perhaps the last major experiment with one was conducted by Sweden in the 1980s and early 1990s. However, it was eventually scrapped because it was largely a failure. Why was this? Because, for governments, financial trades have an annoying habit of migrating to other markets when threatened with extra tax or regulatory burdens. In this case, Sweden's loss was London's gain, and after the tax was abolished following disappointing revenue flows, trading volumes on Sweden's financial markets began to rise again.

Certainly, nothing on the scale of the EU FTT has yet been attempted, even if it does involve less than half of the EU's member states. However, the issue of likely tax leakage as financial trades are transplanted elsewhere to avoid the FTT is perhaps the biggest challenge its supporters face.

To prevent financial institutions from avoiding the FTT by relocating to jurisdictions where it doesn't apply, the draft legislation includes deemed residency and issuance principles. This means that the major factor in determining where and how much tax is due is essentially the location where the financial instrument was issued, rather than where the instrument was traded. However, these anti-avoidance provisions could result in some perverse, unintended (or perhaps intended?) consequences.

An obvious one is that financial institutions outside the FTT zone – and indeed outside Europe altogether – will end up paying it too. Thus, the tax is expected to have a major impact on the City of London, Europe's largest financial center. Yet, the UK won't see one cent of the revenues. Similarly, certain members of the FTT group also expect to be impacted by the tax, but don't anticipate much reward in the way of revenues. Estonia is among them, which is why it refused to sign the latest agreement on the "core" FTT proposals. Slovenia has also grumbled in the past that the costs of administering the tax will probably outweigh the revenue it expects to receive, although it still appears to be on board.

Yet still there are other fundamental problems for the FTT group to tackle. One is that they can't make up their minds what the rates of tax should be, and exactly which trades the tax should be applied to. Another is the potential economic fall-out from an FTT, which the finance industry and skeptical nations like Britain warn could be disastrous, as liquidity and bank lending dries up, and the sovereign borrowing costs rise. And then there are the legal consequences. A 2013 paper by the EU's own legal team has already said that the FTT could not only break a host of the EU's own legal principles and treaties, but also international law. Indeed, UK Finance Minister George Osborne told the FTT group in no uncertain terms that the UK would see them in court if the tax affected the UK negatively in any way.

So a major factor in determining whether the FTT will be introduced could be the opinion of the European Court of Justice. But before that can happen, the FTT group, with or without Estonia, will have to actually agree and implement the tax. They have given themselves an additional six months to do the former, but that's still quite ambitious given the size and importance of the loose ends.

Don't be surprised if history repeats itself again in December 2016!

Autumn Statement Gives HMRC Teeth To Bite Tax Avoiders

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The UK Government is committed to raise GBP5bn from tax avoidance, and in his Autumn Statement the Chancellor indicated that GBP800m would be given to HM Revenue & Customs (HMRC) to help do this and to tackle non-compliance. The Autumn Statement also introduced tougher penalties and criminal offenses which are all clear signs of the tougher attitude to come down hard on evasion and avoidance. Some of the key points are highlighted below:

- A new criminal offense for tax evasion – A criminal offense that removes the need to prove intent for the most serious cases of failing to declare offshore income and gains will be introduced.
- New civil penalties for offshore tax evaders – Civil penalties for deliberate offshore tax evasion will increase, including the introduction of a new penalty linked to the value of the asset on which tax was evaded and increased public naming of tax evaders.
- New civil penalties for those who enable offshore evasion – Civil penalties will be introduced for those who enable offshore tax evasion, including public naming of those who have enabled the evasion.
- New criminal offense for corporates failing to prevent tax evasion – A criminal offense will be introduced for corporates which fail to prevent their agents from criminally facilitating tax evasion by an individual or entity.
- An additional requirement to correct past offshore tax non-compliance – With the Liechtenstein Disclosure Facility (LDF) set to close at the end of 2015, the Government will consult on an additional requirement for individuals to correct any past offshore non-compliance with new penalties for failure to do so.
- Serial avoiders – Tough new measures will be introduced for those who persistently enter into tax avoidance schemes that are defeated by HMRC. Measures will include the names of such avoiders being published and, for those who persistently abuse reliefs, restrictions on accessing certain reliefs for a period.
- General Anti-Abuse Rule (GAAR) – A new penalty of 60 percent of tax due to be charged will be

introduced in all cases successfully tacked by the GAAR. In addition, there will be small changes to the way the GAAR works to improve its ability to tackle marketed avoidance schemes.

- Promoters of Tax Avoidance Schemes (POTAS) regime – The Government will also widen the POTAS regime, by bringing in promoters whose schemes are regularly defeated by HMRC.
- Capital allowances and leasing – With effect from November 25, 2015, legislation to counter two types of avoidance involving capital allowances and leasing will be amended. These changes will prevent companies from artificially lowering the disposal value of plant and machinery for capital allowance purposes.
- Disguised remuneration – action will be taken against those who have used or continue to use disguised remuneration schemes and who have not yet paid their fair share of tax.
- Taxation of asset managers' performance based rewards – legislation will be introduced to determine when performance awards received by asset managers will be taxed as income or capital gains.
- Partnerships and transfers of intangible assets – The Government will amend the intangible fixed asset rules to clarify the tax treatment on transfers of assets to partnerships. This change has immediate effect, and will ensure that partnerships cannot be used in arrangements that seek to obtain a tax relief for their corporate members in a way that is contrary to the intention of the regime.

It is worth noting that many of the individuals referred to as "serial avoiders" will be financially unsophisticated people who were aggressively mis-sold marketed tax avoidance schemes. Presenting them with special reporting requirements and publishing their names is part of the Government's objectives to come down hard on individuals, but is this helpful when a significant number were misinformed by the professionals whose advice they trusted?

Consultation on a new requirement to correct offshore tax non-compliance will pick up after the LDF closes at the end of this year and will definitely carry much stiffer penalties and no protection from prosecution. There are still steps individuals can take now in order to make a disclosure *via* the LDF before it closes at the end of 2015, and Withers is working with individuals in doing so. Owing to the need to establish a connection with Liechtenstein, the deadline to act is really by the middle of December.

HMRC's harder line to also name and shame the enablers of offshore evaders and enforce new civil penalties is clearly directed at certain offshore advisors and may cause some concern. HMRC have highlighted to those professionals who have submitted an LDF disclosure on behalf of a client what these new initiatives are. It comes as no news that Switzerland is already in their sights, but with these new initiatives and the coming of the Common Reporting Standard it seems quite likely that there will be another focus on Swiss banks and intermediaries.

2016 will see the Government move forward with these new measures, and Withers' Tax Investigations team is working closely with our clients and intermediaries to help them understand what these tougher measures mean and what they can do about them.

Spotlight On Mauritius

by Stuart Gray, Senior Editor, Global Tax Weekly

The favorable terms of the Indo–Mauritius tax treaty, the potential for investors to reduce tax using one of Mauritius's "offshore" company formats, and its proximity to India itself, have cemented the island's position as the platform of choice for foreign direct investment (FDI) into India. However, Indian's ongoing attempts to plug what it sees as a major tax loophole, combined with international condemnation of tax avoidance and profit shifting, might mean that Mauritius's role as a financial center has to change. These issues are explored in this article, along with Mauritius – the country and its legal and tax framework.

Introduction To Mauritius

Mauritius is situated in the Indian Ocean, to the east of Madagascar, and is a sovereign state within the British Commonwealth. The head of state is the President of the Republic, who is elected by the National Assembly every five years (with the next election due in 2017). The Prime Minister is the leader of the winning party after elections for the National Assembly and is appointed by the President.

Mauritius's legal system is a mixture of English Common Law and French Civil Law, but company and procedural law is based on English law. Although Mauritius has been obliged to phase out its "offshore" company regime, Global Business Companies meeting certain requirements may reduce their corporate tax to as low as 3 percent (see below).

The Economy Of Mauritius

Ever since gaining independence from Britain in 1968, the economy of Mauritius has grown steadily. Agriculture, predominately sugar production, remains a major pillar of the economy, but there are growing industrial, services, and tourist sectors and an export processing zone set up in 1970 has been successful.

Mauritius's responsible economic policies and prudent banking practices helped to mitigate negative effects of the global financial crisis in 2008–09. GDP grew in the 3–3.5 percent per year range in 2012–14. Economic growth is expected to reach the top end of this range in 2015, according to the African Development Bank,[1] and the country continues to expand its trade and investment outreach around the globe.

With its strong textile sector, Mauritius has been well poised to take advantage of the United States'

Africa Growth and Opportunity Act (AGOA), which was extended for a further 10 years by the US Congress in June 2015. The AGOA, in combination with other trade preference legislation, allows for almost all goods produced in AGOA-eligible countries (approximately 6,800 items) to enter the US market duty-free.

Indeed, robust economic growth, a diverse economy, and sound fiscal policies earned Mauritius plaudits from Moody's in November 2015, when the international ratings agency maintained its Baa1 government bond rating and stable outlook.

"The first rating factor underpinning the affirmation of Mauritius's Baa1 government bond rating with stable outlook relates to the country's significant economic resiliency," Moody's observed.[2] "Over the past five years, the Mauritian economy has posted steady, broad-based growth averaging 3.6 percent in real terms. While the tourism and financial services industries are two pillars of the economic base, contributing directly to approximately 10 percent of GDP each, the economy remains well-diversified. The country's wealth level, as measured by its per-capita GDP in purchasing power parity terms has progressed to almost USD18,689 in 2014 from USD14,539 in 2009."

"The second rating factor is based on Moody's assessment of Mauritius's fiscal strength," the ratings agency continued. "Whereas Mauritius's government debt is at an elevated level, at 56 percent of GDP at year-end 2014, Moody's expects the level to remain broadly stable over the next two to three years. The government's plan is to reduce fiscal deficits substantially in order to comply with its debt target, a statutory debt of 50 percent of GDP by 2018."

However, Moody's also warned that the Mauritian economy does face "ongoing challenges." These include "fostering investment, improving cost-competitiveness, and maintaining the attractiveness and stability of its financial sector." Additionally, the ratings agency suggested that achieving the Government's fiscal consolidation targets will be "difficult."

Financial Services

The financial services industry has been a more recent Government-inspired initiative, but is now developing strongly. In total, there are more than 32,000 offshore entities registered in Mauritius, many aimed at commerce in India, South Africa, and China. Investment in the banking sector alone has reached over USD1bn.

According to the Financial Services Commission's (FSC's) latest statistical report, published on December 2, 2015, the total assets of the financial services sector (excluding companies holding a Category 1 Global Business License) rose from MUR27bn (USD750m) in 2013 to MUR30bn, an increase of 11 percent.[3]

The sector's income was up 8 percent, and profits after tax rose from MUR937m in 2013 to MUR1.05bn. Corporate and trust services providers' total assets also grew, to USD193m in 2014, an increase of 7 percent. Management companies meanwhile saw assets grow by 8 percent to USD210m and they reported a combined profit of USD2.2m, up from USD1.9m in 2013. Gross premiums received for long-term insurance business grew by 8 percent, and there was a marginal increase of about 0.5 percent for general insurance business.

There was also an increase in "offshore" company registrations last year, with 1,359 GBC2s (non-resident company – see below) licenses issued in 2014, up from 1,191, according to the FSC's most recent annual report.[4] The FSC observed that the financial and insurance industry in Mauritius remained quite resilient and expanded by 5.4 percent in 2014. The global business sector grew by 6.1 percent in 2014 and contributed around 3.5 percent to GDP.

Appleby's Offshore-i report for November 2015 also shows that Mauritius is an increasingly popular host for private equity transactions, with nearly one-in-four offshore private equity deals having taken place in the jurisdiction this year.[5] While the monetary value of these deals is relatively small, at just USD273m, Appleby noted in the report that the volume of deals nevertheless highlights "the growing interest of private equity firms in Africa, with Mauritius and the Seychelles the preferred offshore structuring jurisdictions for deals on that continent."

Interestingly, Appleby observed that investor interest in structuring deals in Mauritius and the Seychelles is a relatively new phenomenon. "When we track back to 2011, we can note the gradual increase in activity in Mauritius and the Seychelles, which together saw just three deals in 2011, and one in 2013, before hitting double figures for the first time this year, with three months still remaining."

Global Business Companies

In May 2000, Mauritius wrote a "commitment letter" to the OECD in order to avoid inclusion on the OECD's list of jurisdictions which offer "unfair" tax competition. Partly as a result of this commitment, the Government passed a range of replacement legislation in 2001 including the Financial Services Development Act, 2001, which set up the FSC. Most existing offshore legislation was "grandfathered" into the regime.

In August 2007, the Mauritius National Assembly adopted new financial services legislation, establishing the independence of the FSC and liberalizing the international Global Business Companies regime. The bill became the Financial Services Act 2007 and provided a common framework for licensing and supervision of all financial services other than banking and for the global business sector.

The Financial Services Act redefined the concept of global business. Under its provisions, all resident companies conducting business outside Mauritius may opt for an alternative legal regime. The former restrictions on activities conducted by Category 1 Global Business Companies have been removed.

A Category 1 Global Business Company (GBC1) is defined as a company engaged in qualified global business and which is carried on from within Mauritius with persons all of whom are resident outside Mauritius, and where business is conducted in a currency other than the Mauritian Rupee. A GBC1 may be locally incorporated or may be registered as a branch of a foreign company. The business of a GBC1 must be conducted in foreign currency other than for day-to-day transactions; and a GBC1 must not do business in Mauritius, other than to take professional advice, employ local labor, and to rent property.

A GBC1 is treated as resident, and has access to Mauritius's double tax treaties (see below), subject to possession of a Tax Residency Certificate. The tax treaty with India is particularly favorable, and Mauritius is a favored location for holding companies for those trading with or investing in India.

A GBC1 pays corporate income tax at 15 percent (0 percent if it was incorporated before July 1, 1998). GBC1s are also exempt from stamp duty, land transfer tax, and capital gains (*morcellement*) tax. The expatriate staff of offshore companies pay half the normal rate of personal income tax. There are no withholding taxes or equivalent deductions on dividends or other payments made by GBC1s to non-resident shareholders (residents aren't normally allowed to hold the shares of such companies). GBC1s can also utilize the unilateral foreign tax credit, which is 80 percent of the Mauritian tax rate (leaving a residual liability of 20 percent of the Mauritian tax rate, or 3 percent).

By the end of 2009, 75 percent of all GBC1s were operating in the field of investment holding. Other activities of GBC1s included: collective investment schemes, financial business activities, trading, consultancy, closed-ended funds, ICT, and intellectual property.

A Category 2 Global Business Company (GBC2) can take any of the forms permitted under the Companies Act 2001, but it is treated as non-resident, and therefore cannot get the benefit of Mauritius's double tax treaties, nor can it operate in the Free Port. In most other ways, a GBC2 receives the same tax treatment as a GBC1.

Tax Treaties

In support of its international financial credentials, Mauritius has entered into a considerable number of double tax treaties (over 40). Generally speaking, the treaty benefits are available to all Mauritian companies other than legacy "offshore" companies (GBC2s). All of Mauritius's treaties are based on the OECD model treaty and contain exchange of information clauses.

The most important of the treaties has been the 1982 treaty with India, which had underpinned the emergence of Mauritius as the dominant channel for FDI into India. However, it came under attack from Indian tax authorities in 2002 as a result of alleged abuses by Indian-resident investors through what was termed "round-tripping." In particular, concern was expressed regarding the capital gains clauses that permit both resident Indian and foreign investors to route investment into India via Mauritius to take tax-free gains. After a series of high-profile court hearings, the status quo appeared to have been restored, but rumblings from the Indian authorities with regard to the alleged abuses continue.

In October 2006, in an attempt to head off pressure from India to change the countries' tax treaty, the Mauritian Government announced that it would tighten up rules on the issuance of Tax Residence Certificates, and in future would issue them for only one year at a time. The move was also linked to the signing of a Protocol to the China–Mauritius double tax treaty. The Protocol amended the Capital Gains and Exchange of Information Articles of the treaty, making it harder for Mauritius-based companies investing in China to obtain capital-gains tax exemption.

Rama Sithanen, then Minister of Finance of Mauritius, said shortly before the tightening of the Tax Residence Certificate rules that he was willing to cooperate with India to prevent misuse of the treaty. "Let me state very clearly that we will collaborate to prevent any alleged misuse of the treaty," he said at a news conference on a trip to New Delhi. "But keeping in view historical, cultural, political, and diplomatic ties between the two countries we need a global solution that will not penalize Mauritius." He claimed: "The problem of round-tripping has been eliminated completely."

However, further confusion and uncertainty resulted from India's 2013/14 Budget, announced on February 28, 2013. Among the proposals was a measure to amend the Indian Income Tax Act to provide that a Tax Residency Certificate would constitute a necessary, but not sufficient, condition to avail of the benefits under double tax treaties.

"This announcement has created much confusion among investors in India and internationally, including those using Mauritius to do business with India," stated a communique issued by the Mauritius Government at the time. "The amendment has been interpreted as providing wide powers to the Indian tax authorities to question the Tax Residency Certificate produced by a resident of a contracting state."

The situation appeared to be clarified by a communique issued by the Indian Ministry of Finance on March 1, 2013, which stated that "the [Tax Residency Certificate] produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the income tax authorities in India will not go beyond the [Tax Residency Certificate] and question his residence status."

In July 2013, the Mauritian Foreign Affairs Minister said that the Government is prepared to "walk the extra mile" to conclude the long-running saga over its double tax treaty with India. According to Arvin Boolell, who was Foreign Minister at the time, the Mauritian Government submitted its proposed reforms to the treaty at the previous joint working group of ministers in March 2013.

He explained that the Government "is willing to consider [the] insertion of [an] appropriate clause in the treaty to prevent any perceived abuse," and is happy to plug any loopholes that have arisen. It is not, however, prepared to go ahead with changes to the capital gains provisions, for fear that the certainty and stability of the treaty would be affected.

In June 2014, Mauritius proposed to the then new Indian Government that it would approve a new stringent limitation of benefits (LOB) clause in a revised India–Mauritius double tax treaty, and will exchange information on persons applying to be registered in the territory with Indian authorities automatically. In July 2015, reports suggested that the two sides had agreed in principle to the inclusion of LOB clauses in the treaty. However, as of early December, it is understood that the two governments are still discussing the proposed changes.

Information Exchange

Another major international issue for Mauritius has been the question of information exchange.

In November 2013, the Global Forum on Transparency and Exchange of Information for Tax Purposes rated Mauritius as largely compliant with the international standards on transparency and exchange of information, and the Mauritian Government was keen to point out that the jurisdiction scored similar ratings to the US, the UK, Germany, Italy, Singapore, and Hong Kong.

Since then, Mauritius has taken a number of steps to improve its transparency ratings. On October 24, 2014, Mauritius was among the first 51 jurisdictions (the early adopters) to sign the multilateral competent authority agreement to automatically exchange financial account information under the new global Common Reporting Standard.

Mauritius also signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in June 2015, and has entered into a Model 1 intergovernmental agreement with the US for the implementation of the Foreign Account Tax Compliance Act (FATCA) between the two countries, as well as a bilateral tax information exchange agreement with the US.

FDI – From India To Africa?

Against the backdrop of the OECD's push to stamp out tax treaty abuse as part of its BEPS work, there is some evidence to suggest that Mauritius's role in channeling investment into India is starting to diminish. Figures compiled by India's Department of Industrial Policy and Promotion show that Singapore surpassed Mauritius as the leading source of FDI into India in the 2013/14 financial year (to March 31, 2014), which it attributed to tax considerations. Out of the total equity inflow to India that year of USD24.3bn, FDI from Singapore rose from only USD2.3bn in 2012/13 to almost USD6bn in 2013/14, while FDI from Mauritius fell from USD9.5bn to USD4.86bn.[6]

As the Indian Government itself insinuated, the ongoing uncertainty about the status of the Indo–Mauritius tax treaty is probably the key reason why its importance as a conduit for investment into

India is declining. However, this is by no means the end of the world for Mauritius, which is seeking to tap into the rich potential of the growing economies of Africa.

Indeed, the "crucial role" of the economic partnership between Mauritius and Africa was one of the key themes of Finance and Economic Development Minister Seetanah Lutchmeenaraidoo's Budget for 2015/16, entitled "Mauritius at the Crossroads," in which he announced that the Financial Services Promotion Agency will be reactivated "for more effective promotion campaigns, especially to diversify our Global Business activities in Africa." As part of this campaign, Mauritius intends to work with various African nations on the development of special economic zones on the African mainland. The country also hopes that its membership of the Southern African Development Community free trade area will cement its position as the investment gateway to sub-Saharan Africa.

At present, investment flows from Mauritius to Africa are relatively low. The Mauritius Board of Investment put the figure at just under MUR1bn in 2014,[7] which suggests that it will take some time before Mauritius is established as the jurisdiction of choice for outward FDI to Africa. This means that Mauritius can't yet afford to watch investment flows to India dry to a trickle.

However, despite all the uncertainty surrounding the terms of the Indo–Mauritius double tax treaty, it may be the case that the significance of the fall in FDI from Mauritius to India is being overstated by the Indian Government. Its own data shows that, out of the total FDI equity inflows of USD217.6bn into India since April 2000, Mauritius still supplied 36 percent, or USD78.5bn, compared with Singapore's total of USD25.4bn, or 12 percent.[8]

Moody's also thinks that changes to the terms of the treaty may not be as damaging to the Indo–Mauritius investment relationship as first feared. Noting that amendments to the text "could alter the attractiveness of Mauritius's financial center," it nevertheless believes that the impact "will likely be gradual and manageable."[9]

"Ultimately, the impact will be a function of the extent of the changes, the sensitivity of investment to such changes, and the capacity of the authorities to develop the financial center as a gateway for investment to places other than India, including in Africa," Moody's stated.

The Future

On the face of it, the OECD's final BEPS reports, endorsed by the G20 (including India), could be considered ominous reading. In essence, the proposed measures seek to dismantle the sort of tax avoidance arrangements in which Mauritius often plays a key role, by realigning economic substance with profit, rewriting tax treaties, and increasing corporate disclosure requirements.

But at present, it is difficult to predict how all this will play out with any degree of certainty.

Much will hinge on how the BEPS recommendations are implemented by certain governments, particularly, in the case of Mauritius, those in India and Africa. Nevertheless, it is important to point out here that Mauritius isn't all about finance. The Government is just as keen to use tax and other incentives to attract physical investment, and the successful export processing zone is a prime example. Tourism is also a critical industry into which the Government is keen to encourage foreign investment.

For the foreseeable future, Mauritius's place as a key international offshore financial center would seem reasonably assured, thanks in large part to the sensible policies of its Government, its long established relationship with India, and the vast potential of African growth. That being said, at some point in the future, Mauritius might come under pressure to raise taxes, either from the OECD or as a result of external economic forces.

Endnotes

1 http://www.afdb.org/en/countries/southern-africa/mauritius/mauritius-economic-outlook/

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3 http://www.fscmauritius.org/media/264662/press-communique-fsc-asb-2015-final-02dec15.pdf

4 http://www.fscmauritius.org/media/261681/fsc-annual-report-2014.pdf

5 http://www.applebyglobal.com/publication-pdf-versions/thought-leadership-reports/private-equity-report-2015.pdf

6 http://dipp.nic.in/English/Publications/FDI_Statistics/2014/india_FDI_March2014.pdf

7 http://www.investmauritius.com/budget2015/Africa.aspx

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Change In The UK Treatment Of Dual-Resident Companies May Affect US Tax Planning

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Introduction

On November 30, 2015, the UK tax authorities at HM Revenue & Customs (HMRC)[1] reached an agreement with Jersey[2] about the interpretation of the company residence tie-breaker provision of the Jersey–UK income tax treaty. After reviewing other income tax treaties that contain similar provisions, HMRC will now take the view that the tie-breaker clause will be utilized to determine where a company will be treated as a resident for tax purposes pursuant to the affected income tax treaties.

This represents a significant departure from HMRC's previous view, and could have important implications for many US taxpayers. Under HMRC's prior interpretation, a dual-resident company (*e.g.*, a company resident in the UK by virtue of its place of incorporation but resident in the other jurisdiction by virtue of its management and control) was not treated as a resident of either jurisdiction for purposes of the treaty and therefore was not eligible for treaty benefits.

HMRC now takes the view that, for the purposes of applying the affected treaties, these treaty provisions should be read as treating such a dual-resident company as a resident of the jurisdiction in which it is managed and controlled. When a company is managed and controlled in both the UK and the other treaty jurisdiction, however, the company will not be eligible for treaty benefits.

The affected countries are as follows: Antigua, Belize, Brunei, Burma/Myanmar, Greece, Grenada, Guernsey, Isle of Man, Jersey, Kiribati, Malawi, Montserrat, St Kitts & Nevis, Sierra Leone, Solomon Islands, and Tuvalu.

Of the above list of countries, three do not impose any corporate income tax: Guernsey, Isle of Man, and Jersey. Therefore, as further discussed below, there are a number of potential tax planning opportunities for US businesses with operations outside the United States to eliminate UK corporate taxes and at the same time obtain deferral of the income from a US federal income tax perspective.

"Management And Control" In The Non-US Context

For US federal tax purposes, the place of incorporation is the sole factor in determining whether a corporation is domestic or foreign. In many non-US jurisdictions, however, a foreign corporation is considered a "resident" of a particular jurisdiction if that corporation is either incorporated in such jurisdiction or is managed and controlled in that jurisdiction. For this purpose, management and control generally exists in a particular jurisdiction if regular board of directors meetings are held in that jurisdiction.[3]

A "dual-resident corporation" is a foreign corporation that is created or organized in one jurisdiction but managed and controlled in a second jurisdiction. Generally, when a dual-resident corporation exists, the place where such corporation is resident for tax purposes depends on whether an income tax treaty is in effect between these two foreign jurisdictions.

An income tax treaty's corporate "tie-breaker" provision typically provides that the corporation will be treated as a resident (and therefore taxed) in the jurisdiction where the corporation's "effective management is situated." If no treaty exists, however, a dual-resident corporation may be subject to tax in both jurisdictions (*i.e.*, the jurisdiction where it is created or organized and the jurisdiction where the effective management is situated). Because of the manner in which the United States taxes corporations that are formed in the United States, this would be the result if a corporation were formed in the United States but managed and controlled in a foreign jurisdiction (*i.e.*, it would become a dual-resident corporation and potentially subject to double taxation).[4]

Controlled Foreign Corporations

For US federal income tax purposes, certain categories of income (known as " Subpart F income"[5]) of a "controlled foreign corporation"[6] ("CFC") is taxable annually to the US shareholders of the CFC, whether or not such shareholders receive any actual distributions. Under one category of Subpart F income (foreign personal holding company income, or "FPHCI"), certain types of income received by a CFC from a related corporation that is created or organized under the laws of the same foreign country in which the CFC is created or organized will not be treated as FPHCI as long as the related corporation has a substantial part of its assets used in its trade or business located in that same foreign country (the "same-country exception"). This rule applies even if the CFC is "managed and controlled," and therefore resident, in a different jurisdiction than the related foreign corporation. Similarly, a CFC will generate "foreign base company services income," a second category of Subpart F income, only if, among other things, the income is derived from the performance of services outside of the jurisdiction in which CFC is created or organized. A similar, same-country exception applies for purposes of a third category of Subpart F income, foreign base company sales income, which is more fully described below.

The above provisions, among others, thus may allow a taxpayer to form a foreign corporation in a particular jurisdiction while moving the management and control of such entity to a more favorable taxing jurisdiction, and at the same time avoid certain adverse US federal income tax consequences under Subpart F.

US Tax Planning: Avoiding Foreign Personal Holding Company Income

As noted above, one of the primary categories of Subpart F income consists of FPHCI. FPHCI includes most forms of passive income, such as dividends, interest, royalties, rents, annuities, and the excess of gains over losses from the sale or exchange of property that gives rise to passive income.[7] A major exception from FPHCI applies for dividends and interest received from a related person that (1) is a corporation created or organized under the laws of the same foreign country under the laws of which the CFC is created or organized, and (2) has a substantial part of its assets used in its trade or business located in such same foreign country.[8] Based on HMRC's new interpretation of the company tie-breaker provision of certain UK income tax treaties, a tax planning opportunity exists to take advantage of the same country exception from FPHCI while minimizing UK corporate income tax.

Example: A US corporation (USP) owns 100 percent of the stock of FC1, which in turn owns 100 percent of the stock of FC2. FC1 was formed in the UK but is managed and controlled in Jersey, and therefore is treated as a resident of Jersey under the UK–Jersey income tax treaty. FC2 was formed in the UK and is managed and controlled in the UK. FC1 lends money to FC2 at market rates. Assuming the interest paid by FC2 does not reduce FC2's Subpart F income or create (or increase) a deficit in FC2's E&P that may reduce FC2's Subpart F income, the interest payment will be exempt from Subpart F income under the same-country exception. Thus, USP will have the ability to defer paying US federal income tax on this income until it is distributed to USP. These rules should apply irrespective of whether FC1 is considered to be a tax resident of Jersey and, therefore, subject to corporate income tax at a 0 percent rate, as opposed to the 20 percent corporate income tax rate currently in effect in the UK.

Avoiding Foreign Base Company Sales Income

Another planning opportunity is to use a dual-resident UK company to avoid foreign base company sales income ("FBCSI"). FBCSI is income of a CFC from the sale of personal property that is purchased from or on behalf of, or sold to or on behalf of, a related person where the property is both manufactured and sold for use outside the CFC's country of incorporation. If the CFC manufactures the property that it sells, the sales income generally will not be subject to the FBCSI rules. The FBCSI rules are intended to prevent the deflection of income from the jurisdiction in which the goods are manufactured to a low-tax jurisdiction. Thus, when the manufacturing is carried on by related corporations, the FBCSI rules often will apply.

Example: CFC2 is a manufacturing corporation incorporated in the UK. The US parent of CFC2 forms a sister subsidiary corporation, CFC1, which is also incorporated in the UK but is resident of the Isle of Man under the UK–Isle of Man income tax treaty (*i.e.*, because it is managed and controlled in the Isle of Man). CFC1 enters into a contract manufacturing arrangement for CFC2 to manufacture goods from raw materials that CFC1 purchased from the US parent and provided to CFC2 (thus leaving less profit in CFC2). CFC1 can then sell through a commissionaire (or branch) established in the country of sale.

CFC1 will not be taxed on its sales profits in the UK because the UK treats it as a nonresident based on the UK–Isle of Man tiebreaker provision explained above. For US tax purposes, however, CFC1 is treated as a UK corporation because it was incorporated in the UK. For the FBCSI rules to apply, the sales income would have to be derived in connection with the sale of products both manufactured and sold for use outside CFC1's country of incorporation (here, the UK). In this case, if properly structured, CFC1's sales income should not be considered FBCSI because the income is derived from the sale of products manufactured in the UK and thus the "same country exception" applies. Thus, CFC2 may reduce its tax burden in the UK without any corresponding subpart F income in the hands of CFC1 because of these inconsistencies between the US and foreign determinations of where the corporation resides.

Implications To Other US Tax Provisions

Other Sections of the Code that allow for similar planning include the foreign base company services provisions under Section 954(e) and the related party factoring income provisions of Section 864(d)(7). Similar planning also was available under Section 7874, relating to corporate inversions, until Treasury and IRS recently issued a Notice (2015-79) indicating that they plan to issue regulations providing that benefits are not available unless the foreign corporation in question is subject to tax as a resident of the relevant foreign country in which it was incorporated. Thus, this Notice would eliminate the possibility of exploiting different residency standards in the US versus the foreign country in the context of Section 7874.

Endnotes

1 *See* https://www.gov.uk/government/organisations/hm-revenue-customs

2 *See* https://www.gov.uk/government/publications/double-taxation-agreements-developments-and-planned-negotiations/change-of-view-on-the-interpretation-of-the-residence-articles-in-sixteen-double-taxation-agreements

3 Other relevant factors in determining where a company's management and control is located may

include (1) the jurisdiction where a local office or address exists, (2) the jurisdiction where a local bank account is maintained, and (3) the location where the company's books and records are maintained. In addition, in certain jurisdictions a company will be considered a resident only if the day-to-day management activities occur in such jurisdiction.

4 Of course the FTC provisions generally would provide relief from double taxation. The US also has special rules for "dual-chartered" entities (*i.e.*, those entities that are treated as formed in more than one jurisdiction). ***See*** Reg. 301.7701-2(b)(9) (which treats dual-chartered entities as ***per se*** entities under the entity classification regime). Similar to dual-resident companies, dual-chartered entities that are formed in the US continue to be taxed as domestic corporations.

5 ***See*** https://www.irs.gov/pub/int_practice_units/DPLCUV_2_01.PDF

6 ***See*** https://www.irs.gov/irm/part4/irm_04-061-007.html

7 Section 954(c)(1).

8 Section 954(c)(3)(A). When Section 954(c)(6) is effective, it provides even broader benefits than does the same country exception for FPHCI. Section 954(c)(6) first became effective in 2006. Under that provision, dividends, interest, rents and royalties received or accrued by a CFC from a CFC which is a related person will not be treated as FPHCI to the extent attributable or properly allocable to income of the related CFC that is neither Subpart F income nor effectively connected income. Section 954(c)(6) expired as of January 1, 2015 and, at the time of writing this article, is not effective. Thus, while taking advantage of the same-country exception clearly provides significant tax benefits, when Section 954(c)(6) is effective, that provision may provide even more benefits. There are also other ways to potentially avoid FPHCI income in such cases, including filing a check-the-box election on FC2 in the above fact pattern. Such elections are not always available, however, as in the case of entities that are classified as ***per se*** corporations under US rules.

Topical News Briefing: The Not So Lucky Country

by the Global Tax Weekly Editorial Team

As usual, the tax news wires are populated with stories about the possibility of imminent reform of Australia's tax system. However, the chances of it actually happening aren't good.

Tax reform has been under discussion in one form or another in Australia for a number of years, spanning several different governments. For example, we can go back to 1999, when the Ralph Report on changes to the business tax system was published; the report's more interesting proposals were largely ignored by the Howard administration at the time.

A few years later, the then Labor Government commissioned former Treasury Secretary Ken Henry to conduct a root and branch review of the Australian tax system, a study which took about 18 months to complete (although goods and services tax was not included in its remit). This was intended to lay the foundations of a ten-year plan for tax reform, but the only major change to come out of the Henry Review was a new tax on coal and iron ore miners, which has subsequently been repealed by the current Liberal/National administration.

Ideally, the incumbent Government would also like to reform taxation in Australia with the aim of making the country more economically competitive. But it hasn't gone as far as its predecessors in forming a special commission to provide it with possible options. Perhaps this is because it has learned from the recent past that raising the hopes of taxpayers only to later dash them when reforms can't be delivered can be damaging to a government's reputation – and to its future electoral hopes.

But why does achieving tax reform seem to be such a struggle for the Australians? One major factor must be its federal system. While most taxes are raised at federal level, some, like land and property taxes, are the responsibility of state and territorial governments. What's more, there is a complex revenue-sharing mechanism in place that seeks to ensure that the states and territories receive their fair share of revenues raised from the goods and services tax (GST). So any comprehensive tax reform plan will need input from sub-federal governments, and there is already some disagreement between the various parties on possible GST reform.

Then there is the relatively short Australian electoral cycle. The current Government took over from Labor after winning the September 2013 election. Under the terms of Australia's constitution, the next general election will be held no later than January 14, 2017, and possibly as early as August 6, 2016, which means that the Government has, at best, about a year to see any major legislative reform through.

The Government's budgetary situation must also militate against the possibility of tax reform taking place any time soon. The current Government inherited a AUD48bn (USD35bn) budget deficit after tax revenues collapsed towards the end of Labor's last stint in power. In the 2015 Budget, then Treasurer Joe Hockey said that the deficit will fall to AUD35bn next year, and to as low as AUD7bn in another three years' time.

However, this fiscal consolidation effort will require the Government to wring substantial extra sums of revenue from the existing tax system, as well as cut expenditure, and perhaps this isn't the ideal time to be making bold changes to the Australian tax system. Furthermore, Australia is an enthusiastic supporter of the OECD's BEPS agenda, and the related changes it has already made in this area might be incompatible with long-term goals to make the tax system more attractive to multinational companies.

In essence, tax reform in Australia is going to be a long-term process. The short-term nature of the political system, however, will likely continue to frustrate attempts to complete the task.

Proposed Section 55 Amendments Discussed At Canadian Tax Foundation Roundtable

by Jesse Brodlieb, Associate,
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The Canadian Tax Foundation's 67th Annual Conference was held in Montreal on November 22–24, 2015. At the conference, the Canada Revenue Agency (the "CRA") participated in an extensive roundtable discussion covering a number of issues related to its interpretation of the Income Tax Act (Canada) (the "Act"). Included in the discussion was the CRA's views on the application of the amendments to section 55 of the Act proposed in the 2015 Federal Budget relating to the anti-capital gains stripping rule.

Section 55

The CRA representatives at the roundtable spent a significant portion of the discussion on their interpretation and administrative positions surrounding the proposed amendments to section 55 of the Act.[1] The 2015 Federal Budget included a significant overhaul of the anti-capital gains stripping rule in section 55. While ostensibly targeted at transactions that utilized stock dividends to inflate the adjusted cost base of shares of a corporation or otherwise manipulate the safe income of a group of corporations, the draft legislation (which was subsequently released on July 31, 2015 for public comment) contained far-reaching changes.

Of particular concern to taxpayers and their representatives is the elimination of the related party safe harbor for inter-corporate dividends in paragraph 55(3)(a) of the Act. Under the proposed legislation, that safe harbor will apply only to deemed dividends arising under subsection 84(2) or 84(3).

The CRA addressed several questions on the application of the proposed amendments. First, the CRA was asked to discuss its views on the application of proposed clause 55(2.1)(b)(ii)(A), which would trigger the application of subection 55(2) where a dividend has been paid on a share and one of the purposes of the dividend was to effect a significant reduction in the fair market value of any share. Since every dividend results in reduction in the fair market value of a share (since assets have been transferred to the shareholder), the CRA was asked to describe the factors or tests they would consider in deciding whether a reduction of value is significant.

The CRA noted that numerous factors will be looked at, including the actions taken by the parties to the dividend and their motivation. The CRA noted that, in the case of an ordinary dividend, it is not a results-based test (as it would be in the case of a deemed dividend under subsection 84(3)). The CRA stated that the question to be asked is "what does the taxpayer intend" to achieve with the reduction in value and what benefit does this confer on the taxpayer.

The CRA noted that, for example, a dividend which created losses on a share used to shelter a gain would provide an indication that the purpose test was met. This reasoning seems somewhat perplexing – effectively looking at the results to determine the purpose, which suggests we are back into a results test. The CRA stated that in its view, this would be consistent with the Supreme Court of Canada's interpretation of purpose tests more generally in *Ludco* (2001 DTC 5505).

The second question the CRA considered was the application of the new rules to an intra-group loss consolidation plan between related or affiliated corporations involving the payment of dividends between the corporations. The CRA confirmed that it would not apply subsection 55(2) to such dividends and that it has provided this opinion in recent rulings.

Third, the CRA was asked a question on whether non-participating, non-voting preferred shares that allow for discretionary dividends could have safe income attributed to them. Due to the change in paragraph 55(3)(a) noted above, the importance of safe income in inter-corporate dividends in related-party contexts has greatly increased. In this question, it was assumed that no safe income would be attributed to the discretionary dividend share. However, the CRA was asked for its views on the impact on the other classes of participating shares.

The CRA noted that a discretionary dividend that has no accrued gain cannot reasonably have safe income attached to it, since no part of the corporation's safe income can reasonably be attributed to the growth on that share (as there is no such growth). Accordingly, any dividend on such shares would need to be considered in light of the purpose tests to determine if subsection 55(2) should be applied.

The CRA was of the view that the dividend nonetheless results in the reduction of safe income to the other shares since the capital gain on those shares would be reduced by the dividend and the portion of the income that was paid out as a dividend no longer supports the capital gain.

The fourth question the CRA considered on the proposed changes to section 55 was on the deliberate use of share redemptions to enable a corporation to fit into the paragraph 55(3)(a) related-party exemption. As noted above, under the proposed rules, paragraph 55(3)(a) will no longer apply to cash dividends paid on a share. Accordingly, one workaround for this issue would be to convert certain of the shares to redeemable shares equal to the desired dividend and simply redeem the shares, triggering a dividend under subsection 84(3) which would then presumably be protected by the paragraph 55(3)(a) safe harbor.

The CRA's response was helpful; they noted that the purpose of these proposed rule changes was to address transactions which resulted in the artificial generation or manipulation of tax basis, or the reduction of the fair market value of a share which potentially resulted in a fabricated loss. The CRA appears to take the view that the limitation in paragraph 55(3)(a) was to prevent the use of a dividend in kind that created basis from relying on the related party exemption.

Although the CRA did not explicitly condone the intentional use of share redemptions, it was nonetheless noted that since a redemption or cancellation of shares does not normally result in an increase in tax basis (indeed, basis in the redeemed or cancelled shares is lost), such transactions would not appear to be problematic from the point of view of section 55.

This was subject to the caveat that the use of redemptions to create or stream cost basis would not be acceptable. An example of an inappropriate result given by the CRA was the redemption of shares using a note, which was then contributed back to the corporation for new shares having high tax basis. This would be unacceptable planning in the view of the CRA, and if the paragraph 55(3)(a) exemption otherwise did apply, presumably they would seek to reassess using the general anti-avoidance rule.

The fifth question on the new section 55 rule concerned the use of dividends to achieve creditor proofing. For example, an operating company would pay a dividend to a holding company out of surplus funds. Those funds could be invested elsewhere by the holding company, or even loaned back to the operating company on a secured basis. Absent the related-party safe harbor in paragraph 55(3)(a), subsection 55(2) could apply to the dividend. There is no plan to sell and in fact any sale may occur at the holding company level.

The CRA noted that it would be a question of fact in each case where a so-called "lumpy" dividend was paid whether subsection 55(2) could apply. The CRA said to provide comfort it would be a "healthy practice" to maintain safe income on an ongoing basis.

Endnotes

1 These changes were discussed by the author in *Tax Topics* No. 2257, "Proposed Amendments to Section 55 Contain Unwanted Surprise."

Recession A Missed Opportunity To Improve Tax, Says IFS

Never let a good crisis go to waste. This is the conclusion of a new publication by the Institute of Fiscal Studies (IFS), which contends that the European countries required to make a substantial fiscal adjustment during the financial crisis have missed an opportunity to improve their tax systems.

In a special edition of its journal *Fiscal Studies*, the IFS examined how certain EU countries, including France, Germany, Ireland, Italy, Spain and the UK, responded to the recent recession in terms of their budgetary decisions. It shows that the largest fiscal adjustment by far was made by Ireland, which increased taxes by about 6 percent of national income and cut public spending by well over 10 percent of GDP, followed by Spain where tax hikes and spending cuts have been about half those in Ireland as a percentage of its economy.

The policy responses in France, Italy and the UK were all similar in size – approximately 5 percent of GDP overall. However, the mix of tax increases and spending cuts differed markedly, with France and Italy relying largely on taxation to tackle their budget deficits, but the UK concentrating much more on spending cuts. Several years after the financial crisis broke, Germany on the other hand looks barely affected. Indeed, net taxes have fallen slightly, while there has been a relatively negligible cut in government expenditure.

The IFS did, however, pick out one common theme from the various fiscal policy tools employed by these countries: "Unfortunately … these fiscal responses to the crisis largely missed opportunities to improve the overall efficiency of the tax system."

The IFS picked out three particular examples where tax measures served to distort tax systems further, rather than improve them: France's decision to introduce a corporate tax credit to encourage employment, rather than cut high employer social security taxes; Ireland's succession of VAT changes and capital gains tax hikes, with the latter tax having risen from 20 percent to 33 percent in stages from 2008, which have "unnecessarily created uncertainty and distortions"; and the UK's decision to raise its standard rate of VAT while retaining a relatively narrow VAT base, decisions which "have come at the cost of increasing distortions for both producers and consumers." The UK's individual income tax schedule has also been made "considerably more complicated," the IFS observed.

"With France, Ireland, Italy, Spain and the UK all having planned and implemented large fiscal adjustments since the onset of the Great Recession, we might hope that policymakers would have tried to use this as an opportunity to improve the efficiency of the tax system and public spending in their countries. Or, at the very least, not to have exacerbated existing inefficiencies," the IFS said.

"Unfortunately, in many cases, the fiscal response to the crisis missed opportunities to improve the overall efficiency of the tax system."

Tax Breaks In Indonesia's Next Stimulus Plan

The Indonesian Government has announced tax cuts for workers employed in labor-intensive industries as part of its latest round of economic stimulus measures.

Under phase seven of Indonesia's ongoing economic stimulus strategy, the Government has announced that low-paid employees working in the footwear and textiles industry will receive a tax exemption starting in 2016.

The tax break will apply to employees earning up to INR50m (USD3,600) per year, but the company must employ at least 5,000 Indonesian workers and export at least half its output to qualify for this payroll tax break.

The Government hopes this measure will not only put more money into the pockets of workers, but also improve the cash flow of companies operating in the designated industries, while encouraging them to employ more local workers.

EU Ministers Agree Initial EU BEPS Response

The EU's Economic and Financial Affairs Council (ECOFIN) agreed a work plan in response to the OECD's base erosion and profit shifting recommendations at its meeting on December 8.

Following the meeting, ECOFIN – comprised of finance and economy ministers from all member states – released a list of agreed conclusions.

First, the Council agreed to proposals to strengthen the work of the Code of Conduct Group on business taxation, with additional measures foreseen in 2016. It highlighted the usefulness of the work carried out by the Group in assessing whether individual tax measures in member states are "harmful" and endorsed a new work package for the Group, which will include preparing guidance on tackling BEPS.

In particular, the Group has been asked to prepare guidance on the implementation of BEPS Actions 8–10 (aligning transfer pricing outcomes with value creation) and 13 (transfer pricing documentation), with the support of the Commission and the EU Joint Transfer Pricing Forum. It has also been asked to draft guidance on the EU's response to Action 12, on the disclosure of aggressive tax planning arrangements.

ECOFIN stressed the need to find common, yet flexible, solutions to BEPS at the EU level consistent with OECD BEPS conclusions, paying specific attention to compliance with EU Treaty freedoms and competences. It said it supports an effective, swift and coordinated implementation by member states of the anti-BEPS measures to be adopted at EU level.

It noted that several legislative proposals linked to the BEPS agenda are currently under discussion in the Council, notably the proposal for a common consolidated corporate tax base (CCCTB) and the recast of the Interest and Royalties Directive (IRD). It noted in particular that a common anti-abuse clause is envisaged in the context of the recast of the IRD, following the insertion of a similar clause in the Parent-Subsidiary Directive, on the basis of the conclusions of Action 6. ECOFIN agreed that anti-BEPS measures should ideally be introduced through EU legislation, and in particular directives.

The Commission is expected to put forward an anti-BEPS package of legislative and non-legislative measures early in 2016. The Council said the OECD BEPS conclusions on Actions 2 (hybrid mismatches), 3 (controlled foreign company rules), 4 (interest limitation rules), 6 (general anti-abuse rule), 7 (permanent establishment status), and 13 (country-by-country reporting) might be implemented, following further technical analysis, through legislative proposals focusing on international anti-BEPS aspects, without precluding the application by member states of domestic or agreement-based provisions aimed at preventing BEPS.

ECOFIN said it "acknowledges" the need for further discussion on the concept of minimum effective taxation, in particular within the recast of the IRD.

It noted that OECD BEPS conclusions on Action 2 (neutralizing the effects of hybrid mismatch arrangements) are being taken into account for ongoing works of the subgroup on hybrid mismatches of the Code of Conduct Group and invited that Group and the Subgroup to discuss the forms of hybrid mismatches that are not addressed through EU legislation.

Concluding, the Council stressed the need for "a swift and efficient implementation" of OECD BEPS conclusions also at global level. It said it looks forward to the multilateral instrument to modify tax treaties envisaged under OECD BEPS conclusions on Action 15 expected by the end of 2016, and underlined the importance of involving a maximum number of countries, including developing countries, in order to ensure a level playing field in the area of BEPS.

Eurozone Countries Punt FTT Decision Into 2016

Eurozone finance ministers met to discuss the problematic financial transactions tax (FTT) on December 8, but decided to give themselves another six months to work on an agreement over its terms. Estonia, however, appears to have cold feet.

The latest discussions were not a complete failure; the participating countries managed to agree on some basic parameters of the tax. Notably, they agreed that all share trades would be subject to the tax, including intra-day transactions. They also agreed that the taxation of derivatives should be based on the widest possible base and should not impact the cost of sovereign borrowing.

Yet, many facets of the FTT's design remain up in the air, not least the rate structure of the tax. The finer details of the taxation of derivatives also need to be worked out. The agreement states: "In some cases, adjustments to the tax rates or to the definition of the tax base might be necessary in order to avoid distortions." And although the participating countries agreed to follow the territorial scope outlined in the European Commission's proposal, the statement qualifies this by stating: "It is now being determined whether it is more sensible to start taxation with only shares issued in member states participating in the enhanced cooperation. Important elements in this determination include relocation risks and administrative costs."

Other crucial aspects of the FTT have yet to be worked out, including the mechanisms needed to collect the tax, and how the revenues are distributed and spent.

There is another problem for the FTT group. Estonia refused to sign up to the agreement. This is because under the territorial scope of the FTT, while traders based in the country will likely have to pay the tax, the Estonian Government will unlikely see much in the way of revenue.

This reduces the original 11 EU member states taking part in the FTT to ten, and with Slovenia having expressed dissatisfaction with an earlier deal, this leaves the group dangerously close to the nine-member state threshold needed under the enhanced cooperation rules.

Under the proposed FTT directive drafted by the Commission in 2011, the tax would be imposed on all transactions in financial instruments, with the exchange of shares and bonds taxed at a rate of 0.1 percent and derivative contracts at a rate of 0.01 percent. The tax is expected to produce revenues of as much as EUR35bn (USD38bn) a year, which supporters of the idea argue represents a fair price for the financial sector to pay for its involvement in the financial and economic crisis.

Because most member states opposed the introduction of an EU FTT, it is to apply in no more than 11 countries on the basis of "enhanced cooperation," a legislative mechanism used in the EU when unanimity on new proposals cannot be reached in the Council. The 11 countries are Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.

However, achieving a consensus on the technical design of the tax has been problematic from the beginning. The FTT 11 were supposed to have concluded an agreement by this time last year in readiness for the introduction of the transactions tax in 2016. Earlier this year, the deadline was reset to December 2015, but, evidently, this has also been missed. Under the latest agreement, the participating countries have given themselves until mid-2016 to iron out the remaining issues, meaning that FTT is highly unlikely to be in place before 2017.

Pozen Switches Inversion After US Treasury Changes

US pharmaceutical company Pozen Inc. has decided to change the country of residence of its merger with Canada's Tribute Pharmaceuticals Inc. (Tribute), following last month's anti-corporate tax inversion notice from the US Treasury Department.

Under their plans announced in June this year, Pozen and Tribute shareholders would have owned approximately 66 percent and 34 percent, respectively, of the new company. It therefore would have qualified under the US rule that at least 20 percent of a new group's shares have to be held by the foreign company's shareholders after a merger to allow US multinationals to move their tax residence abroad, and away from the high US corporate tax rate.

Under the original arrangement, the merger would have involved the formation of a new combined company domiciled in Ireland. However, the measures introduced under the new Treasury notice, which are intended to make it more difficult for US companies to undertake an inversion, include a limitation on the ability of US companies to combine with foreign entities using a new foreign parent located in a "third country."

In a statement on December 7, the two companies confirmed their merger plans and announced that they have entered into an amended agreement, which moves the domicile for their proposed parent company from Ireland to Canada.

The Canadian domicile, the two parties added, "offers a substantially similar corporate and tax structure to the previous Irish domicile, and will benefit from Tribute's business foundation and strong presence in Canada, where Tribute is incorporated and from where it has always operated."

DuPont, Dow Confirm Proposed Merger, Tax-Free Spin-Off

DuPont and The Dow Chemical Company on December 11 announced they have concluded talks on a merger of equals, which would potentially unlock substantial tax savings.

DuPont announced that both companies' boards had unanimously approved "a definitive agreement under which the companies will combine in an all-stock merger of equals. The combined company will be named DowDuPont."

"The parties intend to subsequently pursue a separation of DowDuPont into three independent, publicly traded companies through tax-free spin-offs," DuPont said. "This would occur as soon as feasible, which is expected to be 18–24 months following the closing of the merger, subject to regulatory and board approval."

Dow and DuPont shareholders will each own approximately 50 percent of the combined company, on a fully diluted basis, excluding preferred shares. As much of both companies' stock is owned by a handful of the same investors, the merger is thought to have a greater chance of satisfying a US tax code requirement that there should not be a change of control, among other things, to avoid capital gains liability.

Commenting, Edward D. Breen, Chairman and Chief Executive Officer of DuPont, said: "This merger of equals will create significant near-term value through substantial cost synergies and additional upside from growth synergies. Longer term, the three-way split we intend to pursue is expected to unlock even greater value for shareholders and customers and more opportunity for employees as each business will be a leader in attractive segments where global challenges are driving demand for these businesses' distinctive offerings."

DuPont said the transaction is expected to deliver approximately USD3bn in cost synergies within 24 months of closing the transaction.

South Korea–China FTA To Enter Into Force

On December 9, South Korea's Ambassador to China, Kim Jang-soo, and China's Vice Minister of Commerce, Wang Shouwen, exchanged diplomatic notes that set December 20, 2015, as the date for the entry into force of the free trade agreement (FTA) between the two countries.

The FTA was signed on June 1 this year, soon after negotiations commenced in May 2012. As the most substantial FTA South Korea has signed, and given its expected effect of increasing South Korean economic growth prospects, the Government applied a significant amount of pressure in Parliament for its ratification by the end of 2015.

That ratification occurred on November 30, and the agreement is now able to come into effect, following subsequent approval by China's State Council. As the FTA will come into force in 2015, the tariff reductions for its first year will occur immediately. Its scheduled second year reductions will take effect on January 1, 2016.

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

The two sides were able to reach the agreement by excluding ultra-sensitive items from the arrangement. South Korea has only agreed to a part-opening of its agricultural sector, while continuing to exclude such products as rice, pork, and beef.

China is already South Korea's primary trading partner, receiving a quarter of its exports, and South Korea is China's third-largest trading partner. The total value of trade between the two countries is expected to reach more than USD300bn this year.

China–Australia FTA Comes Into Force

On December 9 in Sydney, Australia's Ambassador-designate to China, Jan Adams, and Chinese Ambassador Ma Zhaoxu exchanged diplomatic notes that set December 20, 2015, as the date for the entry into force of the free trade agreement (FTA) between the two countries.

As the FTA will come into force in 2015, the tariff reductions for its first year will occur immediately. Its scheduled second year reductions will take effect on January 1, 2016.

"This will deliver a very material early harvest for our exporters in the form of two rounds of annual tariff cuts in quick succession," said Australia's Minister for Trade and Investment, Andrew Robb.

"This will save our exporters hundreds of millions of dollars in extra tariff payments next year alone compared to if entry into force had been delayed until sometime in 2016."

Upon the FTA's entry into force, more than 86 percent of Australia's agricultural, resource, energy, and manufactured goods exports to China (worth around USD63bn in 2014) will be tariff free, before rising to 96 percent upon full implementation.

South Korea, EU Confirm Full FTA Implementation

The free trade agreement (FTA) between South Korea and the EU went into full effect on December 13, 2015.

Tariff and selected non-tariff measures within the FTA have been provisionally implemented since July 1, 2011, and have already contributed to an expansion of bilateral trade. The FTA eliminates about 98 percent of import duties and other trade barriers in manufactured goods, agricultural products, and services over the first five years of the agreement.

However, the FTA's provisions covering such matters as intellectual property rights and government procurement were among those that awaited the successful conclusion of ratification procedures by all EU members, which has now been completed.

The EU is South Korea's third-largest trade partner and its top foreign investor. It is hoped that full implementation will now promote more business investment between the two sides.

WTO Reports Drop In New Anti-Dumping Investigations

New anti-dumping investigations by World Trade Organization (WTO) members decreased by 12 percent to 233 in the period from July 2014 to June 2015, compared with the previous 12 months, said the WTO.

The findings are included in its new report, *Overview of Developments in the International Trading Environment*.

According to the report, Brazil began the most anti-dumping investigations (38), followed by India (31) and Argentina (14).

The report said that WTO members applied 178 new trade-restrictive measures in the period between mid-October 2014 to mid-October 2015. This equates to a monthly average of just under 15 new measures per month, which is stable and comparable to the previous reporting period.

The overall stockpile of restrictive measures introduced by WTO members nevertheless continued to grow, the WTO said. Of the 2,557 trade-restrictive measures, including trade remedies, introduced by WTO members since 2008 and recorded by the WTO, only 642 had been removed by mid-October 2015.

On the other hand, the report found that a total of 222 measures aimed at facilitating trade were taken between mid-October 2014 and mid-October 2015 – a monthly average of almost 19 measures, the second-highest number since the WTO started monitoring the measures.

Australian Think Tank Reviews GST Reform Options

Australian think tank The Grattan Institute has said that extending the goods and services tax (GST) to cover many of the categories currently exempt could raise AUD17bn (USD12.3bn) a year, while increasing the rate to 15 percent could generate AUD27bn.

According to a new report by the Institute, raising more GST revenue, either through a higher rate or applying it to more goods and services, is preferable to most other means of raising revenue, including higher income taxes. It said a broader or higher GST could help to fund growing health care costs, reduce the deficit, or allow for inefficient taxes to be cut.

In its report, the Institute noted that the GST raised AUD55bn in 2014/15. At around 12 percent of government revenues, this is below the 20 percent average for all OECD countries. Australia's GST coverage is also narrow by international standards. It applies to 47 percent of consumption, compared to the OECD average of 55 percent.

The Institute argued that the most efficient means of reforming the GST would be to broaden the base to include fresh food, health, and education. However, should this prove too politically fraught a policy, raising the rate from 10 to 15 percent would prove a "satisfactory second best." A well-designed GST package that increases the rate to 15 percent could lead to a tax and welfare system that is more progressive, the Institute said.

The Institute calculated that committing 30 percent of the additional revenue raised to income tax reform would allow the Government to reduce the lowest two tax rates by between 2 and 2.5 percent. If it spent a further 30 percent of the revenue generated on welfare reforms, two-thirds of low-income households would be better off overall.

The Institute said that, taken together, these reforms would fully offset a GST increase for households earning up to AUD100,000 a year.

Australian Governments Discuss Tax Reform Options

Australia's federal, state, and territory governments will continue to explore all options for tax reform, with the states agreeing that their taxes and tax bases "will be part of the discussion," federal Prime Minister Malcolm Turnbull has said.

Turnbull was speaking after a meeting of the Council of Australian Governments (COAG). "We've agreed to continue investigating a full range of Commonwealth and state tax and revenue-sharing options. We've reiterated our commitment to changes to the tax system being fair with a growth-enhancing tax mix and base and we have all reiterated our commitment to keeping tax as low as possible," he told a press conference.

The COAG is next due to meet in March 2016. According to Turnbull, the Council will "not simply consider the work we've done." It will instead "aim to take action" when governments "have had a further opportunity to discuss the many issues and approaches that have been canvassed around."

When prompted whether the federal Government will put its own preferred tax plan to the March meeting, Turnbull stressed that "March is not very long before the federal Budget so whatever tax plans we take to the Budget you would imagine would be highly, would be well advanced by March."

Russia To Introduce VAT On Digital Services

Russian lawmakers are considering enacting legislation that would introduce value-added tax (VAT) on business-to-consumer and business-to-business supplies of electronic services.

Mirroring the regime introduced in the EU from the beginning of this year, Russia would require overseas suppliers to charge VAT of 18 percent on their supplies to Russian consumers. It is anticipated that other aspects of the regime however, such as its administration and scope, will differ from the systems adopted relatively recently in the EU, South Korea, Japan, and South Africa.

The change, which is intended to level the playing field for electronic services providers operating in the domestic market, is considered likely to take effect from January 1, 2017.

New Zealand Lawmakers Endorse Key Tax Policy Changes

New Zealand lawmakers approved at first reading a Bill to levy a withholding tax on offshore property speculators and apply goods and services tax (GST) to online purchases of services and intangibles from overseas suppliers.

Revenue Minister Todd McClay said the Residential Land Withholding Tax, GST on Online Services, and Student Loans Bill is about fairness.

The Bill proposes a new residential land withholding tax (RLWT) on sales of residential property by people who live overseas and go on to sell the property within two years of purchase. The proposed measure is the third part of the Government's investment property tax reforms announced as part of Budget 2015.

"This measure will act as a collection mechanism for the new bright-line test, which applies to gains from the sale of residential property purchased on or after October 1, 2015, and sold within two years. This will bring the collection of bright-line tax into line with other withholding taxes, which are applied when there is likely to be a tax owed and collection could be difficult," said McClay.

RLWT will apply when the property being sold is located in New Zealand and defined as "residential land" under the bright-line test provisions, and the seller is an offshore person, bought the property on or after October 1, 2015, and has owned the property for less than two years before selling it.

"The other major part of the bill is about creating a level playing field for collecting GST and putting New Zealand businesses and jobs ahead of the interests of overseas suppliers," said McClay. "The Government needs to deal with increasing volumes of online services and other intangibles purchased from overseas suppliers that should, under New Zealand's tax rules, be subject to GST, which should apply to all consumption that occurs in New

Zealand. This is an increasing challenge because of its exponential growth. The Government is losing revenue and it has created an unfair playing field for New Zealand retailers."

The proposed measures will apply GST to cross-border "remote" services and intangibles supplied by offshore suppliers (including e-books, music, videos, and software purchased from offshore websites) to New Zealand-resident consumers, by requiring the offshore supplier to register and remit GST on these supplies.

"To reduce compliance costs, offshore suppliers will not be required to return GST on supplies to New Zealand-registered businesses, nor will they be required to provide tax invoices," the Minister said.

Non-resident suppliers will be required to register and return GST when their supplies of remote services to New Zealand residents exceed NZD60,000 (USD39,900) in a 12-month period. The proposed new rules for online GST would come into force on October 1, 2016, following enactment of the bill. The RLWT rules will be effective from July 1, 2016.

Japan Agrees Scope Of Reduced Sales Tax Rate

The two members of Japan's ruling coalition, the Liberal Democratic Party (LDP) and the Komeito Party, have finally agreed on the range of food products that will continue to be subject to the 8 percent consumption tax rate when the headline rate increases to 10 percent in April 2017.

Although the LDP had initially hoped to restrict the lower consumption tax rate to fresh food products only, to limit the loss in annual revenue, it has now acceded to requests from the smaller Komeito Party to provide more help to low-income earners.

It is now proposed that the 8 percent rate will be retained for all fresh and processed food and for beverages, with the exception of alcoholic drinks. Restaurants will be subject to the 10 percent rate.

Funding still has to be found for the resulting lost revenues of around JPY1 trillion (USD8.3bn) per year.

Mauritius's Financial Sector Grew Strongly In 2014

Mauritius's Financial Services Commission has released its Annual Statistical Bulletin, including data on the performance of the financial services sector in 2014.

The total assets of the financial services sector (excluding companies holding a Category 1 Global Business License) rose from MUR27bn (USD750m) in 2013 to MUR30bn, an increase of 11 percent. The sector's income was up 8 percent and profits after tax rose from MUR937m in 2013 to MUR1.05bn.

Corporate and trust services providers' total assets grew to USD193m in 2014, an increase of 7 percent. Management companies meanwhile saw assets grow by 8 percent to USD210m, and they reported a combined profit of USD2.2m, up from USD1.9m in 2013.

Gross premiums received for long-term insurance business grew by 8 percent, and there was a marginal increase of about 0.5 percent for general insurance business.

Guernsey Finance To Open Hong Kong Office

Guernsey Finance will open a representative office in Hong Kong during the first quarter of 2016.

The office will be the promotional agency's second overseas outpost, in addition to its Shanghai office, which opened in 2008.

Guernsey Finance's China Representative, Wendy Weng, who is based in Shanghai, will use the office as a base from which to carry out further promotional activities concentrated on the wider South East Asia market. It will also be utilized by the Guernsey Financial Services Commission to provide regulatory advice to those in the region who might be considering Guernsey-specific ventures.

Dominic Wheatley, the Chief Executive of Guernsey Finance – the promotional agency on behalf of Guernsey's financial services industry internationally – said: "The Hong Kong office is an exciting development not only for Guernsey Finance, but also the island's financial services sector which has a growing interest in the region. We believe that establishing a larger presence in Asia reflects current industry trends and is fundamental to our future strategy, particularly as Hong Kong is such an important hub not only for China, but South East Asia overall."

Guernsey's Commerce and Employment Minister, Kevin Stewart, added: "Hong Kong is regarded as a key global financial location and this is a significant step in Guernsey's ability to attract new business from the region on the basis of its reputation as a well-regulated, compliant and cooperative international finance center."

St Kitts And Nevis To Improve Tax Info Exchange

Caribbean territory Saint Kitts and Nevis has proposed legislative changes to improve its ability to exchange information with treaty partners in tax matters.

The territory's Prime Minister, Timothy Harris, explained that the changes have been prompted by an increasing number of requests from treaty partners, which he attributed to a recent OECD assessment that rated the territory as 'largely compliant," one notch below the highest possible rating.

This assessment was part of a first phase peer review undertaken by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, which looked at the legal arrangements in place to enable the exchange of information. In an upcoming second phase review, Saint Kitts and Nevis will need to demonstrate that it exchanges information effectively in practice.

Harris said: "Since that assessment, we have seen an increase in the number of requests from our treaty partners to which we have endeavored to provide responses within the time frame that is stipulated in the international standards. The experience that we have gained from processing these incoming requests has necessitated that we strengthen the Saint Christopher and Nevis (Mutual Exchange of Information on Taxation Matters) Act so that we, as a Federation, could be more efficient and effective in our practice of exchanging information for tax purposes with our treaty partners."

The Federation currently has exchange of information mechanisms with 37 jurisdictions, through 24 tax information exchange agreements and 13 double tax conventions.

HMRC To Proceed With 'Facilitating Evasion' Offense

The UK Government has confirmed that it will legislate for a new criminal offense for corporations that fail to take adequate steps to prevent the facilitation of tax evasion.

Tax authority HM Revenue & Customs (HMRC) has published responses to four consultations on anti-evasion measures announced at the March 2015 Budget. It confirmed that, in addition to the new criminal offense, the Government will introduce a penalty for offshore evasion based on the value of the asset on which tax was evaded, and a new penalty regime for those who enable evasion. It will also establish a further criminal offense that removes the need to prove intent where a large amount of tax has not been paid on offshore income and gains.

International law firm Pinsent Masons said that while the proposed criminal offense for corporates is most squarely directed at financial services and professional services firms, all sectors will be brought within its scope. It explained that companies that commit the offense will have a criminal record, which may hamper their ability to win public contracts. However, Pinsent Masons cautioned that HMRC would encounter significant challenges if it did decide to prosecute overseas firms that played a role in allowing the evasion of UK taxes to take place.

Jason Collins, Partner and Head of Tax at Pinsent Masons, said: "It will be very hard for the UK to force an overseas company to turn up in a UK court to face prosecution. You can't extradite a company. HMRC may resort to 'prosecution by press release' – *i.e.*, by issuing criminal proceedings which, because they are in the public domain, will mean the foreign company has to decide whether to respond in the public domain."

"This is the sort of legislation of which US lawmakers would be proud. It is a bold attempt by the UK to extend the arm of its law beyond its borders. It needs to be matched with resources to police the offense otherwise it will become a damp squib. What does worry us is that HMRC's use of this threat may put off some foreign companies from offering their services in the UK for fear of falling foul of the new rules."

"The US's very aggressive approach to aggressive tax avoidance and tax evasion has put off some financial services firms from exposing themselves to doing business in the US. This offense may lead to the same thing happening in the UK."

SARS Combats High-Risk Sector Non-Compliance

The South African Revenue Service (SARS) Commissioner, Tom Moyane, has announced that the agency will focus on non-compliance by taxpayers in high-risk sectors.

He confirmed that SARS has selected the cash-and-carry industry as one of these sectors. Over the previous six months, 40 companies operating in this sector had been picked up by the agency's risk monitoring systems and selected for audit. These companies are said to have failed to levy VAT, illegally repatriated funds offshore, or claimed fraudulent VAT refunds.

Depending on the taxpayer's intent and the severity of the offense, SARS can impose stringent penalties of up to 200 percent on all taxes owed and, in some cases, taxpayers will be charged and prosecuted.

SARS uses a wide range of methods to detect non-compliance, including high-tech scans of import containers, cross-checking its information against third-party data, and on-site audits and tip-offs.

"If you are not compliant you should take the opportunity to put your tax affairs in order," Moyane said. "This can be done through the Voluntary Disclosure Program; the consequences will be less severe than if SARS establishes the non-compliance."

CANADA - SPAIN

Into Force

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

CANADA - UNITED KINGDOM

Forwarded

Canada and the UK have agreed to amend the arbitration provisions of their DTA in an exchange of notes.

CZECH REPUBLIC - CHILE

Signature

The Czech Republic and Chile signed a DTA on December 2, 2015.

GUERNSEY - SPAIN

Signature

Guernsey and Spain signed a TIEA on November 17, 2015.

HONG KONG - VARIOUS

Into Force

Hong Kong's TIEAs with Denmark, the Faroe Islands, Iceland, and Norway entered into force on December 4, 2015.

INDIA - JAPAN

Signature

India and Japan signed a DTA Protocol on December 11, 2015.

ISLE OF MAN - SPAIN

Signature

The Isle of Man and Spain signed a TIEA on December 3, 2015.

JAPAN - TAIWAN

Signature

Japan and Taiwan signed a DTA on November 26, 2015.

MAURITIUS - MOROCCO

Signature

Mauritius and Morocco signed a DTA on November 25, 2015.

NIGERIA - KOREA, SOUTH

Forwarded

The speaker of Nigeria's House of Representatives has said to South Korea that the nation's lawmakers will swiftly adopt a DTA between the two countries, following delays in the lower house.

QATAR - JAPAN

Into Force

A DTA between Qatar and Japan will enter into force on December 30, 2015, Japan's Ministry of Finance has announced.

SWITZERLAND - ARGENTINA

Into Force

A DTA between Switzerland and Argentina entered into force on November 27, 2015.

SWITZERLAND - BRAZIL

Signature

Switzerland and Brazil signed a TIEA on November 23, 2015.

SWITZERLAND - VARIOUS

Into Force

The Swiss Government on November 24, 2015, announced that four DTAs recently entered into force: the agreement with Cyprus on October 15; with Uzbekistan on October 14; with Estonia on October 16; and with Iceland on November 6.

UKRAINE - CYPRUS

Signature

Ukraine and Cyprus have signed a new DTA that would replace their existing DTA when it expires from January 1, 2019.

UNITED KINGDOM - VARIOUS

Forwarded

On December 9, 2015, legislation was forwarded to the House of Commons to ratify the UK's pending DTAs with Jersey, Guernsey, and Kosovo.

ZIMBABWE - CHINA

Signature

Zimbabwe's tax authority announced the signing of a DTA with China on December 1, 2015.

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

THE AMERICAS

INTERNATIONAL TAX ISSUES 2016

2/9/2016 - 2/9/2016

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_2016/_/N-4kZ1z11j97?ID=259129

INTRODUCTION TO US INTERNATIONAL TAX – LAS VEGAS

2/22/2016 - 2/23/2016

Bloomberg BNA

Venue: Trump International Hotel, 2000 Fashion Show Drive, Las Vegas, NV 89109, USA

Chair: TBC

http://www.bna.com/intro_vegas2016/

AMERICAS TRANSFER PRICING SUMMIT 2016

2/23/2016 - 2/24/2016

TP Minds

Venue: Eden Roc Resort, 4525 Collins Ave, Miami Beach, FL 33140, USA

Key speakers: Garry Stone (PwC), Mike Danilack (PwC), David Varley (IRS), Kenneth W. Wood (IRS), Michael Lennard (United Nations), Mayra Lucas (OECD), Carlos Perez-Gomez (SAT), George Georgiev (Siemens Corporation), among numerous others

http://www.iiribcfinance.com/event/Americas-Transfer-Pricing-Conference

ADVANCED INTERNATIONAL TAX PLANNING – LAS VEGAS

2/24/2016 - 2/25/2016

Bloomberg BNA

Venue: Trump International Hotel, 2000 Fashion Show Drive, Las Vegas, NV 89109, USA

Key speakers: TBC

http://www.bna.com/ITP_vegas2016/

INTERMEDIATE US INTERNATIONAL TAX UPDATE – LAS VEGAS

2/24/2016 - 11/26/2015

Bloomberg BNA

Venue: Trump International Hotel, 2000 Fashion Show Drive, Las Vegas, NV 89109, USA

Key speakers: TBC

http://www.bna.com/inter_vegas2016/

THE 5TH OFFSHORE INVESTMENT CONFERENCE PANAMA 2016

3/9/2016 - 3/10/2016

Offshore Investment

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

Chair: Derek Sambrook (Trust Services)

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

8TH REGIONAL MEETING OF IFA LATIN AMERICA

5/4/2016 - 5/6/2016

IBFD

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

Key speakers:TBC

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

US INTERNATIONAL TAX COMPLIANCE WORKSHOP – SAN DIEGO

6/20/2016 - 6/21/2016

Bloomberg BNA

Venue: Marriott San Diego Gaslamp, 660 K Street, San Diego, CA 92101, USA

Key speakers: TBC

http://www.bna.com/compliance_sandiego2016/

ASIA PACIFIC

THE 4TH OFFSHORE INVESTMENT CONFERENCE SINGAPORE 2016

1/20/2016 - 1/21/2016

Offshore Investment

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

Chair: Nicholas Jacob (Wragge Lawrence Graham & Co)

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

INTERNATIONAL TAX PLANNING – POST BEPS

2/24/2016 - 2/26/2016

IBFD

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

Key speakers: TBC

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

MIDDLE EAST AND AFRICA

INTERNATIONAL TAX ASPECTS OF CORPORATE TAX STRUCTURES

4/13/2016 - 4/15/2016

IBFD

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

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

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

TREATY ASPECTS OF INTERNATIONAL TAX PLANNING

5/22/2016 - 5/24/2016

IBFD

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

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

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

WESTERN EUROPE

5TH ANNUAL IBA TAX CONFERENCE

2/8/2016 - 2/9/2016

IBA

Venue: TBC, London, UK

Key speakers: TBC

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

21ST ANNUAL INTERNATIONAL WEALTH TRANSFER PRACTICES CONFERENCE

2/29/2016 - 3/1/2016

IBA

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

Key speakers: TBC

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

PRINCIPLES OF INTERNATIONAL TAXATION

2/29/2016 - 3/4/2016

IBFD

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

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

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

TRANSCONTINENTAL TAX

3/8/2016 - 3/9/2016

Informa

Venue: TBC, London, UK

Key speaker: Mark Davies (Mark Davies & Associates), Justine Markovitz (Withers), Clare Maurice (Maurice Turnor Gardner), Robin Vos (Macfarlanes), Maxim Alekseyev (Alrud), among numerous others

http://www.iiribcfinance.com/event/Transcontinental-Tax-conference

ITPA LUXEMBOURG WORKSHOP – MARCH 2016

3/13/2016 - 3/15/2016

International Tax Planning Association

Venue: Le Royal, 12 Boulevard Royal, 2449 Luxembourg

Chair: Milton Grundy

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

OFFSHORE TAXATION

3/15/2016 - 3/15/2016

Informa

Venue: TBC, London, UK

Key Speaker: Emma Chamberlain (Pump Court Tax Chamber), Richard Cassell (Withers), Simon McKie (McKie & Co), Kristen Konschnik (Withers), among numerous others

http://www.iiribcfinance.com/event/offshore-taxation-conference

INTERNATIONAL TRANSFER PRICING SUMMIT 2016

3/15/2016 - 3/16/2016

TP Minds

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

Key Speakers: TBC

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

INTERNATIONAL TAX ASPECTS OF PERMANENT ESTABLISHMENTS

4/19/2016 - 4/22/2016

IBFD

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

Key speakers: João Félix Pinto Nogueira (IBFD), Carlos Gutiérrez P. (IBFD), Bart Kosters (IBFD), Tamas Kulcsar (IBFD).

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

CURRENT ISSUES IN INTERNATIONAL TAX PLANNING

5/25/2016 - 5/27/2016

IBFD

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

Key speakers: TBC

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

ASIA PACIFIC

Australia

The High Court of Australia has dismissed an appeal stemming from a decision of the Full Court of the Federal Court of Australia. The High Court held that a former officer of the International Bank for Reconstruction and Development (IBRD) was not entitled to an exemption from taxation in respect of monthly pension payments he had received.

Section 6(1)(d)(i) of the International Organisations (Privileges and Immunities) Act 1963 (IOPI Act) and regulation 8(1) of the Specialized Agencies (Privileges and Immunities) Regulations (SAPI Regulations) confer upon a person who holds an office in an international organization to which the IOPI Act applies an exemption from taxation on salaries and emoluments received from the organization. The exemption is set out in Item 2 of Part 1 of the Fourth Schedule to the IOPI Act. The IBRD is an international organization to which the IOPI Act applies.

The appellant, Mr. Macoun, a former sanitary engineer with the IBRD, received monthly pension payments from a Retirement Fund established under the IBRD's Staff Retirement Plan (SRP) in the 2009 and 2010 income years, when he no longer held an office in the IBRD. The Commissioner – the respondent – included the monthly pension payments in Macoun's assessable income for the 2009 and 2010 income years.

A listing of recent key international tax cases.

Macoun sought review of the Commissioner's decision in the Administrative Appeals Tribunal (AAT). The AAT set aside the decision and substituted the decision that the monthly pension payments did not form part of Macoun's assessable income and were exempt from Australian income tax.

The Commissioner appealed to the Full Court of the Federal Court of Australia. The Full Court allowed the appeal, holding that regulation 8(1) of the SAPI Regulations confined the privileges specified in Part 1 of the Fourth Schedule to the IOPI Act to persons currently holding an office in an international organization to which the IOPI Act applied. As Macoun did not hold such an office in the IBRD in the

2009 and 2010 income years, the exemption from taxation was not available to him. By grant of special leave, Macoun appealed to the High Court.

The High Court unanimously held that Macoun was not entitled to an exemption from taxation for the relevant part of his monthly pension payments because he had ceased to hold an office in the IBRD when he received them, and because he received them from the Retirement Fund established under the SRP rather than from the IBRD. The High Court also held that Macoun's monthly pension payments did not fall within the phrase "salaries and emoluments" in Item 2 of Part 1 of the Fourth Schedule to the IOPI Act, and that Australia's international obligations did not require Australia to exempt the monthly pension payments from taxation.

This judgment was released on December 2, 2015.

http://eresources.hcourt.gov.au/showCase/2015/HCA/44

Australian High Court: *Commissioner of Taxation v. Macoun ([2015] HCA 44)*

WESTERN EUROPE

Switzerland

Hervé Falciani, who leaked details of accounts held by his former employer HSBC Private Bank in Switzerland to foreign tax authorities, was convicted while absent for economic espionage by the Swiss Federal Criminal Court.

The Court sentenced Falciani to five years in prison. He was cleared of other charges of data theft and violating commercial and banking secrecy. As a French (and Italian) citizen residing in France, however, he cannot be extradited to Switzerland.

HSBC welcomed the judgment stating that the ruling demonstrated that the leak of the data was for the "sole purpose of reselling them for his own enrichment." Adding: "The evidence received by the Court show that the intentions of Hervé Falciani were not those of a whistleblower."

The ruling, announced on November 27, may be appealed before the Federal Court.

The Court's written opinion has yet to be published.

Swiss Federal Criminal Court: *Swiss Government v. Falciani*

United Kingdom

The UK First-tier Tribunal (FTT) Tax Chamber has ruled against a taxpayer that brought an appeal on the basis of the Tribunal's earlier decision in *Reed Employment*, only to have its almost-identical appeal dismissed. The case concerned VAT imposed on the fees it received from clients for introducing temporary workers (temps) and managing other administrative aspects.

The case concerned Adecco UK Limited and the services it rendered as part of providing non-employed temps to clients under tripartite agreements. Adecco had accounted for VAT on the full charge paid by its client – specifically, on the element of the charge paid by the client that was equivalent to or represented the wages paid to the temp (including amounts paid in tax); and on the element of the charge effectively retained by itself, for the introductory service.

Adecco brought a claim for the period April 1, 2007, to December 31, 2008, totaling some GBP11.12m (USD16.86m) following the FTT's ruling in *Reed Employment* in March 2011. In that case, the Tribunal found that Reed Employment, in providing non-employed temps to its clients, had supplied introductory services in return for a commission and found that it was not liable to account for VAT on the element of the charge representing the wages that it received from its clients and paid to the temps.

HMRC rejected Adecco's claim however, arguing that it had supplied the services of the non-employed temps as well as the introductory services.

Despite not appealing the ruling in *Reed*, HMRC successfully argued in *Adecco* that the economic reality in this case is consistent with a *Redrow* "follow the liability to pay" analysis. In its eyes, the temps (on taking up an assignment) provided to Adecco the service of agreeing to carry out the assignment as instructed by Adecco's clients in return for payment by Adecco; Adecco then made a supply of the temps' services to its clients.

The appellant's position was that, whatever duties a temp owed Adecco under the contract with Adecco, under Adecco's contract with its client, it had no responsibility for the work performed by the temp and therefore its services were no more than introductory, with certain administrative services, such as operating the payroll, tacked on. This would have been in line with the ruling and circumstances in *Reed*, where the Tribunal placed importance on the fact that Reed and the temp owed each other no obligation to offer or to accept assignments (under "zero-hours contracts," as in *Adecco*); and there was a lack of control by Reed over the temp's work at any time.

The FTT Judge in *Adecco* looked at the facts of the case afresh.

In its decision, the Tribunal in particular looked at to whom the temps supplied their services. The Tribunal agreed that, in reality, Adecco did not monitor the performance of its temps. Further it found that it would be Adecco's client, rather than Adecco, that would terminate an assignment in the event that a temp's performance was unsatisfactory, although both were empowered to do so.

However, the Tribunal instead in particular relied on the terms of the contracts between Adecco and temps and Adecco and its clients to arrive at its decision. It found that Adecco assumed the liability of paying the workers for the work that they performed, rather than facilitating those payments.

The Tribunal highlighted that, within the contract, Adecco agreed with its clients that it would be liable for paying the workers, with the client being absolved of any liability to pay the temps. It said: "If the intention had been that Adecco merely discharged the client's liability to pay the workers, the contract with the client would not have required Adecco to contract directly with the temps, nor would it have required the client to sign timesheets … The contract was clearly drafted to protect Adecco's position on the mutual understanding that Adecco was liable to pay the worker for the work irrespective of whether its client paid it."

Further the Tribunal attached importance to the fact that clients very often did not know the rate of pay earned by the temp; they only knew this information from their own calculations, if they had negotiated a percentage-based commission with Adecco. The Tribunal further highlighted that, after the temp was introduced to the client, no contract was signed between the client and the temp, suggesting that Adecco's services, as a whole – and its role in the transaction – went beyond introductory services.

The Tribunal Judge highlighted that, "when considering what a person has actually agreed to do under a contract, the court considers the genuine contractual terms, which will be terms that have been agreed to for commercial reasons, whether or not they represent a negotiated compromise and whether or not the appellant might have preferred a less onerous term. The fact is that, in its contract with the temp, the appellant agreed to pay the temp for his work. And that is, in my view, very significant in defining what it was Adecco provided to its client under the client contract discussed below."

Further, looking at the nature of the fees received – comprising an initial one-off fee and an ongoing fee – the Tribunal highlighted that an introductory service is a one-off supply and the supply of staff is continuous until the contract comes to an end. The presence of both suggested there were two separate supplies, it said.

Ruling against the appellant, the FTT Judge concluded: "Adecco's position seems to be predicated on the basis that an agreement by A with B to provide goods or services to C as a matter of economic reality must be seen as a supply by A to C as the goods/services effectively move directly from A to C. But that is a wrong legal analysis. It is wrong to say that the supply must be by A to C because the economic reality is that the goods/services in reality move directly from A to C. It is clear that 'economic reality' means something else … The contractual position is that the temp has agreed with Adecco to do what the client tells it to do, based on its contract with Adecco."

The FTT Judge further stated that she expects the ruling to be appealed, given the FTT's earlier ruling in favor of Reed Employment (which was not appealed by HMRC). It highlighted that *Reed* concerned the same tax issue and "similar if not completely identical facts."

The judgment was released on November 27, 2015.

http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j8715/TC04743.pdf

UK First-tier Tribunal: *Adecco UK Ltd v. HMRC [2015] UKFTT 0600 (TC)*

Dateline December 17, 2015

You'd probably expect me to give **Indonesia** a metaphorical pat on the back for the latest round of tax-cutting measures, this time designed to fire up the country's labor-intensive industries, but I'm not going to. These so-called economic stimulus measures are a sign that all is not well with South East Asia's largest economy. True, the Government can point to external economic influences for Indonesia's falling growth, particularly the situation in China, the country's largest trading partner, but some of the pain must be being self-inflicted, partly as a result of the slow pace of economic reforms and partly because of government mismanagement. Indeed, it is another story that appeared in last week's news that I wish to highlight to support my argument: that of the resignation of Indonesia's top tax man, Sigit Priadi Pramudito.

In many senses, poor old Sigit was given something of a Sisyphean task by his political masters. Set a wholly unrealistic tax revenue target by President Widodo, reports suggest that he wasn't the ideal candidate to carry out the job anyway.

According to the *Jakarta Post*, what happened was that the President, emboldened by his recent election win, strode confidently into a meeting with senior tax officials at the start of his term and demanded that they bring about a 60 percent increase in tax revenue in 2015. After several intakes of breath, and probably a few howls of protest, the officials regained their senses and began to haggle, and the figure of 30 percent was eventually agreed.

However, as if this target wasn't difficult enough to achieve for a seasoned campaigner in the field of tax extraction, Widodo, apparently mistrustful of the senior officials who worked under the former administration, wanted his own man to spearhead the tax department's new thrust. And, according to the *Post*, connections, as well as qualifications, influenced the choice.

Whether Sigit's ability came into the equation is a moot point now, because recent figures revealed that the tax department is hopelessly off target, and the hapless tax chief has paid with his job. A relatively minor ripple in the global political pond you might say, but a worrying one nonetheless for those hoping to see Indonesia develop and succeed economically. It hints at the kind of cronyism and muddled thinking in government that tends to beset emerging nations, despite their leaders' best intentions.

Of course, Widodo, a former businessman, won the 2014 election promising to crack down on corruption and promote economic reform. But they all say that don't they? Well, he hasn't made much progress. The Heritage Foundation's Index of Economic Freedom (in which Indonesia lies 105th and is classed as "mostly unfree") says that corruption remains "endemic" in key institutions of state, including, worryingly, the legislature. Okay, in political terms, Widodo has only just got his feet under the desk. However, the Sigit affair hardly inspires confidence that the Government is able to tackle some fundamental economic problems.

Angela Merkel, on the other hand, is the one you want around when you've got an economic crisis on your hands (although you might not agree if you live in Greece). If you're not convinced, just take a look at the conclusions of a study by the UK's **Institute of Fiscal Studies** (IFS) into the fiscal adjustments made by some key EU economies since the recession.

Predictably, the data shows that Italy and France have attempted to tax their way out of their respective fiscal crises, hiking taxes by about 5 percent of GDP, while the UK has instead chosen to squeeze public spending by a similar amount. The report also lays bare the sacrifice made by the Irish, who have experienced a fiscal consolidation program totaling nearly 20 percent of GDP, all told.

Remarkably however, as far as **Germany's** state finances are concerned, it's as if the financial crisis never happened. In fact, the IFS's data shows that net taxes have fallen slightly, and while spending has been cut as a percentage of GDP, it's barely a blip when measured against some of the other countries in the study.

This is all the more extraordinary when you think that Germany has been bankrolling Greece for a number of years, as well as propping up the weaker parts of the eurozone. As the beating heart of the European "project," and a supporter of some the EU's dafter ideas on tax, Germany doesn't often get a lot of praise in this column. But you have to hand it to Merkel – she's a mighty fine housekeeper. No wonder the Germans call her "Mutti."

From a wise old head now to a young and handsome one. It can only be Justin Trudeau, who has been bedazzling world leaders recently with his good looks and youthful bonhomie. But will the Liberals work similar magic on the **Canadian** economy with their fiscal plans? I fear not. To its credit, the new Government is delivering on its central tax pledge, to cut income tax for those in the middle and hike tax for those at the top. But one recent study suggests that far from raising extra revenue – money intended to subsidize the middle class tax cut – the plan to shift the tax burden to top earners could actually cost federal and provincial governments.

The C. D. Howe Institute's Alexandre Laurin, the author of the report, said: "The Liberal election platform said that these changes would be more or less revenue neutral, however we estimate the federal tax changes could result in national tax receipts falling short of commitments for both federal and provincial levels of government by more than CAD4bn (about USD3bn), meaning higher taxes elsewhere, unplanned spending cuts, or larger increases in government debt."

The Institute might be proved wrong of course. But hiking top rates of individual income tax, popular though such measures are with the public, doesn't necessarily lead to higher revenues, as has been shown in other countries. Indeed, in the UK it is widely accepted that the much-maligned former 50 percent tax may have led to lower tax receipts because the rich merely shifted their income into more tax-efficient vehicles, or simply worked less.

Trudeau may look young enough to be my son, but he'll have to learn pretty fast that populist policies aren't necessarily the best policies.

The Jester