Wolters Kluwer

GLOBAL TAX WEEKLY
a closer look

ISSUE 310 | OCTOBER 18, 2018

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

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

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

Wolters Kluwer

GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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

Unique contributions from the Big4 and other leading firms provide unparalleled insight into the issues that matter, from today's thought leaders.

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

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

Wolters Kluwer

GLOBAL TAX WEEKLY
a closer look

ISSUE 310 | OCTOBER 18, 2018

CONTENTS

FEATURED ARTICLES

NEWS ROUND-UP

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

Recent Transfer Pricing Developments

by Duff & Phelps

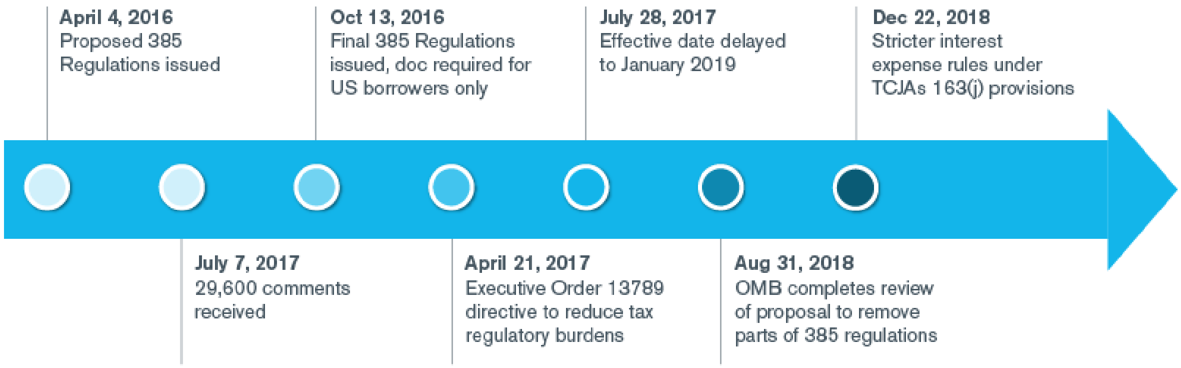
For more information, contact Mike Heimert, Managing Director, at +1 312 697 4560, or visit us at www.duffandphelps.com

In this edition: the IRS and Treasury filed a proposal to remove the regulations under Section 1.385-2; Treasury and the IRS issued proposed regulations under Section 951A of the Internal Revenue Code; the IRS released a draft Form 8991 to compute tax on Base Erosion payments; the OECD released the first public discussion draft on the transfer pricing of financial transactions; the OECD released updated Guidance on the Implementation of Country-by-Country Reporting under BEPS Action 13; Hong Kong activated bilateral exchange relationships with 36 countries for the exchange of Country-by-Country reports; and the ATO again took the opportunity to publicly deliver a number of key messages to taxpayers.

IRS And Treasury Propose Removal Of Section 385 Documentation Regulations

On September 21, 2018, the Internal Revenue Service ("IRS") and Treasury filed a proposal to remove the regulations under Section 1.385-2, which set forth minimum documentation requirements to be satisfied in order for certain instruments to be treated as indebtedness for federal tax purposes. As a result, taxpayers are relieved from these specific documentation requirements, which were set to go into effect next year. The regulations were to apply specifically to certain related-party debt transactions involving U.S. borrowers on or after January 1, 2019.

This proposal is the latest in a series of recent governmental actions taken to temper the 385 regulations since their introduction in April 2016, as highlighted in the diagram below.



As expected, the proposal suggests that the passage of the Tax Cut and Jobs Act ("TCJA"), specifically the revised 163(j) provision which caps interest expense deductibility for federal tax purposes, limits the benefits of minimum documentation requirements and influenced the decision to remove the regulations.

The IRS and Treasury explained that their decision came after careful consideration of public commentary received on these documentation regulations in connection with Executive Order 13789. According to the proposal, most commentary received from taxpayers advocated for either removal or modification of the regulations, and there was general consensus on the need for certain modifications, such as:

- The exclusion of transactions entered into in the ordinary course of business (e.g. trade payables);
- The use of "market standards" as the test for determining whether documentation requirements are satisfied; and
- Expansion of the rules to allow taxpayers to "cure or avoid noncompliance".

The proposal also contains an analysis of the estimated impact of the removal of these regulations. Specifically:

- It was estimated that 6,300 taxpayers (which claim 65% of the interest deductions in U.S.) would be affected;
- Federal revenues would be reduced by $407 million for the period 2019-2028; and
- Compliance costs would be reduced by $924 million over the same period.

Despite their proposal to remove these documentation regulations, the IRS and Treasury indicated that they will continue to study the issues addressed by these rules, and they will maintain the possibility of proposing a "substantially simplified and streamlined" version of the regulations at a later date. If proposed, the IRS and Treasury have committed to an effective date that would allow sufficient time for taxpayers to comply.

The proposal was published in the Federal Register on September 24, 2018. To access a full copy of the proposal, click here.[1]

Proposed GILTI Regulations Under Section 951A

On September 13, 2018, Treasury and the Internal Revenue Service ("IRS") issued proposed regulations implementing Section 951A of the Internal Revenue Code. Section 951A was added to the Internal Revenue Code through the Tax Cuts and Jobs Act, which was signed into law on December 22, 2017. The proposed regulations provide taxpayers guidance related to the inclusion of Global Intangible Low-Taxed Income ("GILTI") by U.S. shareholders.

The proposed regulations provide guidance on several issues, including, but not limited to, the following:

- The determination of pro-rata shares applicable to tested income or loss and to Qualified Business Asset Investment (QBAI) for purposes of determining GILTI;
- The calculation of tested income and loss;
- Rules regarding QBAI and specified tangible property (*e.g.*, clarification that tested loss CFCs do not have specified tangible property);
- Tested interest expense and tested interest income;
- The treatment of domestic partnerships and their partners; and
- The treatment of the GILTI inclusion amount and adjustments to earnings and profits and basis.

The IRS states that GILTI is treated similarly to Subpart F income, with the primary difference being that GILTI is calculated on an aggregate basis. The U.S. shareholder aggregates its pro rata share of certain items (*e.g.*, tested income, tested loss, or QBAI) into a single shareholder-level amount. The background discussion preceding the proposed regulations note that without this clarification, many taxpayers would be compelled to reorganize their ownership structures to obtain the full aggregation of CFC attributes for the GILTI calculations.

As the GILTI calculation includes a reduction of the GILTI inclusion by a tangible income return (*i.e.*, 10 percent of QBAI), the proposed regulations include anti-abuse rules related to tangible assets and their use in reducing the GILTI inclusion. The proposed regulations discourage planning relying on reducing GILTI through asset basis step ups realized through reorganizations and temporary changes in asset ownership if those changes are determined to have been undertaken strictly for purposes of reducing tax under the GILTI rules.

The proposed regulations do not provide guidance under Section 951A on two key and interrelated taxpayer issues regarding GILTI. These two issues are: (1) the calculations for foreign tax credits, and (2) the related expense allocation for Section 904 limitation purposes. These issues are expected to be addressed in future guidance.

Before the proposed regulations are adopted as final regulations, Treasury and the IRS request written or electronic comments on all aspects of the proposed regulations to be submitted within 60 days after its publication.

The proposed GILTI regulations are available here.[2]

IRS Releases Draft Form 8991 To Compute Tax On Base Erosion Payments

On September 20, 2018, the Internal Revenue Service ("IRS") released a draft Form 8991[3] for taxpayers to compute their Base Erosion and Anti-Abuse Tax ("BEAT") under Section 59A with Schedules A (Base Erosion Payments and Base Erosion Tax Benefits) and B (Credits Reducing Regular Tax Liability in Computing Base Erosion Minimum Tax Amount). At this point, the IRS has not released instructions for the Form. There has not been an indication from the IRS on when it will provide instructions.

Taxpayers and practitioners are welcomed to submit comments[4] on the draft form.

OECD Publishes Comments on Financial Transactions Discussion Draft

On July 3, 2018, the Organisation of Economic Co-operation and Development ("OECD") released the first public discussion draft on the transfer pricing of financial transactions. The discussion draft contains the first official detailed comments and guidance from the OECD on transfer pricing aspects of financial transactions. A summary of the discussion draft can be found here.[5]

Comments on the discussion draft were submitted to the OECD by September 7, 2018 and were subsequently made public on September 14, 2018. There were 78 submissions r of comments to the OECD, including a submission from Duff & Phelps, which can be found in Part II[6] of the public comments.[7]Duff & Phelps' comments on the discussion draft pertain to areas that it considers potentially problematic. Below is a summary of Duff & Phelps' response to the discussion draft:

> *First, with respect to the accurate delineation of transactions, we recommend that guidance avoid creating a framework for tax authorities to recharacterize loans simply because the issuance could be seen as relatively risky or speculative. We note that there exist many highly levered, unsecured, high yielding debt issuances in the market. As such, riskier characteristics (e.g., unsecured, subordinate) should not be a means for automatic recharacterization. Instead, as in market practice, risk should be assessed in the context of the lender's availability of funds and appetite for the risk associated with the deployment of these funds and the borrower's intent and ability to meet the debt obligations arising from such an issuance. Further, risk should be adequately reflected in arm's-length compensation (e.g., interest).*
>
> *Also, on this topic, we recognize the perceived merits of the OECD's proposed approach of bifurcating intercompany financing instruments into part debt and part equity (as opposed to an "all-or-nothing" approach), but we also urge the OECD to consider the potential repercussions of loose guidance on this topic that may arise when countries attempt to implement it.*
>
> *Second, with respect to risk free returns, we urge the OECD to reconsider and clarify its guidance with respect to situations in which it is found that a funder lacks the capability to perform decision-making functions and therefore cannot earn more than a risk-free rate as it applies to intercompany loans (and any return that a funder would earn in excess of the risk-free rate would be allocable to the entities that do perform decision making functions). Unlike prior guidance on Action Items 8 to 10 wherein the framework prescribed by the OECD removed potentially unlimited equity returns from what it called "cash boxes", this guidance could remove fixed, contractual and readily benchmarkable returns from funding entities and overly compensate decision-making entities for what could be a relatively routine function in assessing and arranging lending opportunities. As such it is important that the OECD clarify this guidance in the context of intercompany loans, particularly with respect to defining decision making and control.*
>
> *Finally, the Discussion Draft discusses the impact that the MNE group credit rating should have on the credit rating of a particular MNE within the MNE group. We have not opined on the appropriateness of considering the MNE group rating versus a stand-alone credit rating but recommend that the OECD's final guidance have a more clearly defined and objective framework. Group and stand-alone credit ratings are often different from one another, which would likely lead economic analyses to result in different arm's-length interest rates.*

> *As such, introducing these different approaches for determining a MNE's credit rating and potential rebuttable presumptions could lead to double taxation risk if countries interpret and implement this guidance differently.*

Additionally, Duff & Phelps hosted a webcast on the OECD discussion draft on September 19, 2018. A recording of the webcast and presentation materials can be found here.[8]

OECD Releases Further Guidance On Country-By-Country Reporting

On September 13, 2018, the Organization for Economic Co-operation and Development ("OECD") released updated Guidance on the Implementation of Country-by-Country (CbC) Reporting[9] ("the Guidance") under Base Erosion and Profit Shifting (BEPS) Action 13. The Guidance provides several new updates for tax authorities and taxpayers including:

- Section II: Issues Relating to the Definition of Items Reported in the Template for CbC Report
  - The Guidance clarifies the treatment of dividends received in Table 1 of the CbC report.
  - It also makes clear that shortened amounts should not be included in Table 1 of the CbC report.
- Section III: Issues Relating to the Entities to be Reported in the CbC Report
- The Guidance includes questions and answers on the treatment of major shareholdings in Table 1 of the CbC report.
- Section VI: Issues Relating to Mergers, Acquisitions, and Demergers
- The OECD has provided a table that summarizes existing interpretative guidance on the approach to be applied (within Table 1) in cases of mergers, demergers, and acquisitions.

The OECD notes that the Guidance on the Implementation of Country-by-Country Reporting will continue to be updated with any further guidance that may be agreed upon.

Hong Kong Activates Exchange Of Country-By-Country Report With 36 Countries Under OECD Framework

In September 2018, the Organisation of Economic Co-operation and Development ("OECD") updated the bilateral exchange relationships for the automatic exchange of Country-by-Country ("CbC") reports. Through these updates, Hong Kong activated bilateral exchange relationships with 36 countries for the exchange of CbC reports.

Hong Kong's exchange program, which will be undertaken in accordance with the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, will be effective for taxable periods starting on or after January 1, 2019.

The list of all the activated exchange relationships for CbC reports can be found here.[10]

New Key Messaging From The Australian Taxation Office

In August 2018, the Australian Taxation Office ("ATO") again took the opportunity to publicly deliver a number of key messages to taxpayers. Deputy Commissioner Mark Konza spoke at the Australian Tax Institute's 2018 National Transfer Pricing Conference and delivered messages in relation to the ATO's transfer pricing practices and audit activity. In particular, Mr. Konza spoke about the ATO's power to reconstruct non-arm's length arrangements, the importance of addressing the allocation of risk under the updated OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Guidelines"), and the key ATO focus areas in relation to its audit program.

Transfer Pricing Reconstruction Power

The Australian transfer pricing legislation provides the ATO with the power to reconstruct a non-arm's length cross-border related party transaction to accord with how independent parties would have transacted and impose transfer pricing adjustments on that basis. The legislative provision arguably provides the ATO with a broader reconstruction power than that contemplated by the OECD Guidelines and this continues to be of concern to taxpayers. The ATO has previously stated that it would only exercise this power after several levels of internal review. Mr. Konza provided an example of when the ATO might exercise that power at the conference, saying:

For example, we may need to consider the substitution of arm's length arrangements where an Australian entity seeks to transfer significant assets from Australia or allows the relative value of its Australian assets to erode in ways that independent entities acting commercially would not.

The ATO's power to reconstruct arrangements continues to be an area of considerable uncertainty – and therefore concern – for multinational taxpayers.

Adopting the Revised OECD Guidelines

Mr. Konza confirmed that the revised OECD Guidelines (released in July 2017) have now been incorporated into Australian transfer pricing law. He emphasized that the allocation of risks in the revised OECD Guidelines will affect transfer pricing cases in Australia:

We have seen cases in the past where companies have argued that the profits from risk control functions undertaken in Australia should be recognized offshore due to a foreign role in setting a policy environment or formalizing a decision through a board meeting. Under the new commentary, it will be clearer that the outcomes of that entrepreneurial function are properly allocated in Australia.

Multinational taxpayers will clearly have to address the Organisation for Economic Co-operation and Development's ("OECD") allocation of risk principles in reviewing their Australian transfer pricing arrangements going forward.

Transfer Pricing Audits

Mr. Konza also discussed the ATO's audit program, noting the ATO's focus on the pharmaceutical industry. He indicated that there are currently nine transfer pricing audits underway in the industry along with nine advanced pricing arrangement applications in progress. Mr. Konza also emphasized that the ATO is continuing to look at the following hot topic areas:

- The energy and resource sector – particularly exploration expenditure;
- Hubs (particularly marketing hubs); and
- Related party financing such as debt financing, the use of derivatives to avoid interest withholding tax, and cross-country interest rate swaps.

Endnotes

1 https://www.federalregister.gov/documents/2018/09/24/2018-20652/proposed-removal-of-section-385-documentation-regulations

2 https://www.irs.gov/pub/irs-drop/reg-104390-18.pdf

3 https://www.irs.gov/pub/irs-dft/f8991--dft.pdf

4 https://www.irs.gov/forms-pubs/comment-on-tax-forms-and-publications

5 https://www.duffandphelps.com/insights/publications/transfer-pricing/transfer-pricing-times-oecd-publishes-discussion-draft-on-financial-transactions

6 http://www.oecd.org/ctp/transfer-pricing/Compilation-of-public-comments-BEPS-actions-8-10-transfer-pricing-financial-transactions-discussion-draft-part-2.pdf

7 http://www.oecd.org/tax/transfer-pricing/public-comments-received-on-beps-discussion-draft-on-the-transfer-pricing-aspects-of-financial-transactions.htm

8 https://www.duffandphelps.com/insights/webcasts-and-videos/webcast-replay-latest-oecd-guidance-and-best-practices-for-intercompany-financing

9 http://www.oecd.org/ctp/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf

10 http://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm

Ireland's 2019 Budget

by Stuart Gray, Senior Editor,
Global Tax Weekly

Irish Finance Minister Paschal Donohoe announced a 2019 Budget laden with new tax measures on October 9, 2018. However, those pressing for more fundamental changes to Ireland's corporate tax regime were likely to have been disappointed. The Budget's main corporate tax, value-added tax and personal tax measures are summarized below.

Setting The Scene

Broadly, Ireland's tax system rests on solid and stable foundations. The corporate tax regime is favored by international investors, particularly those originating from the United States, and is underpinned by the low 12.5 percent corporate tax rate. The Irish Government has fought hard to maintain this competitive advantage on tax, while seeking to protect its reputation by implementing the recommendations of the OECD's BEPS project.

However, the wider Irish economy has begun to experience headwinds of uncertainty. Ireland's place in a changing international corporate tax landscape, where an emphasis has been placed on restoring the link between value-creation and tax liability, is but one of them. Others include the recent tax reforms in the United States, and exposure to any negative fallout from Brexit, with the UK one of Ireland's closest and most important trading partners.

These factors are now shaping tax policy in Ireland. However, they are also the source of competing forces, which the Government is now attempting to balance: the need to maintain tax competitiveness; and the need for stability, especially given Ireland only recently exited its bailout program.

Another significant problem facing the Government is Ireland's narrow corporate tax base, with the lion's share of corporation tax revenue collected from a relatively small number of large companies. According to Ireland's Parliamentary Budget Office, corporation tax revenue accounted for 16.2 percent of overall receipts in 2017. Almost 40 percent of corporation tax revenue was paid by 10 taxpayers that year, with foreign multinationals accounting for 80 percent of it. And according to the Irish Tax Institute, 51 of Ireland's 100 largest corporate tax paying companies are American.[1]

Corporate Tax Roadmap

The corporate tax roadmap, published in September,[2] revealed much about the Government's thinking as it prepared the 2019 Budget. Indeed, the roadmap foreshadowed several measures announced on October 9. Its emphasis was placed firmly on aligning Ireland's tax regime with the requirements of the OECD's BEPS recommendations and new EU directives designed to discourage tax avoidance, and on preparing taxpayers for these changes.

The roadmap set out the following policy commitments:

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

- The Government will review Ireland's general anti-abuse rule to ensure that it is consistent with the ATAD; and
- The Government will consult in early 2019 on the alternative options of moving to a territorial tax regime or conducting a substantial review and simplification of the rules for the computation of double tax relief.

Budget 2019 – Corporate Tax Measures

The approach to corporate tax policy laid out in the tax roadmap was very much reflected in the 2019 Budget,[3] with two significant new anti-avoidance measures the only real highlights. These included an exit tax and the introduction of CFC rules into the corporate tax regime for the first time.

However, in one significant departure from the roadmap, the Government decided in Budget 2019 to bring forward the effective date of the exit tax, which will apply from midnight on Budget day. This measure taxes unrealized capital gains where companies migrate or transfer assets offshore such that they leave the scope of Irish tax. The rate for the new ATAD compliant exit tax will be set at 12.5 percent.

Member states are not required under ATAD I to transpose exit tax rules into their domestic legislative frameworks until December 31, 2019. However, the Government has decided to introduce it early to "provide certainty to businesses currently located in Ireland and considering investing in Ireland in the future."

As also presaged by the corporate tax roadmap, the Government announced that the 2019 Finance Bill will include a CFC regime as required by the ATAD. Such rules are an anti-abuse measure, designed to prevent the diversion of profits to offshore entities (the CFCs) in low- or no-tax jurisdictions. They are traditionally a feature of territorial tax regimes, and as Ireland has a worldwide tax regime, CFC rules have not previously been a part of the Irish corporate tax system. However, member states are required to align their CFC rules with ATAD I by December 31, 2018.

Other Measures - Corporate Tax Reliefs

While Budget 2019 made no attempts to significantly reduce the corporate tax burden, it did make improvements to two key corporate tax reliefs: film production relief and start-up business relief.

Ireland's film production tax scheme provides relief in the form of a corporate tax credit related to the cost of production of certain films. The credit is granted at a rate of 32 percent of qualifying expenditure which is capped at EUR70m, (USD81m). This incentive was due to expire at the end of 2020, but will be extended until 2024. Additionally, a new, short-term, tapered "regional uplift" starting at 5 percent is being introduced, subject to EU state aid approval, for productions being made in areas designated under the state aid regional guidelines.

The Budget also extended the Three-Year Start-Up Relief for an additional three years, with the new expiry date set at December 31, 2021. Also known as Section 486C tax relief, this measure enables businesses to reduce corporation tax during the first three years of trading. The relief can be applied to the profits from the business's trade and on chargeable gains made on assets used in that trade. Depending on the level of Pay Related Social Insurance (PRSI paid by a company, full relief is available if corporate tax is EUR40,000 or less in a tax year, with partial relief available if corporate tax is between EUR40,000 and EUR60,000.

Value-Added Tax

The Government chose to keep the standard and reduced rates of value-added tax on hold. However, services and goods currently subject to VAT at 9 percent will increase to 13.5 percent from January 1, 2019. This includes tourism services, but excludes newspapers and sports facilities, which will continue to be taxed at the 9 percent VAT rate.

In addition, the VAT rate on e-books and electronically supplied newspapers is being reduced from 23 percent to 9 percent with effect from January 1, 2019. This follows recent agreement among European Union Finance Ministers to allow EU member states apply reduced VAT rates on digital publications.

Personal Income Tax Highlights

Relatively high rates of personal income tax for those on middle and high incomes are thought to be a significant drag on Irish competitiveness. The National Competitiveness Council observed recently that, at present, marginal rates of income tax for individuals earning the average wage and above outstrip those for the euro area and the UK.[4] Indeed, according to the OECD's 2017 Taxing Wages report, a single person on average earnings in Ireland faces a marginal tax rate of 49.5 percent – the third highest in the OECD.[5] Therefore, Budget 2019 was anticipated by taxpayers as much for any measures that would alleviate the personal income tax burden as for possible corporate tax reforms.

Ultimately though, taxpayers were likely to have been disappointed that the 2019 Budget provided incremental personal tax relief rather than any meaningful tax cuts. Donohoe announced that the Government will:

- Increase the entry point to the higher rate (40 percent) of income tax by EUR750 for all earners, taking the threshold to EUR35,300 for single individuals and to EUR44,300 for married one earner couples;
- Reduce the third rate of the Universal Social Charge (USC) from 4.75 percent to 4.5 percent;
- Increase the ceiling of the second USC rate band from EUR19,372 to EUR19,874 to ensure that the salary of a full-time worker on the minimum wage will remain outside the top rates of USC;
- Increase the weekly threshold for the higher rate of employer's PRSI from EUR376 to EUR386; and
- Increase the Earned Income Credit for self-employed workers by EUR200 to EUR1,350.

Donohoe also committed the Government to:

- Increase the lifetime Group A tax-free threshold for capital acquisitions tax – which broadly applies to transfers between parents and their children – from EUR310,000 to EUR320,000;
- As of January 1, 2019, remove the restriction on the amount of interest that may be deducted by landlords in respect of loans used to purchase, improve or repair their residential rental property;
- Increase the betting tax on amounts wagered in Ireland from one to 2 percent and the duty on the commission earned by betting intermediaries or exchanges from 15 percent to 25 percent;
- Extend the vehicle registration tax relief for hybrid vehicles to 2019; and
- Increase the excise duty on cigarettes and other tobacco products, along with the minimum excise duty on tobacco products.

In another notable change, gains arising to employees on the exercise of Key Employee Engagement Program (KEEP) share options will be liable to capital gains tax on disposal of the shares, in place of the current liability to income tax, USC and PRSI on exercise.

KEEP is a share-based remuneration incentive to facilitate the use of share-based remuneration by unquoted SME companies to attract key employees. This incentive is available for qualifying share options granted between January 1, 2018 and December 31, 2023.

Summing Up

Ireland is perhaps uniquely exposed to the combination of a rapidly changing international tax environment and other economic risk factors including Brexit. Some argue that this necessitates a more radical rethink of the corporate tax regime than has so far taken place, with the aim that Ireland maintains its competitive advantages on tax. As such, this camp is likely to have been disappointed by the Government's largely cautious approach in the 2019 Budget.

However, radical change itself carries with it a certain amount of risk. Ireland's corporate tax regime is built on certainty and predictability as much as its lightness of touch. Therefore, the dangers associated with potentially destabilizing the tax regime may have outweighed any potential benefits reform might bring, at least in the short-term. What's more, fiscally, Ireland is not yet in a position to begin slashing taxes.

Ireland's narrow corporate tax base remains a problem, and it may be that the Government will look to widen it in future. However, given all of the above circumstances, the Government's vigilant approach to the 2019 Budget was not unexpected.

Endnotes

1 http://taxinstitute.ie/Portals/0/Press%20Releases%20-%20November%202013/AGM%20Press%20Release%20%E2%80%93%20%20Irish%20Tax%20Institute%20President%20Marie%20Bradley%20%206%20September%202018.pdf

2 https://www.finance.gov.ie/wp-content/uploads/2018/09/Corporate-Tax-Roadmap-Web.pdf

3 http://budget.gov.ie/Budgets/2019/Documents/Financial%20Statement_C.pdf

4 http://www.competitiveness.ie/News-Events/2018/Scorecard-2018-Press-release.pdf

5 https://www.oecd-ilibrary.org/sites/tax_wages-2017-en/index.html?itemId=/content/publication/tax_wages-2017-en

IRS Releases First Round of Proposed GILTI Regulations

by Nicolaus McBee and David Fetner, Alvarez & Marsal Taxand

Department of the Treasury
Internal Revenue Service

In mid-September, 2018, the IRS released its second set of proposed international regulations under the Tax Cuts and Jobs Act of 2017 (TCJA). These proposed regulations provide the first piece of Treasury guidance under Code Section 951A (Global Intangible Low Taxed Income), which brings into effect the so-called "GILTI" regime. To put it simply, GILTI is a mechanism to tax US shareholders of controlled foreign corporations (CFCs), on their share of CFC income over and above a 10 percent return on the tax basis of tangible depreciable assets (subject to certain exceptions).

Some key areas where guidance is provided in the proposed regulations include:

The calculation of tested income and tested loss of a CFC:

- The tested income and tested loss of a CFC are generally calculated by treating the CFC as a US corporation;
- In determining the tested income of a CFC, no deductions are allowed for net operating loss carryovers and capital loss carryovers;
- The exception from tested income for "high-taxed income" only applies to gross income that would otherwise have been Subpart F income if the US shareholder had not elected to exclude it under the high-tax exception;
- Quarterly averaging rules for determining the tax basis in tangible assets;
- The calculation of items necessary to determine the amount of interest expense that reduces net deemed tangible income return (based on QBAI).

Other Items of Note:

- The aggregation of the US shareholder's pro rata share of GILTI to determine the actual GILTI inclusion amount;

- The same translation rule that is used for Subpart F income is applied for translating a pro rata share of tested income, tested loss, tested interest expense, tested interest income and QBAI;
- The treatment of domestic partnerships and their US and foreign partners including a taxpayer-favorable rule for determining a partner's share of the "specified tangible property" of a partnership;
- The treatment of the GILTI inclusion and subsequent adjustments to stock basis related to tested loss CFCs;
- Determination of GILTI amounts for consolidated groups;
- Treatment of GILTI is the same as Subpart F income for purposes of Section 1411 (3.8 percent tax on net investment income);
- Anti-abuse rules for certain transactions that would otherwise result in a tax basis step-up to specified tangible property;
- The proposed regulations (once issued in final or temporary form), would generally be effective for taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of US shareholders in which or with which such taxable years of foreign corporation's end. The comment period on the proposed regulations ends November 12, 2018.

As helpful as this guidance may be for taxpayers, there are still numerous key issues that remain unaddressed (including whether certain provisions in the proposed regulations are inconsistent with the statute). The proposed regulations fail to discuss expense allocations for foreign tax credit purposes as they pertain to the GILTI regime, as well as the Code Section 250 (GILTI and FDII) deductions, amongst other issues that taxpayers are facing. The preamble to the proposed regulations does, however, mention that the Code Section 78 gross up which arises based on GILTI taxes deemed paid should be allocated to the GILTI basket which is good news to taxpayers.

Topical News Briefing: Rutte Rattled In The Netherlands

by the Global Tax Weekly Editorial Team

The Netherlands has long appealed to foreign investors thanks to its politically-stable and business-friendly government, membership of the European Union, and, last but not least, some very favorable tax rules for foreign investors.

Foreign direct investment statistics help to show how the Netherlands, which is roughly the same size as Kentucky, is a major player on the world investment stage: according to the UN Conference on Trade and Development, the Netherlands was the world's sixth-largest recipient of FDI in 2017. In 2016, almost 20 percent of FDI stock was sourced from the US. The next two largest sources of FDI stock (17 and 10 percent, respectively) were Luxembourg and Bermuda, demonstrating the important role the Netherlands plays in the complex tax planning strategies employed by multinational entites.

In the age of BEPS, substance and tax transparency, it could be argued that this status has become as much a weakness as a strength. Thus, the Government recently set about changing perceptions of the Dutch corporate tax regime with a comprehensive set of BEPS-compliant anti-avoidance measures.

In line with global corporate tax trends in the post-BEPS era, the Netherlands is also seeking to reduce the overall level of tax on companies at the same time as broadening the tax base. However, as recent developments show, efforts to align the tax regime with international standards are not going smoothly.

The Government had been seeking to boost Dutch competitiveness by expanding the scope of the dividend tax exemption. However, its fiscal price tag meant that proposed corporate tax cuts had to be scaled back. But in the aftermath of Unilever's decision to scrap a plan to relocate its headquarters to the Netherlands, the Government re-evaluated the tax plan once again, leading to the axing of the dividend tax cut, and further changes to corporate tax proposals (as reported in this week's issue of *Global Tax Weekly*).

It all rather suggests that the Netherlands is struggling to adjust somewhat to the new realities of the global corporate tax environment. And the frequent tinkering and backsliding on a set of tax proposals that are quite far-reaching is not helping to enhance the jurisdiction's reputation from the point of view of certainty.

Fundamentally, it seems that the Netherlands remains a sound jurisdiction for foreign investors, and this is unlikely to change overnight in response to uncertain government policy. But it remains to be seen if these developments do affect its attractiveness.

ISSUE 310 | OCTOBER 18, 2018

New Willful FBAR Case Is Eerily Foreboding For Taxpayer

by Mike DeBlis, DeBlis Law

A new willful FBAR penalty case is getting way in the Southern District of New York. And from the looks of it, the taxpayer appears to have an uphill battle.

In *United States v. Gentges* (USDC SDNY Dkt. 7:18-cv-07910), the Government filed suit to collect a "willful" FBAR penalty from a New York resident for a single tax year – tax year 2007 – in an amount just shy of USD1,000,0000. The case arises from a taxpayer, Mr. Gentges, who owned two Swiss bank accounts at UBS and who failed to report both accounts on an FBAR. But this was just the tip of the iceberg as you'll soon see. For those interested in reading the government complaint, it can be found here.[1]

The complaint alleges that the UBS accounts were established in 2001 as "numbered" accounts, as opposed to a "name" account. As a way of background information, the classic numbered account is legendary in pop culture, making it a story element in countless film noires. You know the one I'm talking about. A spy from right out of the pages of a "James Bond" thriller struts into a Swiss bank, hands over a note with some writing on it, and passes it to his private banker in exchange for a briefcase full of cold, hard cash.

In some cases, the money is "dirty," and the spy is attempting to conceal its illegal source from government authorities. In others, the money is "clean," but the spy seeks to hide it from government authorities in order to avoid having to pay taxes on it. Either way, the intrigue and suspense that this storyline creates is enough to keep moviegoers on the edges of their seats.

While this might contain all of the ingredients of a Hollywood blockbuster, there are certain aspects of this pulp fiction that do not stray too far from reality. For example, numbered accounts do offer increased privacy. In the usual case, a customer's name, address, and signature are provided in the account opening agreement. But only the account number is entered in the general bank system. The numbered account is then assigned to an individual account manager for personal handling. The file containing the customer's name is maintained separately from the numbered account, with only key personnel having access to it. As owners of anonymous bank accounts have grown accustomed to expect, depositing and withdrawing money is based upon an agreed form of communication between the account manager and the customer.

The reason why there is a presumption of illicit activity when a taxpayer opens up a numbered account is obvious: it conceals the identity of the true owner, thereby protecting it from IRS detection by allowing the taxpayer to withhold from reporting it and to withhold from reporting taxes on the interest generated by it — often times with impunity.

Another way that anonymous accounts have caught the ire of government officials is not so obvious but just as prevalent: their illicit use in money laundering. How might a criminal use an anonymous account as a vehicle to launder the proceeds of his ill-gotten gain? First, he might deposit his ill-gotten gain into a numbered account through a wire transfer from another bank. Because the numbered account is anonymous, the criminal has the piece of mind of knowing that there will be few, if any, inquiries into where the funds originated from. Second, when he wishes to use the funds, he need only transfer them to an account in his name in a large onshore jurisdiction, such as the United States.

By filtering the criminal proceeds through these anonymous accounts, onshore banks may never discover the source of the funds. Requests for information by other jurisdictions will fall on deaf ears. In other words, they'll either be declined because the information is not available or because of laws protecting financial secrecy.

Circling back to Mr Gentges, he conveniently told UBS to refrain from investing in US securities, but the proverbial "nail in the coffin" that is sure to become the government's smoking gun in this litigation and Mr. Gentges fateful demise is his signature on a UBS document instructing the bank as follows: "I would like to avoid disclosure of my identity to the US Internal Revenue Service under the new tax regulations. To this end, I declare that I expressly agree that my account shall be frozen for all investments in US securities…."

But Mr Gentges didn't stop there. To add insult to injury, Mr Gentges instructed UBS to hold onto his mail (e.g., bank statements) at the bank rather than mailing anything to his New York residence. Mr Gentges only appeared in person at the bank from time to time to retrieve his mail.

And Mr Gentges was even a little picky about what mail he picked up and what mail he left behind. With respect to any mail that he left behind, he authorized the bank to shred it.

In September 2008, pursuant to their obligations under FATCA, UBS personnel informed Mr Gentges that he must either file an IRS form W-9 or close his UBS accounts by the end of the year. While common sense might have dictated filing an IRS form W-9 and making an offshore voluntary disclosure submission, such was not the case with Mr. Gentges. Here, I'm reminded of the famous quote by French philosopher Voltaire, "Common sense is not so common." In a move that would later come back to haunt him, Mr. Gentges tied a bow and a ribbon on what was already an airtight willful FBAR case: he instructed UBS to transfer assets from his UBS accounts to another Swiss bank, Migros Bank. Unfortunately for Mr Gentges, these instructions were given in the wake of DOJ press releases and media coverage reporting that UBS had agreed to participate in FATCA.

When FATCA began to chip away at the remaining vestiges of bank secrecy in Switzerland, Mr Gentges panicked. Realizing that he was between a rock and a hard place, he applied for the offshore voluntary disclosure program in June 2010. In September 2011, Mr Gentges filed delinquent FBARs which included both of the numbered accounts. In addition, his representative signed the necessary consent forms for extending the statute of limitations for assessing FBAR penalties as is required under the terms and conditions of OVDP.

In 2013, for some unknown but foolhardy reason, Mr. Gentges opted out of the voluntary disclosure program. This is a jaw-dropping development as the facts in this case are egregious. Giving Mr Gentges the benefit of the doubt, he could have been acting on advice given by his tax representative but one will never know.

And this brings us to the present moment where Mr Gentges finds himself standing before a federal judge in a federal courtroom in the southern district of New York. In a move that was not at all surprising, the IRS assessed penalties totaling USD903,853.00 against Mr. Gentges for 2007 for his willful failure to reports his two UBS accounts on an FBAR.

Based on these facts, it appears as though the IRS has a "slam dunk" case and that the odds are stacked against Mr. Gentges. Stay tuned.

Endnote

1 https://www.courtlistener.com/recap/gov.uscourts.nysd.500104/gov.uscourts.nysd.500104.1.0.pdf

Transactions Inappropriately Inflating Paid-Up Capital Do Not Constitute Misuse Or Abuse Until Associated Tax Savings Are Realized By Shareholder

by Jaspreet Kaur, McCarthy Tetrault LLP

This article was previous published in Wolters Kluwer Canada's 'Tax Topics', Number 2429 and is part of a regular monthly feature examining recent cases of special interest, coordinated by John C. Yuan and Christopher L.T. Falk of McCarthy Tetrault LLP. The contributors to this feature are from McCarthy Tetrault LLP, Montreal, Toronto, Calgary, and Vancouver, Canada.

1245989 Alberta Ltd. et al v. Attorney General of Canada, **2018 DTC 5067 (Federal Court of Appeal)**

In this case, a corporation and its principal shareholder appealed the decision of the Tax Court of Canada which upheld the Minister's reassessments that applied the general anti-avoidance rule ("GAAR") to a series of transactions. The transactions would otherwise have allowed the shareholder to offset the adverse effects of having section 84.1 of the Income Tax Act (the "Act") apply to reduce the paid-up capital of the class of shares that were issued to the shareholder in consideration for the transfer of shares of another corporation. As discussed below, the Federal Court of Appeal disagreed with the Tax Court's disposition of the case and held that, since the shareholder had not yet received a tax-free distribution on the issued shares, any finding of misuse or abuse would be premature and, consequently, the GAAR could not apply to support the reassessments under appeal.

At the outset of the subject transactions, the individual taxpayer, Mr. Wild, was the sole shareholder of an operating company, P.W. Rentals Ltd. The operating company transferred properties to corporations controlled by Mr. Wild and his spouse. One of the transferee corporations was 1245989 Alberta Ltd., the taxpayer corporation (controlled by Mr. Wild). The other transferee corporation was 1251237 Alberta Ltd, controlled by Mr. Wild's spouse. According to the taxpayers, these transfers were part of an asset protection strategy.

On June 1, 2007, Mr. Wild transferred some of his shares of the operating company to the corporate taxpayer in exchange for 348.5 shares in newly-created Class C, which had a redemption price of CAD1,000 per share. Mr. Wild's cost and paid-up capital of the transferred shares were both nominal. The parties elected to have the proceeds of disposition be an amount that would allow Mr. Wild to apply the capital gains exemption under section 110.6 of the Act against some of the gain that had accrued on the transferred shares. Because of the non-arm's length circumstances of the transaction, section 84.1 applied on the transfer to restrict the corresponding addition to the paid-up capital of the Class C shares to be the CAD16.40 aggregate paid-up capital of the transferred operating company shares (or CAD0.047 per Class C share).

On June 2, 2007, the operating company transferred depreciable property having a fair market value of CAD348,500 to the corporate taxpayer in exchange for 348.5 Class C shares of the corporate taxpayer. The two corporations elected to have the transfer occur for proceeds of disposition equal to the operating company's undepreciated capital cost for the transferred property pursuant to the section 85 rollover. By virtue of subsection 85(2.1), the addition to the paid-up capital of the Class C shares in respect of the transfer was the operating company's $256,279 undepreciated capital cost for the transferred property.

After the foregoing transfers, Mr. Wild and the corporate taxpayer each held 348.5 Class C shares of the corporate taxpayer with an aggregate paid-up capital for the class of CAD256,295.40 (or CAD367.712 per Class C share).

On June 3, 2007, the operating company and the corporate taxpayer redeemed the shares that they held in each other for promissory notes having a value of CAD348,500. Although the corporations each realized a subsection 84(3) deemed dividend as a consequence of the redemptions, they were entitled to claim a fully offsetting deduction under subsection 112(1) for intercorporate dividends.

During the period covering June 6 to 10, a similar series of transactions was implemented by the parties pursuant to which:

(i) Mr. Wild transferred his remaining 93.6 shares in the operating company for 1,989 redeemable Class E shares of the corporation controlled by Mr. Wild's spouse (which was a transaction that caused section 84.1 to apply to restrict the addition to the Class E paid-up capital in respect of the transfer to CAD93.6 in aggregate or CAD0.047 per Class E share),

(ii) The operating company transferred land and depreciable property on a rollover basis for Class E shares of the spouse's corporation, and
(iii) The two corporations cross-redeemed their shares of each other.

After the June 6 to 10 transactions, Mr. Wild held 1,989 redeemable Class E shares representing aggregate paid-up capital of CAD467,115.61 (or CAD234.850 per Class E share), whereas the aggregate paid-up capital corresponding to the 93.6 shares of the operating company he transferred to his spouse's corporation was CAD93.60.

During the period covering June 11 to 13, further transactions were undertaken to clean up the corporate structure, including a transfer by Mr. Wild of his 348.5 Class C shares of the taxpayer corporation for 348.5 Class E shares of the spouse-controlled corporation pursuant to section 85 of the Act, with a corresponding CAD128,148 increase to the paid-up capital of the Class E shares by virtue of section 84.1 of the Act.

Of concern to the Minister was the fact that, at the start of the series of transactions, Mr. Wild held shares of the operating company having an aggregate paid-up capital of CAD110 and, at the end of the series of transactions, Mr. Wild held Class E shares of the spouse-controlled corporation having an aggregate paid-up capital of approximately CAD595,264 without Mr. Wild having contributed any new capital into the corporate structure in the intervening steps. It should be evident from the transaction steps described above that the series of transactions essentially converted the tax attributes of the operating company into paid-up capital of the Class E shares of the spouse-controlled corporation held by Mr. Wild. The series of transactions caused the corporations within the structure to receive deemed dividends on the share cross-redemptions, but relief from the income inclusion for the dividends was available to the corporations through the deduction for intercorporate dividends under section 112 of the Act.

The Minister of National Revenue issued notices of determination pursuant to section 245 and subsection 152(1.11) of the Act and applied the GAAR to reduce the paid-up capital of the Class E shares of the spouse-controlled corporation from CAD595,264 to CAD110.

It is well-established that, for the GAAR to apply, there must be a tax benefit, an avoidance transaction, and misuse of a provision of the Act or abuse of the Act read as a whole. In the Tax Court of Canada, the taxpayers conceded that the series of transactions produced a tax benefit and that there was an avoidance transaction in the series of transactions. Consequently, the issue that was central to the litigation was whether there was a misuse or abuse.

As noted earlier, the Tax Court held that the GAAR applied because the series of transactions defeated the object, spirit, and purpose of section 84.1 and subsection 89(1) of the Act, which the Court appears to have characterized as creating a regime designed to prevent the stripping of corporate surplus. The Tax Court viewed the transactions as having achieved an indirect extraction of corporate surplus through the use of the capital gains exemption and an inappropriate application of paid-up capital averaging, which result was similar to the one that section 84.1 was designed to deny.

On appeal, the Federal Court of Appeal framed the sole issue as a question of whether subsection 89(1) was misused to increase the paid-up capital of the shares that Mr. Wild held at the end of the series of transactions, thereby "achieving a result that section 84.1 was intended to prevent." Curiously, after having identified this as the sole issue in the appeal, the Federal Court of Appeal's reasons neither focused on subsection 89(1) nor explored the reasons why the paid-up capital of shares of a corporation are tracked by share class under the Act and not on a shareholder-by-shareholder or share-for-share basis, or whether it represents a misuse or abuse to undertake a series of transactions to exploit the way that paid-up capital is tracked by the current provisions of the Act. Rather, the Federal Court of Appeal seemed to quickly shift its focus to whether there was a misuse or abuse of section 84.1, and allowed the taxpayer's appeal on the basis that the GAAR did not apply because there could not be a misuse or abuse of section 84.1 until Mr. Wild received a tax-free distribution on his Class E shares, presumably through a redemption of those shares.

The Court's approach in one of its early GAAR cases, *OSFC Holdings Ltd.* (55 DTC 5471), seems to have played a key role in the Court's handling of this case. In *OSFC Holdings*, the Federal Court of Appeal considered the timing of when a tax benefit was derived from the transactions that were at issue in that case. The transactions included the pre-packaging of a portfolio of underperforming loans (and associated accrued tax losses) and transferring the loan portfolio to a partnership in anticipation of selling the partnership to an arm's length party. The Court concluded that the tax benefit associated with those transactions did not arise until the partnership was sold to the arm's length party and, therefore, the preparatory steps of pre-packaging the tax losses and transferring them to the partnership were not enough on their own to produce the tax benefit, in this case access to the tax losses derived from the underperforming loans, for the arm's length purchaser. By analogy, the Federal Court of Appeal in the present case held that the tax benefit which section 84.1 sought to deny — i.e., the inappropriate extraction of corporate surplus on a tax-free basis — was not yet realized under the transactions undertaken to date and, therefore, there could be no misuse or abuse of section 84.1 to support the application of the GAAR until that occurred.

The Federal Court of Appeal's disposition of this case is not that surprising once one considers that both the Tax Court's and the Federal Court of Appeal's analyses revolved around the question of whether the taxpayer undertook a transaction that was akin to a corporate surplus strip, and the tax results that would otherwise have been produced if section 84.1 did not apply to Mr. Wild's transfer of his shares of the operating company or if he had received corporate distributions on his original operating company shares.

But was it really appropriate to look at this series of transactions as one that was associated with the extraction of corporate surplus? In fact, it is arguable that any arguments or discussion concerning the extraction of corporate surplus or the object, spirit, and purpose of section 84.1 should have been entirely irrelevant to the outcome of this case because the transactions undertaken did not really set up Mr. Wild to extract corporate surpluses. The transactions were designed to allow Mr. Wild to receive the tax benefits associated with additional share capital contributed by a non-arm's length shareholder through the contribution of the shareholder's business assets. If one accepts that the principal tax benefit targeted by the subject transactions was to allow Mr. Wild to have paid-up capital in respect of his Class E shares in excess of the amount that the Act would typically otherwise allow (in this case, by virtue of the application of section 84.1, although this would also be true if the contribution to the paid-up capital of the Class E shares was held down, for example, by virtue of subsections 85(2.1), 85.1(2.1), or 86(2.1) in respect of share issuances under other reorganization provisions in the Act), then it would seem that the relevant tax benefit in this case for purposes of a GAAR analysis is the increase to the paid-up capital of the Class E shares, which is something that has already occurred through the implemented transactions and does not require any corporate distributions to be made to Mr. Wild for him to "enjoy".

It is also worth noting that one of the reasons that this series of transactions would be "tax efficient" (in the absence of the application of the GAAR) is that the intercompany dividend deduction under section 112 was available to relieve the operating company from any adverse tax consequences associated with having lower paid-up capital in respect of the Class C and Class E shares that it received in consideration for the transfer of the operating company's business assets than it would otherwise have if Mr. Wild was not a Class C or Class E shareholder at the time of the property transfers. Nonetheless, it appears that the use of the section 112 deduction was neither of concern to the Minister no considered worthy of discussion by the Federal Court of Appeal.

Topical News Briefing: Safe Havens In Stormy Seas

by the Global Tax Weekly Editorial Team

Events reported on in this week's issue of *Global Tax Weekly* would appear to suggest that, despite the long-standing campaign against harmful taxes, international offshore financial centers are still attracting substantial levels of business. Could it be that the campaign to neutralize the advantages of such tax regimes has had the effect of enhancing the reputations of certain offshore financial centers, not diminishing them?

As the EU's ever-shrinking blacklist shows, there are very few jurisdictions that are now considered uncooperative on tax. Indeed, peer reviews show that most of the major offshore financial centers are at least mostly compliant with tax and anti-money laundering standards. And notably, certain jurisdictions exceed these standards, and are ahead of many of the OECD countries responsible for setting the standards in terms of compliance with them.

Arguably, having a good reputation is now considered as important as a favorable tax and regulatory regime, if not more so. Certainly, some jurisdictions set great store by having legal and administrative frameworks that meet or exceed international standards, and use this as a selling point to investors the world over. Particular examples include the United Kingdom Crown Dependencies of Guernsey, Jersey, and the Isle of Man.

Certainly, as reported in this week's issue of *Global Tax Weekly*, recent figures would tend to suggest that, despite several recent offshore-related tax avoidance scandals investors are not being put off from carrying out business in these financial centers. Company incorporations in the British Virgin Islands during the first quarter of 2018 were up 14 percent quarter-on-quarter and up 12 percent on Q1 2017, the highest number of new incorporations in the BVI in the first quarter of a year since 2015. And this despite the economic impact on the islands of recent hurricanes. Furthermore, according to Appelby's latest Offshore-i report, the value of global offshore merger and acquisition deals in the first six months of the year nearly matched the total recorded for the whole of 2017, with the Crown Dependencies having had a particularly strong performance in the first half of the year.

Perhaps other factors beyond tax should be taken into account when asking why offshore jurisdictions continue to thrive. For example, many OFCs have amassed decades of experience in handling complex cross-border financial arrangements such as M&As, meaning that they now have disproportionately large pools of expertise in these fields. With many jurisdictions retaining strong constitutional links to the UK, political and legal stability, coupled with the prevalence of widely-understood common law systems in these locations, could be other reasons for the enduring success of offshore.

Whatever the main reason is (and it is likley to be a combination of factors), it does seem to be the case that striving to clear the transparency bar each time it has been notched up by the likes of the OECD, the EU, and the FATF, has done certain OFCs no harm. Quite the opposite, in fact.

Angola Delays VAT Introduction By Six Months

The Angolan Government has reportedly decided to delay the introduction of value-added tax by six months to July 2019.

According to a report in the newspaper Jornal de Angola, the implementation of VAT is being postponed because the tax authority and software providers need additional time to discuss the technical details of tax administration, particularly with respect to electronic invoicing and e-filing systems.

Earlier this year, the Government announced that VAT would be phased in from January 1, 2019, starting with businesses registered with the tax authority's large taxpayers office. Under this plan, VAT would be mandatory for large taxpayers in 2019 and 2020, with other taxpayers permitted to register for the tax voluntarily during this transition period. From 2021, VAT would be mandatory for all taxpayers, although those with annual revenue not exceeding the equivalent of USD250,000 in Angolan kwanza would be subject to a simplified VAT regime.

The draft proposals state that there will be one rate of VAT of 14 percent, which will be charged on goods and services supplied in Angola, and on imports, with taxpayers generally having the right to deduct input tax.

Several items would be exempt from VAT, including basic foods, books and newspapers, financial services, and petroleum products, among others.

The objective of the VAT is to replace the existing cascading consumption tax, reduce the country's dependence on oil revenues, and widen the tax base.

UAE Issues New VAT Guidance On Real Estate

The United Arab Emirates Federal Tax Authority has newly released English-language guidance on VAT on real estate transactions.

The document contains guidance about the VAT treatment of supplies of real estate, as well as various common transactions which occur within the real estate sector. It is intended to provide guidance to owners of commercial and residential real estate, landlords making supplies of commercial or residential real estate, and businesses operating within the construction industry, or making supplies which relate to real estate.

In general, VAT at five percent is levied on the provision of commercial premises, "covered land," and the onward supply of an existing charitable building. The supply of new residential property or a new charitable building is zero rated, while the supply of existing residential property and bare land is exempt.

The guidance discusses the specific rules for each type of supply and for mixed use developments, the VAT rules for owners associations, the VAT rules on development infrastructure, place of supply rules, supplies between landlords and tenants, the VAT rules on the construction industry, and the rules concerning VAT refunds for new residences.

Norway Proposes To Lift VAT On E-Books

Following the EU's approval of a proposal to allow the same rate of value-added tax for electronic publications as for tangible publications, Norway has announced that it will seek approval from the European Free Trade Association Surveillance Authority to zero rate the supply of electronic publications and journals.

Announced in the new 2018 Budget, the measure, subject to EFTA approval, would be effective from July 2019.

The Government has also indicated that it is mulling introducing VAT on non-life insurance policies.

The Government has also reversed the 2018 hikes to the taxes on sugary products, including certain non-alcholic beverages, to allow time for a review of the system, after concerns were raised by businesses of an influx of imported goods not subject to tax.

Australian States Promised Stable GST Revenue To Secure Reform

The Australian Government will introduce its proposed reforms to the goods and services tax (GST) distribution system this week and will guarantee that every state and territory will be better off under the new rules.

Under the GST horizontal fiscal equalization (HFE) mechanism, all GST revenue (minus the cost of administration) is passed to the states and territories.

According to Treasurer Josh Frydenberg, the current system is not working. He said that the imbalances within the system are "unfair and unsustainable" and threaten its integrity.

Frydenberg cited the case of Western Australia – which in recent years has seen first a mining boom and then a slowdown – which currently receives around 30 cents for every dollar of GST raised, "while other states and territories with far smaller populations received more."

Frydenberg explained that the Government's reforms include "establishing a more stable and predictable equalization standard based on the fiscal capacity of the stronger of New South Wales or Victoria, introducing a GST relativity floor of 75 cents, and permanently boosting the GST pool with direct Commonwealth cash injections."

These reforms were first trailed earlier this month, following a meeting of the Australian Council on Federal Financial Relations. However, in a new move, Frydenberg also announced that the Government will "provide a guarantee that every state and territory will be better off."

A transition period will apply between 2021-22 and 2026-27. During this period, states and territories "will get the better of the old or the new system," Frydenberg said.

At the end of the transition period, the Productivity Commission will carry out an inquiry to assess whether the reformed system is working efficiently and operating as intended.

The Government estimates that its reforms will deliver an additional AUD9bn (USD6.4bn) in funding to the states and territories over 10 years and thereafter an additional AUD1bn each year.

The current deadlock over how to better divide GST revenues has held back talks in the past on a hike to GST, which is said to be necessary to balance out the cost of making Australia's corporate tax regime internationally competitive through a rate cut for all businesses.

Japan To Proceed With Sales Tax Hike: Abe

Japan's Prime Minister Shinzo Abe on October 15 confirmed that the country will go ahead with the planned hike to the sales tax rate from October 2019.

The rate will rise from eight percent to ten percent.

Japan's sales tax rate was scheduled to increase to 10 percent in October 2015. After an initial delay, this was put forward to April 2017. In November 2016, the Government further decided that it should not take place until October 1, 2019, at the earliest, owing to concerns that economic growth could plummet again, as happened following an earlier hike in the rate from five percent to eight percent.

Netherlands PM Reconsiders Dividend Tax Cancellation

Dutch Prime Minister Mark Rutte has said that plans to scrap the dividend tax may be reconsidered by the Government.

Rutte made the remarks to reporters on October 5 in an apparent response to the decision by Unilever to cancel the proposed move of its entire headquarters from London to the Netherlands.

Rutte has been quoted as saying that "the fact that such a large company that had decided to come to the Netherlands has withdrawn its plan is very relevant for our considerations."

In March 2018, Unilever, which is headquartered in both the UK and the Netherlands, announced that it was proposing to consolidate its business into a single entity located in the Netherlands, which would enable the company to benefit in the future from a broadening of the exemption from Dutch withholding tax on dividends to distributions to shareholders in tax treaty countries. Currently, this exemption is only available to payments to shareholders resident in an EU/EEA member state.

However, Unilever has abandoned its plans after shareholders voted against the proposal.

The Dutch Government included the dividend tax measure in the 2019 Budget, announced last month. To counter profit shifting, the expansion of the exemption will be accompanied by a withholding tax on dividends paid to low-tax jurisdictions and in situations where the tax system is being abused.

Rutte said that the elimination of the dividend tax was part of wider package of measures intended to improve Dutch tax competitiveness, which also includes a corporate tax rate cut. However, he said that the Government would "reconsider this whole package" in due course.

Unilever To No Longer Decamp From The UK

Facing opposition from its UK shareholders, Unilever is said to have abandoned its plans to redomicile to the Netherlands.

In March 2018, Unilever, which is headquartered in both the UK and the Netherlands, announced that it was proposing to consolidate its business into a single entity located in the Netherlands, which would enable the company to benefit in the future from a broadening of the exemption from Dutch withholding tax on dividends.

In a statement issued on March 15, Unilever said the company intended to simplify from two legal entities, a Dutch N.V. and a UK PLC, into a single legal entity incorporated in the Netherlands. It has now reportedly abandoned those plans, most notably due to concerns that FTSE100 shareholders would have to sell their holdings, which could potentially have hit the company's share price.

There had been speculation that Unilever's decision to fully incorporate in the Netherlands was the result of uncertainty over the UK legal and tax framework after the country's EU withdrawal agreement is reached. However, Marijn Dekkers, Chairman of Unilever, said in March the move would simplify Unilever's corporate structure and "create a simpler, more agile, and more focused company."

Nevertheless, the company statement also acknowledged that shareholders in Unilever will be able to benefit from an exemption from Dutch withholding tax on dividends from January 1, 2020.

"Unilever N.V. dividends are currently subject to Dutch dividend withholding tax at a rate of 15 percent. The Dutch Government has announced that the Dutch dividend withholding tax will be abolished from January 1, 2020. Following simplification of the corporate structure and until such abolition, shareholders in the new Unilever holding company will be able to receive distributions in the form of a capital repayment for Dutch tax purposes which will be paid without Dutch dividend withholding tax," the company had said.

The Dutch coalition agreement published on October 10, 2017, includes a proposal to abolish withholding tax on dividends from 2020. The measure is intended to attract more foreign investment to the Netherlands. However, to prevent the establishment of "mailbox structures," the Government has proposed the introduction of withholding taxes on payments of royalty and interest payments to low-tax jurisdictions. This was confirmed in the Government's anti-avoidance plan, published in February 2018.

Netherlands To Keep Dividend Tax

The Dutch Government has decided to cancel the proposed elimination of the dividend tax and provide for a larger reduction in the rate of corporate tax, according to an announcement by State Secretary for Finance Menno Snel on October 15, 2018.

The proposal to abolish the dividend tax and introduce a withholding tax on dividends paid to low-tax jurisdictions and in situations where the tax system is being abused was included in the 2019 Budget, announced last month. However, according to Snell's statement to parliament, the measure has been dropped in favor of maintaining current dividend tax rules.

The Government intends to use revenue saved by retaining current dividend tax rules to provide additional reductions in corporate tax. Under the new plans, the headline rate of corporate tax will be cut from its existing rate of 25 percent to 20.5 percent in 2021. The Budget had originally proposed reducing corporate tax to 22.5 percent.

In addition, the rate of the corporate tax on profits up to EUR200,000 (USD231,000) will be reduced to 15 percent from 2021, instead of 16 percent as originally planned.

In another change to the Government's tax policy, the proposed reduction in the length of time expatriate workers can benefit from the special 30 percent ruling tax scheme will be delayed.

The 30 percent ruling provides an income tax exemption for qualifying expat workers of up to 30 percent of taxable income, subject to a minimum salary requirement. Earlier this year, the Government agreed to reduce the maximum duration of the scheme from eight to five years.

Australia Tightens Rules On CGT Relief

Australia is to tighten the rules regarding access to the small business capital gains tax (CGT) concessions.

The aim is to ensure that partners in partnerships cannot inappropriately access the concessions when dealing in rights that alienate future income from the partnership.

Under the changes, access to the small business CGT concessions will be denied when partners alienate their income by creating, assigning, or otherwise dealing in rights to the future income of a partnership.

Partners will only be eligible for the concessions when such rights make the assignee a partner in the partnership.

The measure will apply as of 19:30 AEST on May 8, 2018 (Budget night).

A consultation on the proposals will close on October 31.

EU Approves Broadening Of Danish Tonnage Tax

The EU has approved the expansion of Denmark's tonnage tax scheme to additional types of vessels.

Under tonnage tax schemes, maritime transport companies pay taxes on the basis of the ship tonnage (i.e. the size of the shipping fleet), rather than on the basis of their taxable profits. Such schemes can be approved by the European Commission under EU state aid rules.

Denmark intends to extend its existing tonnage tax scheme to cover guard vessels, vessels servicing off-shore installations, and vessels for raising, repairing, and dismantling windmills, along with pipeline- and cable-laying vessels, ice management vessels, and accommodation vessels.

Denmark notified the Commission of the proposed changes in May 2016. The Commission has now decided that these types of vessels are involved in maritime activities that are subject to the same legal requirements and competitive conditions as maritime transport. It has therefore approved the reforms.

As part of the Commission's ruling, Denmark will amend the scheme to align it with the Commission's current interpretation of the Guidelines on State aid to maritime transport. The Commission has in recent years been requesting EU member states to amend their schemes to ensure equal treatment amongst European shipping companies and to keep pace with the evolution of the shipping sector.

Denmark will therefore amend its rules on ancillary services that are closely connected to shipping activities. These services will be subject to tonnage taxation only if they account for less than 50 percent of the ship's total tonnage-taxed income. In addition, services relating to the leasing of ships without crew will be subject to tonnage taxation provided that the beneficiary self-operates at least 50 percent of the tonnage tax fleet and the vessel is not leased out for a period longer than three years.

Spain To Press Ahead With Digital Tax

The Spanish Government will proceed with a proposal to introduce a digital services tax along similar lines to the European Commission's proposed interim digital tax.

Under the measure, a three percent tax will be imposed on certain digital services provided by companies with global sales exceeding EUR750m (USD867m) and sales of more than EUR3m within Spain. Revenue from the selling of online advertising, digital intermediary and brokerage services, and personal data would be included in the scope of the law.

The proposal has been included in the budget agreement negotiated by the minority socialist Government and the Podemos party.

Also included in the Budget is a previously announced measure intended to ensure that companies pay an effective corporate tax rate of no lower than 15 percent by restricting the use of deductions.

In addition, the Budget includes a proposal to reduce the rate of value-added tax on feminine hygiene products from 10 percent to four percent.

EU Hoping For Deal On Digital Tax By Christmas

The EU's Tax Commissioner has said that a deal on proposals for a digital services tax is "doable by Christmas."

The Commission has proposed the introduction of a temporary three percent excise tax on turnover from certain online activities. EU member states must unanimously agree on the proposals.

In an interview with the BBC, Pierre Moscovici said: "It's doable to have an agreement by Christmas. I hope that we can make it." He added that although "good progress" has been made and "the climate is rather positive," "we are not yet there."

Moscovici explained that it is important that a deal is reached by the end of the year because "after that we will enter into another timing, which will be the political cycle, first Brexit will approach and then the European elections."

Moscovici told the BBC that the EU's "corporate tax system is old" and needs to be updated to "reflect on digital presence."

"If you compare all businesses, 23 percent is the average corporate tax rate. For the internet, it is something like nine percent. This is a problem of a level playing field," he said.

According to the BBC, Moscovici has signalled his willingness to support a sunset clause that would ensure the EU's digital tax is temporary, remaining in place until there is international agreement on a regime applicable to all countries.

Earlier this week, it emerged that Ireland, the Czech Republic, Finland, and Sweden have written to the Commission to warn that the tax could cause double taxation issues and violate the EU's tax treaties. They warned that this could have "potentially far-reaching political, economic, and legal consequences."

BVI Reports Surge In Incorporations Despite Hurricanes

Company incorporations in the British Virgin Islands during the first quarter of 2018 were up 14 percent quarter-on-quarter and up 12 percent on Q1 2017, the highest number of new incorporations in the BVI in the first quarter of a year since 2015.

This was despite the territory still recovering from the widespread destruction from the category-5 Hurricane Irma and then Hurricane Maria, which both struck the BVI in early September 2017. The hurricanes knocked out 80 percent of homes and businesses and caused losses of just under USD3bn to the territory's GDP.

During Q1 2018 the jurisdiction's Limited Partnership Act became law, supporting the growth of partnership vehicles in the BVI. This new legislation allows partnerships several innovative advantages as well as a number of unique features, says BVI Finance, the territory's financial services promotional agency. It said this flexibility has attracted more businesses from the investment and private equity sectors to base their businesses in the BVI.

Lorna Smith, Interim Executive Director of BVI Finance, said: "In early 2018, we were still very much in recovery mode, just three months after so many homes and businesses across the islands were destroyed. To see that we had our best quarter for incorporations for three years in that period is encouraging indeed."

"This achievement is largely down to the incredible efforts of the FSC and industry on-island and around the globe who worked tirelessly to keep our systems online and our customers informed. Many on-island professionals came back to work in the new year in temporary offices and accommodation, surrounded by destruction."

"In particular, these strong figures are likely proof of increased interest from Asian businesses seeking an international base for their ventures, as well as a growing number of tech and crypto-focused entrepreneurs coming to the BVI to create their new and innovative businesses."

"Since Irma and Maria struck, our mantra has been that we must rebuild the BVI stronger than it was before the hurricanes. I am confident we will achieve this because of the spirit, quality and determination of the professionals who work to offer the global business community a unique centre for their international business needs."

Surge In Value Of Offshore Mergers And Acquisitions In H1 2018

Merger and acquisition activity in offshore jurisdictions in 2018 is up markedly on last year, according to the latest Offshore-i report from Appleby.

The value of global offshore merger and acquisition deals in the first six months of the year nearly matched the total recorded for the whole of 2017. However, while the value is higher, volume was down on the second half of 2017.

Appleby, in its Offshore-i report, said the Crown Dependencies had a strong performance in the first half of the year. The number of deals involving Guernsey targets was similar to the latter half of 2017, while deal volume was ahead in Jersey and the Isle of Man.

"The Crown Dependencies are making a strong showing in 2018, with investment funds and manufacturing companies featuring prominently," said Wendy Benjamin, Group Partner at Appleby, Guernsey. "The International Stock Exchange, which is headquartered in Guernsey, is also reporting impressive growth in the rate of new listings."

Collectively, the Crown Dependencies showed a strong preference for domestic deals in the first half of 2018, which Appleby said demonstrated faith in the local economies and a recognition that there are local targets worth investing in.

In total, there were 1,344 deals recorded in the first half of 2018, representing a 10 percent decrease compared with the last six months of 2017. The total deal value of USD216 billion marked a 68 percent increase over the second half of 2017.

Billion-dollar deals have become frequent offshore, with 28 reported in the first half of this year. The surge of big transactions has been bolstered by a desire by boards of major companies to head off disruptive technological threats and accelerate growth, according to the report. The most frequent types of deals were acquisitions, capital increases, and minority stakes in other companies.

"Increasingly, firms are choosing to top up an existing stake and secure control of an investment outright," said Cameron Adderley, Partner and Global Head of Corporate at Appleby. "This makes sense with the increasing competition for quality targets, a low-risk environment and easy access to finance."

Last year saw new highs for offshore IPOs and that momentum has continued into 2018, with 180 companies announcing their intention to go public in the first half of the year.

"Pent-up investor demand for fast growth investments, including small-cap listings, makes it a good time to go public," Adderley said. "Economic conditions remain encouraging, equity valuations remain high in many parts of the world, and interest rates remain low."

The top sub-sectors for announced offshore IPOs were information service activities and financial services. The report also flagged the private equity sector as being "at a crossroads," with funds sitting on record amounts of cash reserves but facing challenges due to high valuations and rising competition from free-spending corporations, with lower performance expectations.

Andorra Finalizes Automatic Tax Information Exchange Framework

Andorra's legislature, the Council of Ministers, has approved improvements to the territory's framework for the automatic exchange of information on fiscal matters.

In an October 3, 2018, statement, the Government said the changes are needed to ensure the territory's regime for sharing foreign taxpayers' financial information conforms with the OECD's latest international tax transparency standard, the Common Reporting Standard.

The CRS replaced exchange of information between countries on request. It includes an automatic obligation for jurisdictions adopting it to share financial account information on foreign taxpayers to the state that they are tax resident in automatically each year, to tackle aggressive tax avoidance, evasion, and fraud. It is the international equivalent of the US Foreign Account Tax Compliance Act.

The Government said the changes make uniform the rules for financial institutions on how they should report data to the tax agency for sharing internationally and the due diligence procedures they must undertake to identify foreign account owners.

Further, the Council approved a list of jurisdictions with which information concerning the 2019 financial year will be exchanged from 2020.

Jersey Budget Includes Few Tax Changes

Jersey's 2019 Budget includes an increase to stamp duty on the sale of high-value homes and an increase to the personal tax exempt allowance. However, perhaps the most significant announcement is that legislation will soon be tabled to require certain Jersey companies to be able to demonstrate economic substance to access Jersey's beneficial tax policies.

According to the Budget document, legislation on economic substance will be tabled this month, following talks between the Crown Dependencies and the EU's Code of Conduct Group (Business Taxation), which would be effective from next year.

For individuals, the Budget includes a GBP500 increase to the personal tax-free income allowance, to GBP15,400. It also announces a GBP150 increase to the second earners' allowance, hiking it to GBP6,000.

First-time buyers' relief from stamp duty on properties will be increased from GBP450,000 to GBP500,000, and stamp duty on mortgages for homes costing up to GBP600,000 will be abolished. There will be a tapered charge for homes valued between GBP600,000 and GBP700,000 and a 0.5 percent increase in standard stamp duty rates for homes valued over GBP500,000.

Otherwise, the Budget includes a 3.5 percent increase to alcohol duty, a GBP0.02 increase to fuel duty, and a GBP0.59 increase in duty on a packet of cigarettes.

Jersey's new Treasury and Resources Minister Susie Pinel said: "This is an affordable, balanced and common sense Budget, which is right for our current circumstances. In abiding by the three core principles, my first Budget contains no surprises, with no major tax measures, and does not disturb my predecessors' long-term fiscal framework of achieving a balanced budget."

Tempur Sealy Settles Danish TP Dispute

Mattress manufacturing company Tempur Sealy has announced an agreement with the United States Internal Revenue Service and the Danish tax authority, SKAT, relating to a long-running transfer pricing tax dispute.

In a press release issued on October 4, 2018, Tempur Sealy confirmed that it had received "significant income tax assessments from SKAT for prior tax years" stretching from 2001 to 2011, which the company subsequently disputed.

The tax assessments related to the amount of royalties paid by one of Tempur Sealy's US subsidiaries to the company's Danish subsidiary, Dan-Foam ApS, which maintained legal ownership of certain of the company's proprietary technology and intellectual property.

The company said that the resolution reached in the three-party agreement is for an amount "significantly less" than originally assessed by SKAT.

Commenting on the agreement, Scott Thompson, Tempur Sealy International, Inc. Chairman and CEO, said: "We are pleased an agreement could be reached. This dispute on international transfer pricing, which in substance was about whether more profit should be in Denmark or the US, was complex. The resolution of this decade-old matter removes a material contingency from the business."

The firm also disclosed that it is in the process of entering into negotiations with the IRS and SKAT to reach a mutual agreement with respect to the appropriate royalty rates for years after 2011.

Luxembourg Updates CbC Reporting FAQs

The Luxembourg tax authority has updated its country-by-country reporting FAQs, with new information on the treatment of dividends; and on mergers, acquisitions, and spin-offs.

The October 5 update follows the publication by the OECD in September 2018 of additional interpretative guidance on CbC Reporting.

This new guidance from the OECD covered the treatment of dividends received and the number of employees to be reported in cases where an MNE uses proportional consolidation in preparing its consolidated financial statements. The updated guidance also clarified that shortened amounts should not be used in completing Table 1 of a country-by-country report. Finally, it summarized existing interpretative guidance on the approach to be applied in cases of mergers, demergers, and acquisitions.

Slovenia Lines Up BEPS Law And VAT Changes

The Slovenian Government has published a proposed amendment to the corporate tax law that would transpose elements of the European Union Anti-Tax Avoidance Directive (ATAD I) into domestic legislation and align national law with EU VAT requirements with respect vouchers and tax rules for small businesses.

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

The Slovenian proposals, published by the Government on September 28, 2018, include provisions for a general anti-avoidance rule and controlled foreign company laws that are in line with ATAD I.

Member states are required to transpose ATAD I by December 31, 2018, with the exception of the exit tax rules, which must be transposed by December 31, 2019.

The Government also approved proposals incorporating the requirements of the EU Vouchers Directive (Directive 2016/1065) into domestic law. This directive is intended to provide for common rules for the VAT treatment of vouchers. It applies to any vouchers issued on or after April 1, 2019.

In particular, the Directive sets out to reduce the risk of mismatches in national tax rules leading to double taxation, non-taxation, or other undesired consequences. This can happen where a voucher is issued in one member state and used in another, and particularly where vouchers are traded.

In addition, proposals were also approved that will alleviate the compliance burden for those rendering electronically supplied services to consumers worth less than EUR10,000 (USD11,550) in a year. This EU rule will allow businesses making cross-border sales to consumers worth less than this threshold to be subject to domestic VAT rules, rather than having to comply with other member states' tax rules in the location of the consumer. It is intended that this change will be effective in Slovenia from January 1, 2019.

Belgium Approves Draft BEPS MLI Law

Belgium's Council of Ministers has approved a draft law to implement the BEPS Multilateral Instrument (MLI) into Belgian law.

According to the Council's press service, the draft law was approved by ministers on October 12 on the proposal of Foreign

Minister Didier Reynders. The law was then submitted to the Council of State, Belgium's supreme administrative court, for an opinion.

The BEPS MLI, developed through negotiations involving more than 100 countries and jurisdictions as part of the OECD's BEPS project, is intended to enable countries to incorporate BEPS-related amendments into their tax treaties without having to renegotiate bilateral treaties on a piecemeal basis - a process that could take more than a decade to achieve.

ANGOLA - PORTUGAL

Signature

On September 18, 2018, Angola and Portugal signed a DTA.

BOTSWANA - LUXEMBOURG

Signature

On September 19, 2018, Botswana and Luxembourg signed a DTA.

BULGARIA - SAUDI ARABIA

Ratified

On September 4, 2018, Bulgaria ratified its DTA with Saudi Arabia.

CHINA - CONGO, REPUBLIC OF THE

Signature

On September 5, 2018, China and the Republic of the Congo signed a DTA.

CHINA - GABON

Signature

On September 1, 2018, China and Gabon signed a DTA.

CONGO, REPUBLIC OF THE - TURKEY

Negotiations

On September 24-27, 2018, the Republic of Congo and Turkey held the first round of negotiations towards a DTA.

INDIA - PORTUGAL

Into Force

On August 8, 2018, the amending protocol to the DTA between India and Portugal entered into force.

JAPAN - ESTONIA

Into Force

On September 29, 2018, the DTA between Japan and Estonia entered into force.

KAZAKHSTAN - UZBEKISTAN

Ratified

On September 18, 2018, Kazakhstan ratified the amending protocol to its DTA with Uzbekistan.

LATVIA - SWITZERLAND

Into Force

On September 3, 2018, the amending protocol to the DTA between Latvia and Switzerland entered into force.

LIECHTENSTEIN - LITHUANIA

Initialed

On September 28, 2018, Liechtenstein and Lithuania initialed a DTA.

MALTA - MONACO

Signature

Malta and Monaco signed a DTA on October 1, 2018.

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

THE AMERICAS

Family Office & Private Wealth Management Forum West

10/24/2018 - 10/26/2018

Opal Group

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

Key speakers: TBC

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

Family Office Summit: Integrating the Full Balance Sheet

11/1/2018 - 11/1/2018

ClearView Financial Media

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

Key speakers: TBC

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

30th Latin American Tax Law Conference

11/4/2018 - 11/9/2018

IBFD

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

Key speakers: TBC

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

TP Minds West Coast

11/13/2018 - 11/15/2018

Informa

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

Key speakers TBC

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

111th Annual Conference on Taxation

11/15/2018 - 11/17/2018

National Tax Association

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

Chair: Rosanne Altshuler (National Tax Association)

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

TP Minds Brazil

12/5/2018 - 12/6/2018

Informa

Venue: Address: TBC, Brazil

Key speakers: Leonardo Macedo (CARF), Carolina Archanjo (Microsoft), Sergio Guardia (AkzoNobel), Leonel Luz Vaz Moreno Filho (Korn Ferry), among numerous others

https://finance.knect365.com/tp-minds-brazil/

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

2/4/2019 - 2/5/2019

STEP

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

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

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

ASIA PACIFIC

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

11/7/2018 - 11/8/2018

IBFD

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

Key speakers: Jan de Goede (IBFD), Shiqi Ma (IBFD), Premkumar Baldewsing (IBFD), Abe Zhao (Baker & McKenzie), among numerous others

https://www.ibfd.org/Training/Current-Issues-International-Tax-Structuring-and-Tax-Planning-Chinese-Outbound-Perspective

9th IBFD International Tax Conference

11/8/2018 - 11/8/2018

IBFD

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

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

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

STEP Asia Conference 2018, Hong Kong

11/20/2018 - 11/21/2018

STEP

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

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

https://www.step.org/asia2018

The 4th International Conference on Private Capital and Intergenerational Wealth

11/22/2018 - 11/22/2018

STEP

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

Key speakers: TBC

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

International Taxation Conference 2018

12/6/2018 - 12/8/2018

IBFD

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

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

https://www.ibfd.org/IBFD-Tax-Portal/Events/International-Taxation-Conference-2018

STEP Australia 2019

5/15/2019 - 5/17/2019

STEP

Venue: The Stamford Plaza, Brisbane, Australia

Key speakers: TBC

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

CENTRAL AND EASTERN EUROPE

Ukrainian Business Forum Kiev 2018

11/19/2018 - 11/19/2018

CIS Wealth

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

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

https://ubf.international/

MIDDLE EAST AND AFRICA

Tax Planning in Africa and the Middle East

10/28/2018 - 10/30/2018

IBFD

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

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

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

TP Minds Africa

10/31/2018 - 11/2/2018

Informa

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

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

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

STEP Arabia Branch Conference

11/11/2018 - 11/11/2018

STEP

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

Key speakers: TBC

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

Introduction to GCC VAT

3/3/2019 - 3/5/2019

IBFD

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

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

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

WESTERN EUROPE

Current Issues in International Tax Planning

10/22/2018 - 10/24/2018

IBFD

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

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

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

Operational Tax for Investment Managers - 7th Annual Practitioners' Forum

10/30/2018 - 10/30/2018

Informa

Venue: Crowne Plaza City Hotel, 19 New Bridge St, London, EC4V 6DB, UK

Key speakers: Paul Tucker (HMRC), Hazell Hallam (PwC), Forbes Bailey (Baring Asset Management), Judith Mertesdorf-Perathoner (Franklin Templeton Investments), among numerous others

https://finance.knect365.com/operational-tax-for-funds-conference/

Transfer Pricing and Substance Masterclass

10/31/2018 - 11/2/2018

IBFD

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

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

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

International Business Structuring Conference

11/1/2018 - 11/1/2018

IBSA

Venue: The Berkeley, Wilton Place, Knightsbridge, London, SW1X 7RL, UK

Key speakers: Roy Saunders (IBSA & IFS Consultants), Philip Baker (Gray's Inn Tax Chambers), Aliasghar Kanani (Bonnard Lawson), Liz Palmer (Howard Kennedy), among numerous others

https://www.theibsa.org/conference/the-growth-of-cosipod

IFRS Update Courses 2018

11/5/2018 - 11/8/2018

Informa

Venue: etc.venues Marble Arch, Garfield House, 86 Edgware Rd, London, W2 2EA, UK

Key speakers: Shân Kennedy (Independent IFRS Expert), Sunil Kansal (Independent IFRS Expert)

https://finance.knect365.com/ifrs-update/

Operational Taxes for Banks Europe

11/7/2018 - 11/7/2018

Informa

Venue: Address TBC, Zurich, Switzerland

Key speakers: Philip Kerfs (OECD), Peter Bläuer (Julius Baer), Bernhard Schopper (HSBC), Emile Osumba (JP Morgan), among numerous others

https://finance.knect365.com/operational-taxes-for-banks-europe/

Beyond Borders: International Tax Into 2020

11/7/2018 - 11/10/2018

Taxlinked.net

Venue: Amathus Beach Hotel, Limassol, Cyprus

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

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

The 7th Annual OffshoreAlert Conference Europe

11/12/2018 - 11/13/2018

OffshoreAlert

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

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

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

Global VAT

11/13/2018 - 11/16/2018

IBFD

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

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

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

Global VAT - Specific Countries

11/15/2018 - 11/16/2018

IBFD

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

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

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

AICPA & CIMA Finance Transformation London

11/19/2018 - 11/20/2018

Informa

Venue: The Bloomsbury Hotel, 16-22 Great Russell St, London, WC1B 3NN, UK

Key speakers: Dr Noel Tagoe (Association of International Certified Professional Accountants), Christopher Argent (Vodafone), Stuart Pemble (Thomson Reuters), David Wray (Huawei), among numerous others

https://aicpa-cima.knect365.com/finance-transformation-london/

Principles of International Taxation

11/19/2018 - 11/23/2018

IBFD

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

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

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

Annual Conference on European VAT Law 2018

11/22/2018 - 11/23/2018

Academy of European Law

Venue: TBC, Trier, Germany

Key speakers: TBC

https://www.era.int/cgi-bin/cms?_SID=9e33bf77b0e4587e14991159621fbca45243657200594226138893&_

sprache=en&_bereich=artikel&_aktion=detail&idartikel=127489&idrubrik=1024

International Tax, Legal and Commercial Aspects of Mergers & Acquisitions

11/28/2018 - 11/30/2018

IBFD

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

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

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

Capital Taxes Update

12/5/2018 - 12/5/2018

STEP

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

Key speaker: Chris Whitehouse (5 Stone Buildings)

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

Advanced VAT Optimization

12/6/2018 - 12/7/2018

IBFD

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

Key speakers: TBC

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

Transfer Pricing and Intra-Group Financing

12/10/2018 - 12/11/2018

IBFD

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

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

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

Transfer Pricing Masterclass

2/14/2019 - 2/15/2019

IBFD

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

Key speakers: TBC

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

Current Issues in International Tax Planning

2/27/2019 - 3/1/2019

IBFD

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

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

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

International Tax Planning Association Meeting

3/20/2019 - 3/22/2019

ITPA

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

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

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

US Corporate Taxation

4/1/2019 - 4/3/2019

IBFD

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

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

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

IBFD Seminar: The Future of VAT

5/9/2019 - 5/10/2019

IBFD

Venue: Address: TBC

Key speakers: Donato Raponi (Taj), Robert van Brederode (Crowe Horwath), Werner Engelen (LEGO Group), Toon Beljaars (Uber), among numerous others

https://www.ibfd.org/IBFD-Tax-Portal/Events/IBFD-Seminar-Future-VAT

Managing European Tax Affairs

5/13/2019 - 5/14/2019

IBFD

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

Key speakers: Emma Barrögård (IBFD), Premkumar Baldewsing (IBFD), Jordi Sol (IBFD), Barry Larking (international tax analyst), among numerous others

https://www.ibfd.org/Training/Managing-European-Tax-Affairs

Transfer Pricing: Pharmaceutical and Life Sciences Industry Masterclass

5/21/2019 - 5/22/2019

IBFD

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

Key speakers: Anuschka Bakker (IBFD), Antonio Russo (Baker & McKenzie), among numerous others

https://www.ibfd.org/Training/Transfer-Pricing-Pharmaceutical-and-Life-Sciences-Industry-Masterclass

Tax Accounting, Reporting and Control

6/5/2019 - 6/7/2019

IBFD

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

Key speakers: Soojin Lee (IBFD), Tjeerd van den Berg (PwC), Ed Rijkers (EY), Koen De Grave (PwC), among numerous others

https://www.ibfd.org/Training/Tax-Accounting-Reporting-and-Control

The BEPS Multilateral Convention and Its Impact on Tax Treaties

6/20/2019 - 6/21/2019

IBFD

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

Key speakers: Carlos Gutiérrez Puente (IBFD), Emma Barrögård (IBFD), Bart Kosters (IBFD), among numerous others

https://www.ibfd.org/Training/BEPS-Multilateral-Convention-and-Its-Impact-Tax-Treaties

Introduction to European Value Added Tax

6/25/2019 - 6/28/2019

IBFD

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

Key speakers: Fabiola Annacondia (IBFD), Jordi Sol (IBFD), Marie Lamensch (Vrije Universiteit Brussel), Wilbert Nieuwenhuizen (University of Amsterdam), among numerous others

https://www.ibfd.org/Training/Introduction-European-Value-Added-Tax-0

International Tax Aspects of Corporate Tax Planning

7/3/2019 - 7/5/2019

IBFD

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

Key speakers: Premkumar Baldewsing (IBFD), Emma Barrögård (IBFD), Clive Jie-A-Joen (Simmons & Simmons LLP), Jeroen Kuppens (KPMG Meijburg & Co), among numerous others

https://www.ibfd.org/Training/International-Tax-Aspects-Corporate-Tax-Planning

Tax Risk Assessment

9/5/2019 - 9/6/2019

IBFD

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

Key speakers: Soojin Lee (IBFD), Mark Koek (LyondellBasell Industries), among numerous others

https://www.ibfd.org/Training/Tax-Risk-Assessment

ASIA PACIFIC

India


A listing of recent key international tax cases.

Mumbai's Income Tax Tribunal has recently ruled in favor of HSBC, in a long-running dispute concerning the India-Mauritius double tax agreement, and specifically India's recognition of Tax Residence Certificates issued by foreign states for tax treaty claims.

The case concerned income received by a HSBC entity registered in Mauritius that received considerable income from Indian debt securities.

HSBC sought an exemption from Indian taxes on that income through the India-Mauritius double tax agreement.

Indian authorities argued that the Mauritian entity failed to satisfy the tests required of it to benefit from exemption, namely that said income is "derived and beneficially owned by any bank carrying on a bona fide banking business," and is resident in Mauritius.

This provision – Article 11(3)(c) of the treaty – was replaced in a 2016 Protocol agreed between Mauritius and India and restricted to debt claims existing prior to April 1, 2017. However, the case concerns income received prior to that amendment.

Following an earlier ruling from the Tribunal in 2016 that was appealed by HSBC, the issues considered in this ruling by the Tribunal were whittled down to a singular matter: whether HSBC Mauritius was the beneficial owner of the interest income.

In securing a ruling in its favor from the Tribunal, HSBC successfully argued that the Certificate of Residence issued by the Mauritian authorities was evidence enough of its beneficial ownership of the assets from which it derived interest income.

The Tribunal agreed that Circular No. 789/2000, which deals with income from dividends and capital gains, provides the same protections for taxpayers receiving interest income prior to the DTA amendment.

Earlier the Bombay High Court had ruled that the Circular covered royalty income derived by a Dutch company and one other case heard by an Indian court agreed that the Circular extends also to interest income.

Notably in this case, in order to be eligible for the DTA benefits under Article 11(3)(c), HSBC was not required to have undertaken banking business in India to access the DTA, the Tribunal finding in 2016 that HSBC engaging in banking activities in Mauritius was sufficient to demonstrate it carried on bona fide banking business to satisfy the tests required under Article 11(3)(c), prior to its amendment.

https://www.taxmann.com/globalsearch.aspx?cat=dtl&st=[2018]%2096%20taxmann.com%20544%20(Mumbai%20-%20Trib.) (Subscription required)

Mumbai IncomeTax Tribunal: *HSBC Bank (Mauritius) Ltd. v. Deputy Commissioner of Income-tax (IT)-2(2)(2), Mumbai*

MIDDLE EAST AND AFRICA

Dubai

The Dubai International Financial Centre recently released a consultation paper on a new insolvency law regime.

The DIFC says the new regime is intended to bring its insolvency law into line with international best practice by taking account of changes to insolvency law regimes in comparable jurisdictions, as well as specific developments in English insolvency law and insolvency considerations in the United Arab Emirates.

The DIFC says the new regime attempts to balance the needs of all stakeholders in distressed situations in the DIFC and also provide efficient and effective insolvency and restructuring tools.

Key aspects of the proposed regime include the introduction of a new debtor in possession rehabilitation procedure under court supervision, and a new administration process (including the appointment of an insolvency practitioner) accessible via rehabilitation where there is evidence of mismanagement or misconduct.

The proposed regime also enhances the rules governing voluntary winding up and compulsory winding up procedures, includes more detailed provisions on wrongful trading and the re-use of company names, and enhances the law relating to the enforcement of financial collateral.

Other changes include a new offense in respect of any misconduct taking place during a winding up, and the incorporation of the United Nations Commission on International Trade Model Law on cross-border insolvency proceedings into the DIFC law (with certain modifications).

The consultation closed on October 17, 2018.

https://www.difc.ae/newsroom/news/difc-announced-proposed-new-insolvency-law-regime-public-consultation

DIFC Authority's Legislative Committee: *Consultation on Changes to Insolvency Laws*

WESTERN EUROPE

France

The European Court of Justice has once again criticized French tax rules on dividends, adding that France's Council of State should not have issued rulings that were contrary to EU law in the matter, with the ECJ having earlier ruled against the relevant French tax provisions.

In its judgment in *Accor* (Case C-310/09), released in September 2011, the Court of Justice held that the difference in the tax treatment of dividends redistributed by a resident subsidiary (which were entitled to a tax refund) and those distributed by a non-resident subsidiary to a French resident entity (which were typically subject to unrecoverable tax) was contrary to EU law and that the French mechanism for avoidance of double taxation was incompatible with the provisions of the Treaty.

The Conseil d'Etat (Council of State, France), following the *Accor* judgment, delivered several judgments which gave rise to complaints addressed to the Commission. The Commission found that certain conditions relating to the reimbursement of the advance payment, on dividend payments from non-residents to French resident entities, established by those judgments, were likely to constitute infringements of EU law.

After France refused to comply with the European Commission's opinion, which called upon the nation's authorities to adopt certain measures, the Commission brought an action for failure to fulfill obligations before the Court of Justice.

In its October 4 judgment, the Court considered that, in the context of tax rules which seek to prevent the double economic taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder receiving nationally sourced dividends, in so far as, in both cases, the profits made are, in principle, liable to be subject to a series of charges to tax.

EU law requires a member state which has a system for the avoidance of double economic taxation as regards dividends paid to residents by resident companies to treat dividends paid to residents by resident companies in the same way as dividends paid to residents by non-resident companies.

The Court therefore found that France was required, in order to bring an end to the discriminatory treatment in the application of the tax mechanism seeking to avoid the economic double taxation of distributed dividends, to take into account the taxation levied earlier on the distributed profits resulting from the exercise of the tax powers of the member state in which the dividends originated. It said that must take place, irrespective of the level of the chain of interests on which the tax was levied – that is, a subsidiary or a sub-subsidiary. The ECJ therefore ruled that France failed to fulfill its obligation under EU law in this respect.

Further, the ECJ considered complaints that the French Council of State should have made a reference for a preliminary ruling before determining the arrangements for reimbursement of the advance payment, the levying of which was deemed unlawful in *Accor*. The Court pointed out that a member state's failure to fulfill obligations may, in principle, be established whatever the agency of that state whose action or inaction is the cause of the failure to fulfill these obligations, even in the case of a constitutionally independent institution, such as the French Council of State.

The ECJ said: "Where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the [ECJ] where a question of the interpretation of the Treaty is raised before it. [...] That the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the member states. That obligation does not apply, by way of exception, when the national court finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt."

"For the first time, the Court finds that a court or tribunal against whose decisions there is no judicial remedy under national law should have requested a preliminary ruling from the Court of Justice in order to avert the risk of an incorrect interpretation of EU law. Since the Conseil d'Etat failed to make that reference, even though the correct application of EU law in its judgments was not so obvious as to leave no scope for doubt, the infringement is established."

https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180144en.pdf

European Court of Justice: *Case C-416/17: Commission v France*

Dateline October 18, 2018

There'll be a **digital tax** by Christmas, proclaimed European Commissioner for Taxation Pierre Moscovici last week. Perhaps he needs to brush up on his history. We've heard such bold claims in previous eras. For example, they said that World War One would be all over by Christmas. And it was. Christmas 1918, not Christmas 1914.

Nevertheless, as Christmas 2018 approaches, digital taxation is dominating the international tax agenda. Indeed, it's somewhat like listening to children excitedly discussing their chances of receiving the next new-fangled toy or gadget in their Christmas stockings this year – every government now seems to want a digital tax! The **Spanish Government** just added one to its 2019 Budget wish list; the **UK** isn't quite sure yet whether it really needs a digital tax, but it certainly would like one; and at the beginning of October, the **Australian Government** wrote to taxpayers asking very nicely if it could have a digital tax. India on the other hand is in no mood for asking, and it isn't waiting around for an OECD bearing gifts either. It's building its own, in the form of proposed **new digital permanent establishment rules.**

Of course, we're well aware that the **EU** really, really wants a digital tax. So much so that it's prepared to accept an untried and untested temporary prototype just as long as it can get its hands on one.

But not everyone is impressed; there's always the bah-humbug brigade, the proverbial Christmas scrooges. Enter the party-poopers: Ireland, the **Czech Republic, Finland and Sweden**. At least, this is according to a report last week by the Irish Times – I don't wish to cast aspersions. So, what's their problem? Well, they're worried that, like a new video game, the digital tax as envisaged **won't be compatible** with existing legal operating systems. All manner of things could go wrong as a result. Tax treaties will be broken, international obligations flouted, companies doubly taxed; stuff that cannot be fixed merely by switching it off and switching it on again.

They've got a point. Companies don't tend to rush out their latest innovations. They're tested thoroughly before being unleashed on the market. Therefore, perhaps Moscovici needs to take their reservations about the interim digital tax in particular more seriously. He should also remember that a digital tax is for life, not just for Christmas.

Moving on, but staying in Europe, and **Brexit** seems to be doing strange things to people's decision-making. Some of the UK's fellow (for now) member states are tightening up corporate tax regimes and condemning aggressive tax competition. But, since the UK's decision to leave the EU, they are also falling over themselves to capitalize on the uncertainty generated by Brexit by offering generous new tax breaks. **The Netherlands** is one such example. On the one hand, it is (as matters stand) offering an expanded dividend exemption from next year, partly in the hope of luring business away from the UK. But at the same time, the Netherlands is proceeding with other measures intended to change international perceptions that its tax regime is set up to encourage profit shifting. The two goals hardly seem compatible though - a bit like bolting the back door to tax avoidance, then flinging open the patio doors to all comers. But that's Brexit for you.

Then there's the strange case of **Unilever**, one of the UK's largest companies. Jointly headquartered in the UK and the Netherlands, it had appeared that latter had been successful in wooing the firm away from London with the promise of tax perks and a life in the EU. Then the shareholders revolted, and the whole thing was called off. Emotions are obviously running high. Who knows, if not for Brexit, it was a saga that probably wouldn't have played out at all, at least not so publicly.

Even stranger perhaps was the reported response of Dutch Prime Mark Rutte to Unilever's u-turn. This in effect went something like "if Unilever doesn't want our tax breaks, then nobody can have them!" Because according to Rutte, the Government will now go away and **rethink its entire corporate tax strategy**, including the flagship dividend tax proposal.

A little impetuous perhaps? You don't have to abandon the party just because one guest decided not to show up, even if the invitee in question was going to contribute to proceedings in a significant way. Just be a little more imaginative with regards to entertaining your remaining guests.

Is this the Brexit effect we're witnessing? Is it all too much for people to process? Are we all going slightly giddy with the fear and the excitement the uncertainty brings? I need a lie down...wake me up in April 2019.

The Jester