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GLOBAL TAX WEEKLY
a closer look

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

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

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

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GLOBAL TAX WEEKLY
a closer look

Global Tax Weekly – A Closer Look

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

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.

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Transfer Pricing: Re-evaluating Profit Splits

by Robert Verzi and Philip Brudney, HA&W/Aprio, independent member of Morison KSi

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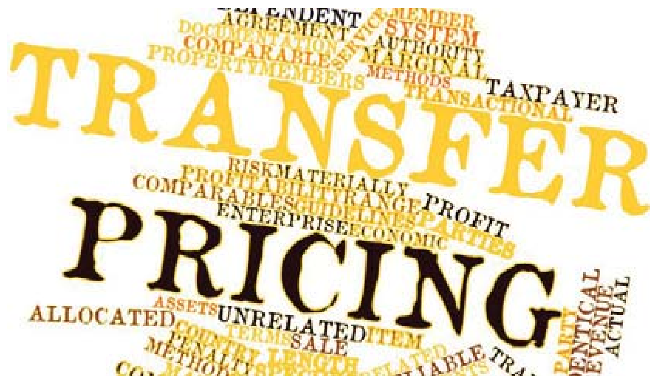


Introduction

As part of its BEPS initiative, the OECD identified as one priority "Aligning Transfer Pricing Outcomes with Value Creation" *via* Actions 8–10. Through a series of discussion drafts, the OECD has promulgated its view of the way forward for transfer pricing for multinationals in the global economy. One of the key drafts addresses the use of the profit split method in transfer pricing, and presents several key issues for multinational companies as they examine their global transfer pricing policies.

Background

The most common transfer pricing method is the transactional net margin method (TNMM). A typical TNMM analysis treats the least complex party to a transaction as the "tested party." The TNMM assigns a routine return to the tested party for the functions it performs using financial data for comparable companies. For example, if a German-based manufacturer has a UK subsidiary that distributes its products in the UK, that UK subsidiary would typically be treated as the tested party and would earn a simple distributor's return. The remaining income relative to the transaction would accrue to Germany.

As described below, the profit split requires that both parties make a contribution beyond the routine return ascribed to the tested party under a TNMM. The profit split method aims to divide the combined profit or loss of associated enterprises in accordance with the division of profits that would have been expected in an arm's length agreement. The division of profits is typically in accordance with each company's contribution to the transaction. In the example above, if the

UK company creates significant marketing intangibles, then the UK subsidiary would earn an additional return for these intangibles and report more income in the UK.

Analyzing The Multinational Group

In practice, the analysis of whether a profit split method applies begins with a review of a multinational company's global value chain. According to the OECD, a value chain analysis identifies the features of the commercial or financial relationships between parties to a transaction, including where and how value is created in the business operations. A value chain analysis will provide information including:

- The key value drivers in relation to the transaction, including how the associated enterprises differentiate themselves from others in the market;
- The nature of the contributions of assets, functions and risks by the associated enterprises to the key value drivers, including consideration of which contributions are unique and valuable;
- Which parties can protect and retain value through performance of important functions relating to the development, enhancement, maintenance, protection, and exploitation of intangibles;
- Which parties assume economically significant risks or perform control functions relating to the economically significant risks associated with value creation;
- How parties operate in combination in the value chain, and share functions and assets in parallel integration (as described below).

The OECD guidance elaborates that a profit split reflects a relationship where the parties either share the same economically significant risks associated with the opportunity, or separately assume closely related risks, and consequently should share in the resulting profits or losses. In particular, the sharing of risks may be identified by a high degree of integrated functions or the making of unique and valuable contributions by each of the parties, such that the contributions cannot reliably be evaluated in isolation. Risks might be shared, and a profit split more appropriate, where two parties jointly develop intellectual property or perform marketing activities.

This contrasts with a classic value chain, where each party performs a discrete function. Such a case may be evidenced by parallel integration within the value chain such that multiple parties are involved in the same stage, rather than sequential integration where parties perform discrete functions.

Assessing The Results

The review of the global value chain will often suggest that certain aspects are highly integrated, and a profit split may be necessary. From a tax perspective, however, the profit split will not be desirable in all cases. Recall that the profit split will result in more income allocated to a jurisdiction that would receive only a routine return under a traditional TNMM. Therefore, depending on tax rates in the various jurisdictions involved, a profit split may or may not be tax advantageous.

Take, for example, a US-based company manufacturing in several offshore jurisdictions.

Upon review of the company's functions, it was determined that the offshore manufacturing operations performed significant development activities that could not reliably be evaluated in isolation, and therefore a profit split may be appropriate. The profit split was also tax advantageous because the offshore operations were taxed at a lower rate than the USA's 35 percent corporate tax rate. Given the current uncertainty regarding US tax rates, changes may be necessary in the future to reassess profit splits involving US operations.

If a change is deemed appropriate, the multinational must actually be able to move the value creation between jurisdictions. The OECD makes clear that a simple contractual adjustment of risk is not sufficient:[1]

> "[R]isks contractually assumed by a party that cannot in fact exercise meaningful and specifically defined control over the risks, or does not have the financial capacity to assume the risks, will be allocated to the party that does exercise such control and does have the financial capacity to assume the risks."

OECD guidance further explains that a company manages risk (and receives the associated reward) only if it has:

- The capability to make decisions to take on or decline a risk bearing opportunity;
- The capability *and actual performance* of making decisions on how to respond to risks; and
- The capability to mitigate risk.

Some risk management may be outsourced, provided the enterprise outsourcing the risk has the capacity to decide whether to outsource and also oversees the third party. A company wishing to adjust the risk profile of a group member must ensure that the company is sufficiently capitalized to bear risk and that local employees have the capability and autonomy to actually manage the risk. Similarly, for any function being shifted to another jurisdiction, the employees in that jurisdiction must have the capability to perform that function and must actually perform it.

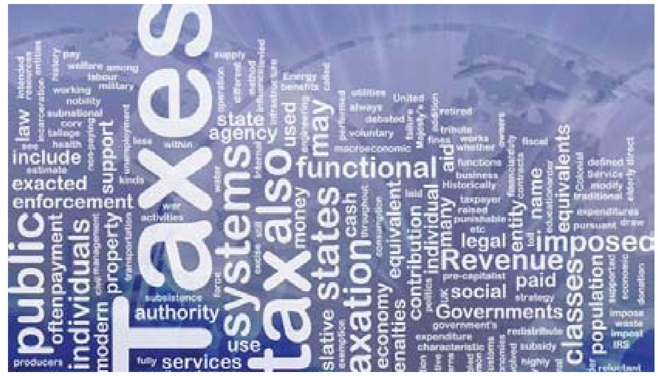
As tax authorities worldwide implement OECD guidance and reconsider the applicability of profit split methods, maintaining proper transfer pricing documentation remains crucial to avoiding prolonged tax audits or potential double taxation. The documentation should contain a detailed functional analysis to illustrate where value creating activities are performed and substantiate whether a profit split should be used. Multinational companies should also ensure that their intercompany agreements are updated to reflect their desired transfer pricing outcome. They then must monitor the actual conduct of companies involved to ensure that the division of functions and risks matches the agreements, as tax authorities will generally look to facts and circumstances rather than the form of agreements.

Endnotes

1 OECD/G20 BEPS Project, *Actions 8–10: 2015 Final Reports* (pdf version), at p.10 (Executive Summary).

France: Focus On Macron's Tax Program

by Stéphane Gelin, Partner, International Tax, and Quentin Thouéry des Hivernals, Lawyer, International Tax, CMS Bureau Francis Lefebvre



Introduction

Emmanuel Macron, new President of the French Republic, appointed his government on May 17, 2017. Macron has been identified since the beginning of his political career as a liberal democrat, supporting an incentivizing tax policy for companies. The appointment of Prime Minister Edouard Philippe and also key ministers such as Bruno Le Maire (Economy Minister) and Gerald Darmanin (Budget Minister), who were all members of the conservative right-wing party "Les Républicains," seems to confirm that policy will continue in this direction. In the coming months, the measures announced in the Macron campaign plan will be implemented, provided that sufficient support is achieved in the legislative elections in June.

The most significant tax measures promoted by Macron are described hereafter on the basis of details provided during the presidential campaign, but no official text exists at the time of writing. Taxpayers should have a more complete vision of the evolution of tax law for the five-year presidential mandate in the coming months, to the extent that an outline law defining the administration's tax plans for the whole period should be voted on later in 2017. According to our information, this law will be prepared during the summer and submitted to Parliament in the autumn.

1. Tax And Levies On Companies

Corporate income tax

The standard corporate income tax rate in France is currently 33.33 percent, and is among the highest in the European Union. The Finance Act 2017 planned a progressive decrease of this rate to reach 28 percent in 2020. Macron wants to go further, by introducing a gradual decrease of the rate to reach 25 percent in 2022. Moreover, a special reduced rate would be created for small businesses.

Additionally, the European Common Consolidated Corporate Tax Base (CCCTB) project would be continued by a French initiative in favor of a better convergence of the corporate income tax rates of the EU member states.

Decrease of levies

The Tax Incentive for Competitiveness and Employment (*Crédit d'Impôt pour la Compétitivité et l'Emploi*, CICE) is a tax credit amounting to 7 percent of individual gross wages where this does not exceed 2.5 times the minimum wage (SMIC). As an equivalent of a reduction of social contributions, this tax incentive would be removed and replaced by a durable decrease of employer contributions.

During their first year of activity, micro-businesses would be exempted from levies, and the upper limit of turnover to benefit from this exemption would be doubled.

The social security scheme for independent professionals (*Régime Social des Indépendants*, RSI) such as traders and freelancers would be integrated with the general social security regime, without increasing their share of levies. The RSI is often considered to not be well adapted to the needs of professionals and requires complex administrative processes.

2. Tax And Levies On Individuals

Individual income tax

The pay-as-you-earn (PAYE) system was the most noteworthy measure of the last Finance Bill. Under the current regime, French taxpayers pay tax during the current year based on what they earned in the previous year, but in future the tax due will be automatically deducted from their monthly salaries, in an employer based PAYE system as in place in most European countries. This reform was planned to be effective as from January 1, 2018. However, Macron has announced that an additional audit of the organizational consequences of this reform must be performed before deciding in July on its first implementation period. Indeed, such a reform will require fluent exchange of information between tax authorities and those employers that will collect tax from their employees. Thus, the coming into effect of this measure would be postponed to 2019.

Passive income: introduction of a flat tax

Under the current taxation rules, capital gains, interest, dividends and assimilated income are included in the taxpayer's global taxable income, which faces progressive rates up to 45 percent plus various social contributions amounting to 15.5 percent. To encourage investment, a unique flat tax of 30 percent would be introduced, while keeping the possibility of opting for the progressive scale.

Social contributions

An increase of 1.7 percent of the *Contribution Sociale Généralisée* (CSG) is planned. The rate of the CSG, which consists of a withholding tax on most revenues, is currently 7.5 percent on wages. This increase should however not concern modest retirement pensions and unemployment benefits, but income from capital would be within the scope of this measure.

The social contributions on salaries regarding health and unemployment would be reduced in return for the increase of the CSG. For employees with a net salary of EUR2,200 (USD2,464) per month, the gain would be equivalent to EUR500 per year.

The exemption from social contributions on overtime was introduced in 2007, but removed during François Hollande's mandate. Macron wishes to re-establish this exemption, which would still not be applicable to income tax. This measure would include a deduction of EUR0.50 per hour on employer's contributions for companies with more than 20 employees, and a full exemption of social contributions paid by employees on overtime (both social contributions and CSG-CRDS).

Wealth tax

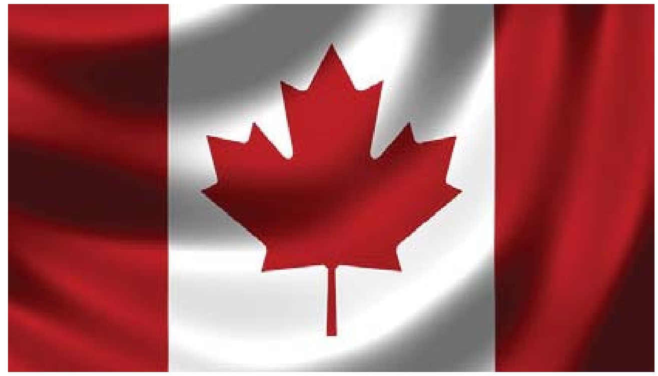
A wealth tax (*Impôt de Solidarité sur la Fortune*, or ISF) applies to individuals with net assets in excess of EUR1.3m. The tax base currently does not include professional assets or works of art, so as to support both the general economy and the art sector. Macron wants to go further by transforming the ISF into a wealth tax on real estate, thereby excluding from its tax base all non-real estate assets that would be considered as investments, in favor of the development of the economy. The threshold of EUR1.3m and the progressive scale of the ISF would remain the same.

Dwelling tax

The dwelling tax (*Taxe d'Habitation*) is levied on persons who have the use or the disposal (owners or tenants) of properties used as accommodation. From 2018 until 2020, an exemption from this tax would be progressively introduced through a three-step plan for around 80 percent of taxpayers, especially those whose taxable income is individually less than EUR20,000.

Environmental tax law

The diesel tax regime is currently more advantageous than the regime regarding petrol. The taxation of these two fuels would be harmonized by 2022.



Canada: More Ready Than Ever For CbC Reporting

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Introduction

Further to the introduction of section 233.8 into the *Income Tax Act* (Canada) (**Act**) in the fall of 2016, the Canada Revenue Agency (the **CRA**), the administrative body responsible for the enforcement of the Act, issued form RC4649, Country-by-Country Report, and RC4651 Guidance on Country-by-Country Report. Subject to some notable differences, Canada's guidance is consistent with the Organisation for Economic Co-operation and Development's (**OECD**) recommendations.

On October 21, 2016, federal Finance Minister Bill Morneau tabled a notice of ways and means motion that implemented country-by-country reporting into Canadian tax legislation. The measures implemented into Canadian law were consistent with the minimum standard recommended in Action 13 of the OECD's base erosion and profit shifting initiative.

The Canadian legislation requires multinational enterprises with total annual consolidated group revenue of EUR750m (USD838.5m) or more to file country-by-country reports. The filing deadline for a country-by-country report depends on the fiscal year end of the entity. A country-by-country report is required to be filed in Canada for fiscal years of multinational enterprise groups beginning on or after January 1, 2016.

Since the implementation of country-by-country reporting, Canadian tax practitioners have urged taxpayers to think about country-by-country reports in advance of the filing deadline in order to ensure consistency between the various tax documents filed. This advice was difficult to adhere to as there was no guidance from the CRA about the precise method of enforcing the newly enacted country-by-country provision. Fortunately, this has changed with the CRA's release of the country-by-country reporting form and its accompanying guidance. Given that the first country-by-country report for a multinational enterprise could be filed this year, it is not surprising that the CRA has stated that it intends to provide a reasonable degree of flexibility for filing a country-by-country report in Canada for the initial reporting year.

RC4649 – Country-By-Country Reporting Form

The RC4649 form released by the CRA follows the format suggested by the OECD. The form requires taxpayers to provide some basic information about the reporting entity, the role of the entity in the OECD's reporting hierarchy (*i.e.*, whether the entity is the ultimate parent entity, surrogate parent entity, or constituent entity), and certain other reporting metrics. The country-by-country reporting form also requires taxpayers to provide additional details on constituent entities, including the taxpayer's identification number and the location of the business.

RC4651 – Guidance On Country-By-Country Reporting Form

The CRA's guidance on country-by-country reporting, a 17-page document, covers many key areas of the country-by-country initiative that are also covered in the OECD guidance. The CRA openly acknowledges that the seeds of the country-by-country reporting were planted by the OECD.

However, the CRA takes a number of views that are divergent from those of the OECD guidance and takes the position that where there are differences between the OECD model legislation and the Canadian country-by-country reporting legislation, the Canadian country-by-country reporting legislation takes precedence. Taxpayers need to be mindful of the differences to ensure that they are fully compliant with Canadian tax law.

Taxand's Take

Certain approaches advocated for by the CRA differ from those recommended by the OECD. Circumstances could arise where Canadian practices differ from those of the OECD. It is expected that in these situations the CRA will likely take a position that is aligned with Canadian practices rather than those of the OECD. As a result, it is extremely important that multinationals with Canadian operations are mindful of the unique aspects of Canadian country-by-country reporting requirements.

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The EU Common Consolidated Corporate Tax Base Proposals

by Stuart Gray, Senior Editor,
Global Tax Weekly

With the French and German governments having pledged to redouble their efforts to drive forward deeper political and economic integration within the EU, plans for a common EU corporate tax base have been placed firmly back on the bloc's agenda.

Indeed, following the May 23 meeting of EU finance ministers, EU Vice-President Valdis Dombrovskis said there is a broad consensus among European finance ministers on the principle of greater tax harmonization.

However, as we shall see, this particular EU tax project is not going to be easy to complete. As Dombrovskis noted in his remarks, given the complexity of the measures proposed, the Commission has opted for a staged implementation, with member states focused on achieving a political agreement on the rules for calculating a common corporate tax base (CCTB), including certain provisions against tax avoidance. Consolidation (thus, a common *consolidated* corporate tax base, or CCCTB) is left for the second stage.

Nevertheless, the EU has accorded this proposal high priority given its potential for simplifying corporate tax rules, and for reducing tax avoidance. This article therefore looks at the origins of the CCCTB and the main provisions in the recently repackaged proposal, and weighs up the pros and cons of the concept.

Background

The idea for a common EU corporate tax base is far from new. But, as is almost customary for an EU-level initiative that will bring major changes to rules and regulations in all member states, the proposal is politically challenging, and has been much debated.

The policy was first presented in a European Commission Communication published on October 23, 2001, and confirmed in another Commission Communication on November 24, 2003. A public consultation was then held in 2003 concerning the use of international accounting standards as a possible starting point for a common EU corporate tax base.

In July 2004, a Commission non-paper was presented before being discussed at the informal meeting of the European Council of Finance Ministers (Ecofin) in September that year. Broad support was expressed at the meeting for the creation of a Commission Working Group to progress work on the common tax base.

The CCCTB Working Group had its first meeting on November 23, 2004, and held 12 subsequent meetings, with the last one taking place May 14–15, 2008. The role of the Working Group was to provide technical assistance and advice to the Commission, and it had the following as its main objectives:

- To examine from a technical perspective the definition of a common consolidated tax base for companies operating in the EU;
- To discuss the basic tax principles;
- To discuss the fundamental structural elements of a common consolidated tax base; and
- To discuss other necessary technical details such as a mechanism for "sharing" a consolidated tax base between member states.

Experts from all member states and the Commission Services participated in the Working Group. Contributions were made in a technical capacity, and no member state was called upon to make political commitments. Furthermore, participation by a member state did not commit it to implement a common consolidated tax base. The Commission was also keen to ensure contributions to the work by experts from business and academia, and in December 2005 the Working Group met in an extended format for the first time.

On May 2, 2007, the Commission adopted another Communication, on "Implementing the Community Program for improved growth and employment and the enhanced competitiveness of EU business: Further Progress during 2006 and next steps towards a proposal on the Common Consolidated Corporate Tax Base."

Then, for the Ecofin meeting of September 27–28, 2007, the Commission Services prepared a working paper on "CCCTB: possible elements of a technical outline," which set out a possible outline of the principles of a common consolidated corporate tax base by beginning to bring the various structural elements of the base together into a coherent set of rules. Finally, on March 16, 2011, a draft Directive arrived incorporating the CCCTB.[1]

Revived And Repackaged CCCTB

While the CCCTB had the backing of influential member states – notably France and Germany, which have at various points explored the idea of harmonizing their own corporate tax systems – the proposal represented a step too far for others, especially those members states sensitive to the issue of tax sovereignty. And after it became impossible to reach a political agreement on the draft directive, the proposal was sidelined.

Nevertheless, energized by its prominent role in driving international cooperation to combat base erosion and profit shifting (BEPS), the Commission revived the plan in 2015, and in June that year a revised proposal was outlined as as part of its corporate tax reform Action Plan. Crucially, the CCCTB was sold by the Commission as a key weapon in the fight against tax avoidance and aggressive tax planning, as well as a simplification initiative.

"The CCCTB can deliver on all fronts, significantly improving the Single Market for businesses, while also closing off opportunities for corporate tax avoidance. Negotiations are currently stalled on the Commission's 2011 proposal for a CCCTB. However, there is a general consensus that they need to be revived, given the major benefits that the CCCTB offers," the Commission stated at the time.[2]

In October 2015, the Commission launched a public consultation on the proposals, and in June 2016, Pierre Moscovici, the EU Commissioner for Economic and Financial Affairs, Taxation and Customs, informed the Berlin Tax Forum of his determination to see through the introduction of a common corporate tax base. "The CCCTB will complete the Single Market for businesses, from a tax perspective," he argued.[3] The proposal would therefore be re-launched, again, in revised form towards the end of 2016, Moscovici added.

The CCCTB was re-launched in October 2016. However, recognizing that the original CCCTB was too ambitious, the initiative has been broken down to a two-step process. Another key change would make the rules mandatory for the biggest multinational groups operating in the EU with global revenues exceeding EUR750m (USD840m) a year – the same threshold as currently applies for country-by-country reporting under the OECD's BEPS project.

In summary, under the new two-stage approach, harmonized rules would be introduced on how to calculate a company's tax base in all member states. Then, tax revenues would be collected and distributed among member states under a formulary apportionment approach, whereby revenues would be allocated based on factors such as turnover, sales, and employment levels. These steps are described in more detail in the following sections.

The Common Corporate Tax Base

The first step towards an EU-wide corporate tax system, the Proposal for a Council Directive on a Common Corporate Tax Base (the CCTB Proposal),[4] lays down common corporate tax rules for computing the tax base of companies and permanent establishments in the EU. The Explanatory Memorandum to the CCTB Proposal describes the following provisions.

Scope

The directive will be mandatory for companies which belong to groups beyond a certain size. The criterion for fixing a size-related threshold will refer to the total consolidated revenue of a group which files consolidated financial statements. Furthermore, to reach a degree of coherence between the two steps (*i.e.*, common corporate tax base and CCCTB), companies will be required to meet the conditions for consolidation in order to fall within the mandatory scope of the common base. This will ensure that once the full initiative materializes with the adoption of consolidation and the apportionment formula, all taxpayers under the rules of the common base will automatically move into the CCCTB scheme. These common rules will also be available, as an option, for those companies which do not comply with these conditions.

Definition of a permanent establishment

The concept of a permanent establishment (PE) is related closely to the post-BEPS recommended definition in the OECD Model Tax Convention. Differently from the 2011 proposal, the revised definition covers only PEs situated within the EU and belonging to a taxpayer who is resident for tax purposes within the EU. The aim would be to ensure that all concerned taxpayers share a common understanding and to exclude the possibility of a mismatch due to divergent definitions. It was not seen as essential to put forward a common definition of PEs situated in a third country, or in the EU but belonging to a taxpayer who is resident for tax purposes in a third country. The third-country dimension is thus left to be dealt with in bilateral tax treaties and national law.

Tax base

The tax base is designed broadly. Therefore, all revenues will be taxable unless expressly exempted. Income consisting of dividends or proceeds from the disposal of shares held in a company outside the group will be exempt for participations of at least 10 percent, in order to prevent the double taxation of foreign direct investment. In the same vein, the profits of PEs will also be exempt from tax in the state of the group's head office.

Taxable revenues

Taxable revenues will be reduced by business expenses and certain other items. The CCTB Proposal will also replicate, with some necessary adjustments to ensure consistency, the list of non-deductible expenses that featured in the 2011 proposal. To support innovation in the economy, the CCTB Proposal introduces a super-deduction for research and development (R&D) costs into the already generous R&D regime of the 2011 proposal.

The baseline rule of the 2011 proposal on the deduction of R&D costs will therefore continue to apply, meaning that R&D costs will be fully expensed in the year incurred (with the exception of immovable property). In addition, taxpayers will be entitled, for R&D expenditure up to EUR20m, to a yearly extra super-deduction of 50 percent. To the extent that R&D expenditure reaches beyond EUR20m, taxpayers may deduct 25 percent of the exceeding amount.

The CCTB Proposal will also grant an enhanced super-deduction for small starting companies without associated enterprises which are particularly innovative (a category that will in particular cover start-ups). In that context, taxpayers who qualify, according to the directive, may deduct 100 percent of their R&D costs in so far as these do not exceed EUR20m and provided that these taxpayers do not have any associated enterprises.

Interest limitation rule

This is a new rule (absent from the 2011 proposal) which features in the Anti Tax Avoidance Directive (ATAD) and was analyzed in detail as part of the BEPS initiative. It limits the deductibility of interest (and other financial) costs, in order to discourage practices of profit shifting towards low-tax countries. The rule envisages the full deductibility of interest (and other financial) costs to the extent that they can be offset against taxable interest (and other financial) revenues. Any surplus of interest costs will be subject to deductibility restrictions, to be determined by reference to a taxpayer's taxable earnings before interest, tax, depreciation and amortization (EBITDA).

Allowance for growth and investment (AGI)

The CCTB Proposal aims to tackle the asymmetry whereby interest paid out on loans is deductible (subject to some limits) from taxpayers' common base while this is not the case for profit distributions. The CCTB Proposal will include a rule against debt bias, in order to neutralize the current framework that discourages equity financing. Taxpayers will be given an allowance for growth and investment according to which increases in their equity will be deductible from their taxable base subject to certain conditions, such as measures against potential cascading effects and anti tax avoidance rules. As part of the review of the common tax base, the Commission shall give specific consideration to the functioning of the AGI as a basis for considering adjustments to its definition and calibration.

Depreciation

The thrust of the rule according to which fixed assets shall be depreciable for tax purposes, subject to certain exceptions, remains the same as in the 2011 proposal. Yet, more assets will now fall within the scope of individual depreciation as medium-life fixed tangible assets have been removed from the pool system.

Losses

As under the 2011 proposal, taxpayers are allowed to carry losses forward indefinitely without restrictions on the deductible amount per year. However, the rule has been reinforced with an anti-abuse provision to discourage attempts to circumvent the rules on loss deductibility through purchasing loss-making companies.

Temporary loss relief with recapture

In order to partially make up for the absence of the benefits of cross-border consolidation during the "first step," there will be a possibility to consider, under strict conditions, losses incurred by an immediate subsidiary or PE situated in another member state. This relief will be temporary since the parent company will add back to its tax base, considering the amount of losses previously deducted, any subsequent profits made by its immediate subsidiaries or PEs. Furthermore, if the incorporation does not occur within a certain number of years, the deducted losses will be reincorporated automatically.

Anti tax avoidance

Similarly to the 2011 proposal, the system under the CCTB Proposal will include an array of rules against tax avoidance. The General Anti-Abuse Rule (GAAR) is drafted in line with the text featuring in the ATAD and is supplemented by measures designed to curb specific types of tax avoidance. The proposal seeks to ensure that the GAAR applies to domestic situations, within the EU and *vis-à-vis* third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ.

The rules also include a switch-over clause, which is targeted against certain types of income originating in a third country. It aims to ensure that income is taxable in the EU if it was taxed below a certain level in the third country. Controlled foreign company (CFC) legislation largely refers to the rule in the ATAD and has the effect of reattributing the income of a low-taxed controlled subsidiary to its parent company in an effort to discourage profit shifting. CFC rules extend to the profits of PEs where those profits are not subject to tax or are tax exempt in the taxpayer's member state.

Hybrid mismatches

Mismatches are likely to persist in the interaction between the framework of the common base and national or third-country corporate tax systems. Therefore, the CCTB Proposal lays down rules whereby one of the two jurisdictions in a mismatch may deny the deduction of a payment or ensure that the corresponding income is included in the common base.

Consolidation

As mentioned above, this proposal is the second step in a staged approach towards an EU-wide corporate tax system with cross-border consolidation of the tax results among members of the same group. The Explanatory Memorandum to the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (the CCCTB Proposal) [5] describes the following provisions.

Scope

Again, unlike the 2011 proposal, which laid down an optional system for all, this proposal will be mandatory for groups of companies beyond a certain size. The criterion for fixing a size-related threshold will refer to the total consolidated revenue of the group which files consolidated financial statements and to which a company belongs. In addition, the common rules will be available, as an option, to a wide scope of groups that fall short of the size threshold.

Definition of "group"

These rules follow those presented in the 2011 proposal, in that eligibility for the consolidated tax group will be determined in accordance with a two-part test based on (i) control (more than 50 percent of voting rights) and (ii) ownership (more than 75 percent of equity) or rights to profits (more than 75 percent of rights giving entitlement to profit). The two thresholds for control and ownership or profit rights shall be met throughout the tax year; otherwise, the failing company will have to leave the group immediately. There will also be a minimum requirement of nine consecutive months for establishing group membership.

Business reorganizations and taxation of losses and unrealized capital gains

The CCCTB Proposal is unchanged from the 2011 proposal, and chiefly involves the treatment of losses and unrealized capital gains on entering and leaving the group.

When a company enters the group, pre-consolidation trading losses will be carried forward to be set off against its apportioned share. When a company leaves the group, no losses incurred during the period of consolidation will be allocated to it. This proposal refines the 2011 rule: in cases of more extensive reorganizations where more than one company has to leave a loss-making group, a threshold is fixed to determine under which conditions companies will no longer be leaving a group without losses, but there will instead be a loss allocation across the consolidated group.

There are rules for dealing with unrealized capital gains which have accrued to fixed assets where the assets are disposed of within a short period after their entry into, or exit from, a group. A member state (in the case of an entry into a group) or the group (in the case of an exit from a group) are given the right to tax underlying capital gains to the extent they were created in their taxing territory. Moreover, the tax treatment of capital gains engrained in self-generated intangible assets calls for a customized approach, which will involve assessing them on the basis of a suitable proxy, *i.e.*, R&D, marketing and advertising costs over a specified period.

Withholding taxes

The proceeds of withholding taxes charged on interest and royalty payments made by taxpayers will be shared according to the formula of that tax year. Withholding taxes charged on dividends will not be shared since, contrary to interest and royalties, dividends are distributed after tax and do not lead to any previous deduction borne by all group companies. These rules are unchanged from the 2011 proposal.

Preventing circumvention of tax exemptions

Unchanged from the 2011 proposal, the tax exemption in favor of disposals of shares will be disallowed if this is illegitimately extended to sales of assets other than shares. This occurs if assets are moved within the group, without tax implications, to a group member which is then sold out of the group. The assets will then benefit, under the cover of a sale of company, from the tax exemption which is provided for share disposals. A similar treatment is provided for intragroup transfers of assets which are then sold out of the group within the current or following tax year. In this case, an adjustment will be made in order to treat the asset as having left the group from the member state where it initially was located, *i.e.*, prior to the intragroup transfer.

Formulary apportionment

Also unchanged from the 2011 proposal, this key element will comprise three equally weighted factors (*i.e.*, labor, assets and sales by destination). The labor factor will be divided into payroll and the number of employees (*i.e.*, each item counting for half) in order to account for differences in the levels of wages across the EU and thereby allow for a fairer distribution. The asset factor will consist of all fixed tangible assets. Intangibles and financial assets will be excluded from the formula due to their mobile nature and the risks of circumventing the system. These factors and weightings are an attempt to ensure that profits are taxed where they are actually earned. By exception, where the outcome of the apportionment does not fairly represent the extent of business activity, a safeguard clause will provide for an alternative method of income allocation.

As the general scheme of formulary apportionment cannot address the specificities of certain industries, there will be rules on adjusted formulae, in order to better fit the needs of sectors such as financial services and insurance, oil and gas, and shipping and air transport.

Administrative procedures

Unlike the 2011 proposal, the common administrative rules in the CCCTB Proposal are limited to the consolidated group. As a matter of principle, single taxpayers who opt to apply the rules under the "first step" will continue to fall within their national administrative provisions.

Groups will deal with a single tax administration ("principal tax authority") in the EU; this is also referred to as the "one-stop-shop." This will be based in the member state where the parent company of the group ("principal taxpayer") is resident for tax purposes. Audits will be initiated and coordinated by the principal tax authority. The national authorities of any member state in which the profits of a group member are subject to tax may request the initiation of an audit.

The competent authority of the member state in which a group member is resident or established may challenge a decision by the principal tax authority concerning the notification that there is a group or an amended assessment. For this purpose, an action will be brought before the courts of the member state of the principal tax authority. Disputes between taxpayers and tax authorities will be dealt with by an administrative body which is competent to hear appeals at first instance according to the law of the member state of the principal tax authority.

Weighing Up The CCCTB

The Commission explained that the primary goal of the CCCTB proposal is to strengthen the EU Single Market by making it easier and cheaper for companies to operate across borders within the EU. It argued that it would enable them to file a single tax return for all their activities in the EU through one tax authority, rather than having to file a tax return in every country in which they operate. In addition, after the second phase, companies would be able to offset losses in one member state against profits in another.

Part of the CCCTB's appeal is that it would, in theory, simplify tax administration and compliance for companies operating in the EU. According to the Commission, under the CCCTB, the time spent by companies on annual compliance activities should decrease by 8 percent, while the time spent setting up a subsidiary would decrease by up to 67 percent, making it easier for companies, including SMEs, to establish extra operations abroad.

It is also a major anti tax avoidance initiative. It therefore tackles two major items on the Commission's tax agenda in one go. The CCCTB, the Commission has argued, would eliminate mismatches between national systems and preferential corporate tax regimes, and the formulary apportionment approach would remove the need for transfer pricing rules for related-party dealings within the EU, mitigating the potential for aggressive tax avoidance.

As Pierre Moscovici said upon announcing the repackaged proposals: "With the rebooted CCCTB proposal, we're addressing the concerns of both businesses and citizens in one fell swoop."

Of course, a proposal as comprehensive and wide-ranging as the CCCTB has not been spared critical analysis by businesses and tax experts, and many of the conclusions reached have not been favorable. Indeed, the perception is that the CCCTB could merely replace one set of problems with another.

In response to the Commission's initial CCCTB re-launch in June last year, the Association of Chartered Certified Accountants cautioned that a mandatory system may be difficult to implement. "Member states may not find it palatable to relinquish the complete design and implementation of their corporation tax system, and would probably wish that companies were able to choose," observed Chas Roy-Chowdhury, its Head of Taxation.[6]

What is more, seven national parliaments have objected to the proposals on the grounds that it breaches the principles of subsidiarity, according to Irish MEP Brian Hayes. In areas in which the EU does not have exclusive competence, the principle of subsidiarity sets out the limited circumstances in which the Union may override member states' autonomy where the objectives of a proposed action by a member state cannot be sufficiently achieved by the member states, but can be better achieved at Union level.

Hayes confirmed that the list comprises the Irish, Swedish, Danish, Maltese, and Luxembourgish parliaments, and two chambers of the Dutch Parliament. The UK Parliament published a report "criticizing the proposal but did not issue a formal objection."

Hayes said that while the number of objections is "significant," it is not enough to trigger the EU's so-called "yellow card" procedure. He did nevertheless emphasize that "there is a serious onus on the Commission now to understand the concerns that various member states have on this file." He said that the governments concerned now "have a stronger mandate from their elected representatives going into negotiations." [7]

Others have pointed out that the CCCTB could actually be incompatible with the OECD BEPS project, rather than complementary to it, as it diverges from the current transfer pricing-based approach to multinational taxation. For instance, the Tax Executives institute (TEI) has said adoption of the CCCTB on a compulsory basis by a large number of OECD member countries before the full implementation of the BEPS project "would regrettably indicate [that] the arm's length standard (ALS) and BEPS approach [have] been discounted."

So, far from reducing the incidence of avoidance, the concurrent application of the CCCTB and the ALS may create opportunities for aggressive tax planning, the TEI warned the EU.[8]

In its response to the proposals, Insurance Europe expressed concern that while corporate tax compliance in Europe would be simplified, it could become more complex in other ways. "Some businesses would find increased complexity and compliance costs if CCCTB is applied to EU operations, but not to non-EU operations," it observed.[9]

Furthermore, given the greater importance of tax rates under the CCCTB, the change, on the face of it, should benefit low-tax member states like Ireland. However, modeling by the Economic and Social Research Institute (ESRI) last year concluded that EU-wide adoption of the CCCTB could result in Ireland's potential economic output being 1.5 percent lower.[10] ESRI noted that "if the corporate income on which taxes are levied is shared amongst countries for firms operating in multiple locations, then the risk for a small country such as Ireland is that the tax base here is reduced."

And in something of a double whammy for Ireland, ESRI said that the CCCTB could not only reduce Irish revenues, but also reduce the attractiveness of Ireland's 12.5 percent corporation tax rate, "as it would apply to a smaller share of a multinational enterprise's income."

ESRI added that a number of other countries also stand to lose significantly, with Bulgaria, Romania, and Poland expected to see falls in foreign direct investment. "Apart from Germany, most of the countries that would expect a reduction in tax revenues are small open economies reflecting the redistribution of sole revenues to their sales location rather than production center or headquarters," it noted.

Similar conclusions were drawn by Chartered Accountants Ireland in a report released in December 2015,[11] which states: "In its most extreme incarnation, BEPS or CCCTB could lead to a significant loss of tax revenue in Ireland."

"Under a CCCTB-style apportionment based on capital, sales, and labor, Ireland's share of the tax base from pharmaceuticals could be around 80 percent lower than it is now," the report said. "The potential loss of annual corporation tax revenue for Ireland under these scenarios is between EUR575m and EUR650m."

Conclusion

The CCCTB is seen by the EU as a key initiative that would effectively solve two problems – corporate tax avoidance, and tax complexity – in "one fell swoop," as Moscovici put it. However, it would bring profound change to the EU corporate tax environment, and it seems any advantages brought about by the CCCTB in terms of simplification and revenue generation could be outweighed by possible flaws.

As such, it remains difficult to foresee a political agreement on the CCCTB, at least in the short term, and it may be the case that the proposals are simply too ambitious to be adopted unanimously. Nevertheless, the CCCTB is still very much on the EU's mind, and is arguably now the most important tax project on its agenda. For this reason, businesses in the EU should not dismiss the proposals out of hand, no matter how outlandish they may seem.

Endnotes

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France – Withholding Tax System For 2018

by Elisabeth Toffaloni, Managing Partner, France, Global Tax Network

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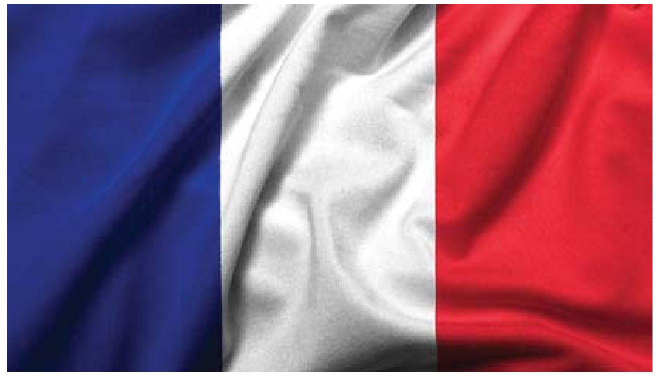

Introduction

The French Finance Act for 2017 was adopted on December 29, 2016, introducing a new withholding tax system coming into force as of January 1, 2018.

Currently, French tax residents file an annual income tax return and pay their income tax a year after the income was received (*i.e.*, for income received in 2016, the income tax is paid in 2017).

As a result of the new French tax law, French tax residents will be subject to a monthly withholding tax on their 2018 income beginning January 1, 2018, rather than paying the 2018 income tax when they file their 2018 tax return in 2019.

Nature Of Income Subjected To Withholding Tax

The scope of income subjected to the new withholding tax system covers most categories: employment income, pensions, replacement income (*i.e.*, unemployment benefits, sick pay, *etc.*), annuities, self-employment income (industrial and commercial, non-commercial, agricultural), and rental income.

Certain types of income will not be subjected to this withholding tax requirement, in particular:

- Gains derived from qualified stock-option and free share schemes;
- Income paid to non-resident taxpayers already subjected to a withholding tax obligation;
- Profit-sharing and incentive plans;

- Capital gains;
- Investment income (already subject to a different tax withholding process).

The Payer Of The Withholding Tax

For salaried employees of French companies, the tax will be withheld by the French employer, based on a specific rate.

For non-salaried income and employees of foreign companies, the tax will be directly withheld from the personal bank account of the taxpayer if they are a French tax resident.

Rates

The taxpayer can choose one of the following three options to determine the withholding tax rate:

- The average income tax rate that was applied for the individual taxpayer during the previous calendar tax year;
- In the absence of the known tax rate, a "neutral rate" may apply;
- Or, if certain conditions are met, the withholding basis or rate can be chosen by the individual taxpayer.

In the last two cases, if tax computed in the return is higher than the amount of tax withheld, the taxpayer will be required to pay the balance due to the French tax authorities before the end of the year. In case of non-payment of any balance due, penalties may apply. If the tax withheld is more than the tax computed in the return, the difference will be refunded by the French tax authorities.

Income Tax Return

There will still be an obligation to submit a yearly income tax return in the year following the year in which the income was received. For example, the tax return for income received in calendar year 2017 would be filed in early 2018.

Transitional Year: A Tax Exemption On The Regular Income Earned In 2017

In switching from a self-assessment to a pay-as-you-earn system, French taxpayers would have been liable to a double tax charge in 2018:

- They would have had to pay their 2017 income tax on the income earned in 2018; and
- They would have been subjected to the withholding tax on the 2018 income in 2018.

To avoid this double tax payment in one calendar year, the French Government will apply a tax credit on regular income earned in 2017, thus eliminating any income tax on the 2017 regular income. The 2017 income tax return will still be filed in 2018 to determine the income tax on all income. Even after the credit is applied, certain exceptional income may result in income tax being due.

Future Tax Filing Timeline

2017:

April–June: Submit your individual tax return for 2016 income.

Summer: You will receive your withholding tax rate. However, you can choose a neutral rate.

October: Your chosen withholding tax rate is sent to your employer.

2018:

January: Tax is automatically withheld from your salary every month and its amount is included on your pay slip.

April–June: You submit your tax return on 2017 income.

September: Your 2018 withholding tax rate is based on the individual's 2017 tax situation.

2019:

April–June: You submit your tax return on 2018 income. The Tax Administration calculates your 2018 income tax.

Summer: If the total amount withheld is higher than the tax due, you get a tax refund in August

September–December: If it is lower, you should pay the balance during the four last months of the year.

Due to the results of the recent election, the implementation of the change may be delayed, or it could possibly be revoked.

Topical News Briefing: GCC VAT – A Movable Feast

by the Global Tax Weekly Editorial Team

Those of us who follow international tax developments on a regular basis will be all too familiar with moving targets when it comes to important tax reforms in one country or another; comprehensive tax reform in the US and the long-awaited goods and services tax system in India are but two from a long list of examples that could be compiled from around the world.

It would appear to be the case, however, that one important tax reform may soon be taken off the pending list, after the United Arab Emirates Government revealed last week that it is on course to implement value-added tax (VAT) on January 1, 2018, simultaneously with the five other members of the Gulf Cooperation Council (GCC): Saudi Arabia, Qatar, Oman, and Kuwait.

Taxpayers in the region have waited a long time for this reform to take shape. The GCC-wide VAT is intended to replace revenues lost from the elimination of tariffs and customs on internal GCC trade, as well as to widen the tax bases of countries largely dependent to this point on hydrocarbon revenues. Initially, the tax was supposed to have been in place by 2012, but certain member states have struggled to lay down the technical and administrative foundations for the measure. Hence, the timetable slipped, and, unhelpfully from a taxpayer's perspective, only vague promises about the tax's introduction were then made by member states until GCC finance ministers approved the VAT framework in June last year, and finally signed it this year.

Despite these promising signs, for taxpayers, the signing of the VAT framework, and the UAE's recent ratification of VAT legislation, certainly doesn't represent a conclusion to the uncertainty. The January 2018 introduction date isn't exactly cast in stone, and member states have until January 2019 to fully implement VAT.

What's more, although we know that the standard rate of the GCC VAT will be 5 percent, and that the oil and gas sector will be exempt, there are a lot of gaps that need filling. It has been agreed that individual states will be able to decide whether to exempt education, local transportation and health services and real estate sales from VAT. It will also be up to the GCC Financial and Economic Cooperation Committee to approve any exemptions on food commodities, should any member states decide to take this course.

Furthermore, the GCC has yet to publish the finer details of the VAT requirements, notably in the area of compliance and administration. While this information is due to be publicized imminently (likely some time in mid-2017), this leaves only six months for businesses to put the appropriate systems in place to ensure compliance with the new tax, such as invoicing, completing the necessary forms, and arranging for VAT payment and recovery. And this change is going to have a fairly profound effect on the way in which companies in the GCC do business, affecting cash flow, pricing, and potentially increasing compliance costs. All of which is hardly ideal preparation for such a transformative measure.

Canada Revenue Agency Held To Its Agreement

by Andrea Schneider, Articling Student,
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This is a regular monthly Canadian Tax Topics feature examining recent Canadian tax cases of special interest, coordinated by John C. Yuan and Christopher L.T. Falk of McCarthy Tétrault LLP. The contributors to this feature are from McCarthy Tétrault LLP, Montreal, Toronto, Calgary, and Vancouver, Canada.

***Rosenberg v. MNR*, 2017 DTC 5011 (Federal Court)**

This case was a judicial review application brought by the taxpayer to review an auditor's exercise of power with respect to issuing a demand letter under section 231.1 of the *Income Tax Act* (the Act). The demand letter at issue was seeking information pertaining to taxation years that had already been reviewed by the CRA, and in respect of which the taxpayer and the Minister had already reached an agreement. This case provides insight into the standard of review applicable to the exercise of power under section 231.1, and demonstrates the court's willingness to uphold agreements between taxpayers and the Minister.

In February 2010, the taxpayer and an auditor signed a letter regarding certain straddle transactions in the taxpayer's 2006 and 2007 taxation years. This letter was the "agreement" at issue in this case, specifically its scope and validity. The letter stated that, after review of the relevant transactions and applicable law, the CRA was satisfied with the taxpayer's reporting position. However, the CRA added that its position may change if:

(1) The taxpayer, the taxpayer's spouse and/or future executors engaged in similar "straddling transactions" in the future; or
(2) If the fact pattern on which the auditor based its conclusions changed.

In January 2013, an auditor who was not a party to the 2010 letter sent a demand letter requesting further information on the 2006 and 2007 returns of the taxpayer. The demand letter specifically stated that the review was in relation to the "straddle loss" in those years. It was not disputed that this "straddle loss" was the same transaction reviewed in 2010.

The taxpayer took the position that the 2010 letter was a binding agreement, which barred the Minister from re-auditing or reassessing the taxpayer's 2006 and 2007 taxation years unless the taxpayer breached the 2010 "agreement." The taxpayer argued that the 2010 letter must be binding in order to bring certainty to arrangements between taxpayers and the CRA. On the other side, the Minister made two key arguments. First, the 2010 letter did not bar an audit, it barred an assessment, and audits and assessments are two different things. Secondly, the Minister argued that if there were an agreement, it would be void as such an agreement would be illegal and contrary to the Act and public order.

The court began its analysis by raising the issue of the standard of review that should apply to this case, an issue that the parties had not raised. The matter under judicial review was the exercise of power by the Minister under section 231.1 of the Act when it issued the demand letter in 2013 despite the "agreement" in 2010. The court stated the default standard of review of a decision by the Minister was reasonableness; however, the court noted that there was a "cogent argument for why reasonableness should not be used." Ultimately, the court decided not to reach a conclusion on the standard of review applicable because, even if the Minister were given a generous standard of review, the Minister's interpretation did not fall "within the range of acceptable and rational solutions."

The court then proceeded to review the subject matter of the dispute, and stated that there were two issues to be determined:

- As a matter of contractual interpretation, what was the scope of the 2010 letter?
- Was the 2010 letter a binding agreement?

On the first issue, the Minister claimed that the interpretation of the "agreement" should be narrow, arguing that it stood only for declining to reassess the 2006 and 2007 taxation years at the point in time of the letter. The court found that this interpretation was unreasonable as the agreement would be valid only on the day it was made, and then invalid the next day. The Minister also tried to argue that in order to determine if the taxpayer had breached the conditions of the "agreement," for example, due to a change in the fact pattern, the Minister should not be precluded from a new review under section 231.1 of the Act.

To determine the scope of the "agreement," the court interpreted the contract using the applicable law, which was the *Quebec Civil Code*. The court found that there was an agreement between the parties whereby the taxpayer benefited from not being reassessed for the 2006 and 2007 tax years if he refrained from conducting business in a way that would create straddling transactions – there was a *quid pro quo*. The court found the agreement to be neither ambiguous nor vague. Further, there was no allegation that the taxpayer's fact pattern had changed or that the taxpayer had engaged in any further straddling transactions.

Lastly, the court determined that the letter clearly stated that the CRA would not proceed with any reassessments of the 2006 and 2007 taxation years regarding the straddling transactions. The court held that based on the following factors the 2013 demand letter was part of the process of proceeding with a reassessment: the 2013 auditor was a member of the Specialty Audit Section of the International and Ottawa Tax Services Office; the 2013 letter stated it was a compliance audit; and the new audit from Ottawa, and not Montreal, had the aim of reassessing the taxpayer.

To address the second issue, whether there was a valid and binding agreement, the court first considered an argument made by the Minister that such an agreement is not valid because an agreement cannot waive the Minister's obligation to enforce the Act. The Minister relied on section 220 of the Act, which states that: "[t]he Minister shall administer and enforce this Act." The court interpreted section 220 and the use of the word "shall," and held that in the context of this provision, the word "shall" was simply Parliament vesting the executive branch with certain powers and jurisdiction. The court added that section 220 requires the Minister to administer and enforce the Act, but does not mandate how this is to be done. The Minister did not waive its duty by entering into the 2010 "agreement," but rather chose to enter into the agreement as a means of administering and enforcing the Act.

The court then considered whether the agreement was valid. The Minister argued that, based on the *Galway (74 DTC 6247)* line of cases, it cannot be bound by an agreement where, if the facts are known and the law is understood, the agreement is to assess an amount that is less than the amount that the Act provides. The court held that this proposition from the *Galway* line of cases was correct but was limited in scope and only stands for the position that once the facts are determined, the law is applied and there is one result, an agreement cannot depart from that. The court went on to add that, from a policy standpoint, tax disputes are settled every day and settlement should be encouraged. An agreement that does not encroach on the *Galway* line of cases will be enforceable. In this case, the assessment of the taxpayer's liability had already taken place in 2010 and no evidence was provided to suggest that it was not justifiable on the facts and law. In fact, the agreement stipulated that if the facts changed, the Minister could proceed with a reassessment.

Lastly, in considering the second issue of the validity of the contract, the court considered whether or not it would be contrary to public order to find an agreement that limited the Minister's powers to be valid. The Minister put forward a bold proposition that the "law is clear, no agreement between the Minister and taxpayers can interfere with the Minister's powers to conduct audits." The court held that legislative power cannot be fettered, but there was no such fettering in this case. The real question is whether or not a contract is compatible with the objectives of the legislation. In conclusion, the court held that the Minister was not fettering her discretion, and that the agreement was in furtherance of the legislative goals as it allowed the matter to be settled.

Topical News Briefing: Ever Closer Union Lite

by the Global Tax Weekly Editorial Team

If a major reason why the United Kingdom felt the need to withdraw from the EU was because, increasingly, the interests of individual member states were being superseded by the collective, then the timing of its withdrawal is particularly appropriate.

In the last few days, since the pro-EU Emmanuel Macron became the first independent candidate to become President of France, the EU – or its most influential constituents – seems to have a renewed commitment to deeper political and economic integration between member states. And the harmonization of the bloc's tax rules would be a key step in realizing this commitment.

At the recent high-level meetings between the new French administration and the German government, tax harmonization appeared to be high on the agenda in discussions about closer cooperation between France and Germany, and within the EU as whole. Their finance ministers talked of promoting the repackaged common consolidated corporate tax base (CCCTB) proposal, and suggested that they were prepared to lead by example by exploring the possibility of merging the French and German corporate tax systems.

Recent developments have also indicated that the EU is making steady progress towards harmonizing its rules, especially in the area of anti-avoidance, with the bloc leading – some say too far – the international response against base erosion and profit shifting (BEPS). As reported in this week's issue of *Global Tax Weekly*, the European Council has formally adopted a new anti-avoidance directive, aimed at closing down hybrid mismatches between EU tax systems and those of non-EU countries, and has reached a compromise on a new draft directive aimed at resolving double taxation disputes within the EU.

Indeed, the European Commission's Anti-Avoidance Package is described as an "ambitious agenda for fairer, simpler and more effective corporate taxation in the EU," containing measures to prevent aggressive tax planning, boost tax transparency, and create a level playing field for all businesses in the EU.

However, a unified front against tax avoidance is one thing; there is, after all, a broad international consensus to tackle aggressive tax avoidance in all its forms. But harmonizing national tax regimes is quite another proposition, involving difficult questions about sovereignty and subsidiarity. Here, it would appear, the EU is split.

The Commission has always insisted that while it supports a harmonized EU corporate tax base, it is not seeking harmonization of tax rates. This could be a tacit acknowledgment that such a move would encroach on national tax sovereignty

But it is clear that there is a core of member states that are more sympathetic to the idea of closer harmonization on corporate tax rates. And, as also reported in this week's issue of *Global Tax Weekly*, there appears to be more support for a single corporate tax rate in the high-tax member states, including among business leaders in these jurisdictions.

The idea that the high-tax member states would be able to take the low-tax EU countries, like Ireland, Estonia and Cyprus, with them towards tax harmonization is difficult to envisage. However, as with the introduction of the single European currency, a future whereby parts of the EU are more harmonized than others is far less unrealistic. Indeed, the EU's recent White Paper on the future of the Union suggests this is likely to be the way forward for those member states seeking more integration.

Taxpayers may therefore be affected by some profound changes to taxation in the EU in the years ahead. They should also be prepared for the prospect of a two-speed Europe.

Malmström: EU, US Need More Time On Trade Deal

EU Trade Commissioner Cecilia Malmström has said that the case remains for an ambitious trade agreement with the US, but that both sides "need a bit more time."

In a speech to the European Business Summit, she acknowledged that the Transatlantic Trade and Investment Partnership (TTIP) "was left in the freezer in January." She noted that there have been "protectionist measures coming from the US," and with a new US Trade Representative appointed last week, the EU needs "time to evaluate and reflect."

Malmström added that the EU will work to ensure it maintains a constructive relationship with the US.

"There's still a case for an ambitious trade agreement between us; not to mention a huge potential. But we both need a bit more time, and to know there was shared ambition and common ground," she said.

Turning to the EU's broader trade agenda, she said the agreement with Canada has been approved at an EU level and was recently voted on in the Canadian Senate. The deals with Singapore and Vietnam still require ratification.

Malmström explained that good progress has been made in negotiations with Japan, with "both political commitment and substantial technical engagement to our talks."

Talks with Mercosur are likewise progressing well, and the EU and Mexico intend to speed up their negotiations, with a view to concluding an agreement before the end of the year.

Malmström anticipates that talks with Chile, Australia, and New Zealand will open in the autumn.

Mexican Sugar Industry Seeks Equal Border Tax On US Sugar

Mexican sugar producers are seeking the introduction of anti-dumping duties (ADs) on US fructose, similar to those proposed to be introduced by the US.

On May 3, the US Department of Commerce said it would restore ADs and countervailing duties (CVDs) on Mexican sugar exports if alternative action cannot be agreed by June 5.

In October 2014, Commerce reached final affirmative determinations in AD and CVD investigations regarding sugar imported from Mexico. However, in 2014, an agreement was signed with the Government of Mexico and with Mexican sugar producers that suspended ADs and

CVDs on sugar imports. The agreements were to prevent imports from being concentrated during certain times of the year, to limit the amount of refined sugar entering into the US, and establish minimum price mechanisms.

However, concerns were raised with Commerce in 2016 that the agreements were not effectively remedying the injury faced by US firms. Efforts have been ongoing between the US and Mexico to resolve the issues, but Commerce said negotiations have now "reached an impasse."

Mexico's National Chamber for the Sugar and Alcohol Industry (CNIAA) has petitioned the Mexican Government to introduce a reciprocal tax on US sugar. It added that this would reduce the amount of US sugar imported to the country by a third.

However, the organization said it was confident that both countries could instead reach an agreement on sugar tax without resorting to "an absurd trade war."

EU Council Adopts Directive On Hybrid Mismatches

On May 29, 2017, the European Council formally adopted a new anti-avoidance directive, which aims at closing down hybrid mismatches between EU tax systems and those of non-EU countries.

Such mismatches can result in either double deductions for the same expense, or deductions for an expense without the corresponding receipt being fully taxed. Hybrid mismatch outcomes can arise from hybrid financial instruments (both equity and debt) and hybrid entities, and from arrangements involving permanent establishments. They can also arise from hybrid transfers and dual resident companies.

The draft measures are said to be the latest of a number of measures designed to prevent tax avoidance by large companies. They would prevent firms from exploiting disparities between two or more tax jurisdictions to reduce their overall tax liability through these arrangements.

The agreement for the new provisions – "ATAD 2" – will ensure that hybrid mismatches of all types cannot be used to avoid tax in the EU, even where the arrangements involve third countries. The proposal addresses hybrid mismatches with regard to non-EU countries, given that intra-EU disparities are already covered by the Anti Tax Avoidance Directive adopted in July 2016.

The directive was adopted at a meeting of the Competitiveness Council, without discussion. This follows an agreement at a meeting on February 21, 2017. The European Parliament gave its opinion on April 27, 2017.

Member states will have until January 1, 2020, to transpose the directive into national laws and regulations (January 1, 2022, for one specific provision).

Welcoming the development, Edward Scicluna, Minister for Finance of Malta, which currently holds the Council presidency, said: "Our aim here is to tackle one of the main practices that multinational companies have devised to reduce their tax bills. The directive adds to the rules we adopted last year to tackle the most common forms of tax avoidance. It will also ensure implementation of the OECD's recommendations."

EU Reaches Agreement On Resolving Tax Treaty Disputes

The European Council has reached a compromise on a new draft directive aimed at resolving double taxation disputes within the EU.

The draft directive, which was agreed at a May 23 meeting, seeks to improve the mechanisms used for resolving disputes between member states when disputes arise from the interpretation of agreements on the elimination of double taxation in connection with the adjustments of profits of associated enterprises.

The draft directive requires dispute resolution mechanisms to be mandatory and binding, with clear time limits and an obligation to reach results. It sets out ways to secure a tax environment where compliance costs for businesses are reduced to a minimum.

The text allows for a mutual agreement procedure to be initiated by the taxpayer, under which member states must reach an agreement within two years. If the procedure fails, an arbitration procedure would be launched to resolve the dispute within specified timelines. For this, an advisory panel of three to five independent arbitrators would be appointed together with up to two representatives of each member state. The panel's opinion for eliminating the double taxation in the disputed case would be binding on the member states involved unless they agree on an alternative solution.

The Council reached a compromise on the following issues:

- Scope of the directive – *i.e.*, the types of disputes that should be covered. The Council agreed on a broad scope but with the possibility, on a case-by-case basis, of excluding disputes that do not involve double taxation;
- Criteria to ensure the independence of those appointed to a pool of independent arbitrators. It was agreed that arbitrators must not be employees of tax advice companies or have given tax advice on a professional basis. Unless agreed otherwise, the panel chair must be a judge; and
- The possibility of setting up a permanent structure to deal with dispute resolution cases if member states so agree.

The Council will adopt the directive once the European Parliament gives its opinion. Member states will have until June 30, 2019, to transpose the directive into national laws and regulations. It will apply to complaints submitted after that date on questions relating to the tax year starting on or after January 1, 2018. The member states may however agree to apply the directive to complaints related to earlier tax years.

Edward Scicluna, Minister for Finance of Malta, which currently holds the Council presidency, welcomed the Council's compromise, adding: "This directive is an important part of our plan for strengthening tax certainty and improving the business environment in Europe."

Firms In High-Tax EU States Support Single EU-Wide Rate

Most European businesses (53 percent) support the creation of a single EU-wide corporate tax rate, according to a survey by Grant Thornton.

Support is particularly strong among business leaders in Italy (70 percent), Spain (66 percent), France (64 percent), and Greece (62 percent), where rates are higher than the European average, despite recent cuts in Italy, France, and Germany.

According to the survey, just 6 percent of businesses in Ireland, 10 percent in Estonia, 28 percent in the Netherlands, and 30 percent in Lithuania supported the idea of an EU-wide regime.

"Corporate tax cuts are politically in-fashion as a route to reviving demand and stimulating investment," Francesca Lagerberg, Global Leader for Tax Services at Grant Thornton, said. "Lowering the rate to 15 percent is one of [US] President Trump's big economic promises, so it comes as little surprise to learn that, in eurozone countries where rates are low, most businesses do not welcome the prospect of [corporate tax rates] being raised [above this] to meet an EU-wide standard."

She noted, however: "Our data tells us that business leaders want a more even playing field in future."

New OECD Guidance On Hard-To-Value Intangibles

The OECD has launched a consultation on a discussion draft which provides guidance on the implementation of the approach to pricing transfers of hard-to-value intangibles (HTVIs) described in Chapter VI of the OECD's Transfer Pricing Guidelines.

The final report on Actions 8–10 of the BEPS Action Plan (*Aligning transfer pricing outcomes with value creation*) mandated the development of guidance on the implementation of the approach to pricing HTVIs contained in Section D.4 of Chapter VI of the Guidelines.

This discussion draft, which the OECD said does not yet represent a consensus position of the Committee on Fiscal Affairs or its subsidiary bodies, presents the principles that the OECD says should underline the implementation of the approach to HTVIs. It provides examples illustrating the application of this approach, and addresses the interaction between the approach to HTVIs and the mutual agreement procedure under an applicable treaty.

The OECD is seeking comments solely on the proposed guidance contained in the discussion draft for the implementation of the approach, rather than on the findings on how to approach pricing HTVIs.

India Launches 'Operation Clean Money' Portal

The Indian tax authority has launched the Operation Clean Money portal, which is intended to support its efforts to challenge potentially non-compliant taxpayers who may have failed to declare income deposited in bank accounts.

Operation Clean Money was initiated by the Income Tax Department (ITD) on January 31, 2017. It looked into large cash deposits between November 9 and December 30, 2016, and detected 1.8m taxpayers whose income did not tally with the amount being reported for tax purposes.

Those taxpayers were then required to submit information about that income, to verify that it was not undeclared income and funds were not being laundered. Around 1.3m taxpayers made declarations; enforcement action is being taken in the remaining cases.

The department said it has subsequently identified a further 371,000 accounts linked to 158,000 taxpayers, which it has added to its investigations.

The new portal includes guidance for taxpayers, including step-by-step guides to making declarations, and answers to frequently asked questions, among other things.

"The [ITD] urges all taxpayers and citizens to actively participate in Operation Clean Money for a common cause of building a proud nation, which runs on the strength of the honest taxpayers," the Government said.

UAE: Smaller Businesses Less Prepared For Forthcoming GST

According to a survey published in May 2017, more than half of businesses based in the United Arab Emirates (UAE) do not have an implementation strategy in place for the forthcoming introduction of VAT in the territory from January 2018.

The poll was conducted by recruitment firm Hays, which questioned more than 100 "senior decision-makers and finance professionals" from both the private and public sectors on their VAT implementation strategies and budget allocations.

According to the survey, 52 percent of those questioned between February and April 2017 said they did not have an implementation strategy in place, while 60 percent had not allocated an additional budget for dealing with the transition, opting instead to implement changes using existing employees and resources.

Larger organizations were found to be more likely to have a plan in place, with 73 percent of businesses questioned with more than 1,500 staff stating that they have a strategy; 7 percent retaining a budget of over AED100,000 (USD27,224) for implementation; and over half (53 percent) anticipating hiring non-finance staff. This compares with 42 percent, 3 percent, and 23 percent, respectively, for smaller organizations (those employing fewer than 250 staff).

Commenting on this finding, Chris Greaves, Managing Director of Hays Gulf Region, observed: "This correlation is not overly surprising for two reasons. Firstly, the larger organizations, typically multinational companies, are well practiced in the processes and procedures around VAT, having implemented practices and paid it in other geographical locations. They are therefore at an advantage for implementing here in the UAE and can better anticipate the level of expertise, budget and planning required."

"The second reason is that the Ministry of Finance has announced that some small businesses will be safeguarded from VAT for this initial phase. However, which organizations will fall into this threshold is so far unknown. What is clear, is that no organization is completely exempt from the effects of this new era of change.

Americans For Tax Reform Backs Simple Tax Form For Seniors

Americans for Tax Reform (ATR) has urged all members of Congress to support a bill aimed at simplifying tax filing for American seniors.

ATR president Grover Norquist wrote to Congressman Bill Posey (R – Florida), who is introducing the Seniors' Tax Simplification Act. The bill would create a new tax form, 1040SR, aimed at senior citizens with relatively simple tax affairs. It would include the most common types of income reported by seniors, such as interest, dividends, capital gains, Social Security benefits, and pension payments.

Norquist noted that a similar form already exists: form 1040EZ. However, this covers some forms of income not relevant to those who have retired.

He suggested that introducing form 1040SR could benefit some 23m taxpayers.

Norquist said: "All members of Congress should have no hesitation supporting and cosponsoring this helpful legislation."

Seychelles Confirms Penalties For Late Business Activity Statements

As of June 1, the Seychelles Revenue Commission is applying penalties for late submission of business activity statements (BAS).

Through the BAS, businesses must report and pay a number of taxes, such as goods and services tax, pay-as-you-go (PAYG) tax installments, PAYG withholding, excise tax for locally manufactured goods, and income and non-monetary benefits tax.

Following the entry into force of Statutory Instrument 1 of 2017, the following penalties apply from June 1:

- SCR500 (USD36) in the case of a small business, plus SCR50 for each week or part of a week that the form is not furnished;
- SCR1,000 for medium businesses, plus SCR100 for each week or part of a week; or
- SCR5,000 in the case of a large business, plus SCR500 for each week or part of a week.

2018 Budget: Tax Reform To Be 'Deficit-Neutral'

The Trump Administration's first full budget reaffirms the tax reform proposals put forward recently by the President's team, and indicates that a reform package will be deficit-neutral.

The Budget blueprint sets out the spending commitments and revenue projections for the fiscal year 2018. It also broadly sets out policies that underpin the projections, including those for tax reform, which the Administration estimates will not add to the deficit, despite studies that point to the contrary.

The Budget sets out the key measures of "a comprehensive overhaul of [the] tax code" as envisaged by the Administration. It talks of lower rates for individuals and businesses, although it does not specifically mention a headline 15 percent corporate tax rate, as previously mooted by the President.

The Budget states that the US would "eliminate most special interest tax breaks," repeal the alternative minimum tax, abolish Estate Tax, and adopt a territorial tax system. The transition to this would see a one-time repatriation tax on accumulated overseas profits. It also reaffirms the Republicans' objective of repealing Obamacare and associated taxes, such as the 3.8 percent surcharge on capital gains and dividends.

The document also reiterates the intention to "expand the standard deduction" as part of a raft of policies delivering "tax relief for American families – especially middle-income families."

Mnuchin Grilled By Senate Committee On Tax Reform Plan

The Senate Committee on Finance has questioned the Trump Administration's math on the growth estimates underlying the assertion that tax reform will be deficit-neutral.

The Treasury Secretary, Steven Mnuchin, was appearing before the Committee to discuss the Budget request for fiscal year 2018 and tax reform policy options. Mnuchin was accused by Ranking Member Ron Wyden (D – Oregon) of using math that "would make Bernie Madoff blush."

Wyden referred to reports that the Budget double-counts additional federal revenue over the next decade. "Aren't you double-counting the same USD2 trillion to pay down deficits that you claim will pay for tax reform?" he asked Mnuchin.

The Budget, released on May 23, stated that a tax reform package would be deficit-neutral. Mnuchin stated that not all the effects of tax reform were included.

"When the President's Budget was done, we were not ready to have a full-blown tax reform plan that we could model into the Budget, so we haven't put that in. We have put in the economic impact," said Mnuchin. He said other areas of the Budget were "extremely conservative."

He said the tax reform package targets annual economic growth of 3 percent. He has previously suggested that this growth will fuel an increase in revenues that would fund any revenue-cutting tax changes.

Mnuchin tried to reassure the Committee that any increase in revenue used to pay for a tax reform plan will not have been accounted for already. "I assure you when we present a tax plan, we will not be double-counting the growth," he said.

Changes Proposed To Obamacare Replacement Bill

The House Ways and Means Committee is seeking to add three bills that include changes to health care related tax credits, following the House's approval of the American Health Care Act (AHCA).

Three bills were marked up and approved by the Committee. They are intended to supplement the AHCA.

First, the Verify First Act would tighten verification requirements for tax credits under the AHCA.

The Broader Options for Americans Act would expand access to tax credits for Americans who have lost their job and ensures that people in similar circumstances who work at churches or other houses of worship have the same access.

The third bill would consolidate an existing regulation ensuring veterans have help to purchase health insurance coverage.

The Congressional Budget Office (CBO) has now scored the amended AHCA passed by the House. Earlier it had estimated that 24m more Americans would no longer have subsidized health insurance by 2026 under the AHCA. This number has been reduced only to 23m under the amended version.

It has estimated that, over the 2017–2026 period, enacting the bill would reduce direct spending by USD1.1 trillion and reduce revenues by USD992bn, for a net reduction of USD119bn in the deficit over that period.

The largest increases in the deficit would come from repealing or modifying tax provisions in the Affordable Care Act (ACA) that are not directly related to health insurance coverage – such as repealing a surtax on net investment income, repealing annual fees imposed on health insurers, and reducing the income threshold for determining the tax deduction for medical expenses.

The largest savings would come from reductions in outlays for Medicaid, and from the replacement of the ACA's subsidies for nongroup health insurance with new tax credits for nongroup health insurance, the CBO said. The revenue reduction would be made up of a number of tax changes, including abolishing Obamacare individual and employer mandate taxes; the Medicine Cabinet Tax; the Flexible Spending Account tax; the Chronic Care Tax; the HSA withdrawal tax; the 10 percent excise tax on small businesses with indoor tanning services; the health insurance tax; the 3.8 percent surtax on investment income; the medical device tax; the tax on prescription medicine; and the tax on retiree prescription drug coverage.

Morrison Defends New Australian Bank Levy

Australian Treasurer Scott Morrison has said his proposed new "major bank levy" represents "a fair contribution by the banking sector," and should not give banks "an excuse to increase costs for their customers."

Morrison made the comments in his speech on the second reading of the Major Bank Levy Bill. He explained that, from July 1, all Authorised Deposit-taking Institutions (ADIs) – foreign and domestically owned – with more than AUD100bn (USD744.7bn) in licensed entry liabilities will be liable to pay the tax.

According to Morrison, the levy will equal 0.015 percent of each affected bank's licensed liabilities each quarter, or 0.06 percent per annum. Liabilities captured by the levy will include: corporate bonds, commercial paper, certificates of deposit, Tier 2 capital instruments, operational liabilities, and deposits that are not protected under the Financial Claims Scheme (FCS).

The levy will exclude Additional Tier 1 capital, deposits protected by the FCS, and the quarterly average value of Exchange Settlement Account balances held with the Reserve Bank of Australia. Morrison stressed that the levy will not apply to everyday household deposits, or to banks' assets.

The levy will be administered by the Australian Taxation Office, and will rely largely on data already reported to the Australian Prudential Regulation Authority.

Morrison said: "Australia's five largest banks are highly profitable – earning more than AUD30bn a year after tax – and benefit from a regulatory system that has helped to embed their dominant position in the market … They also contribute to systemic risk through their scale and concentration to the financial system – risks that ultimately fall on the broader Australian community."

The Government has asked the Australian Competition and Consumer Commission to undertake an inquiry into residential mortgage pricing, to scrutinize whether the affected banks are passing the cost of the levy on to their customers. The aim is to "illuminate how the banks respond to the introduction of the levy and give all Australians the information they need to get a better deal elsewhere," Morrison said.

The Government has released an explanatory memorandum to accompany the legislation. This document contains a regulation impact statement.

Commenting on the legislation, Anna Bligh, Chief Executive of the Australian Bankers' Association, said: "This levy will impact on investor confidence in Australia's major banks and make it more expensive for banks to raise the money they need to lend to businesses and individuals. The major banks' market value has already fallen by around AUD39bn since the Budget."

Bligh also criticized the lack of a sunset clause that would abolish the tax upon the budget's return to surplus. She argued: "One of the rationales for the levy is that it will contribute to budget repair. If that is the case then let's be fair and remove the tax once the budget is back in the black."

Australian Bankers Call For Senate Inquiry On New Tax

The Australian Bankers' Association (ABA) has written to the Senate Economics Legislation Committee calling for "rigorous analysis" of the proposed new bank tax.

In the letter, ABA CEO Anna Bligh said: "The ABA has concerns regarding the speed of introduction of legislation for the AUD6.2bn (USD4.6bn) levy on Australia's five largest banks, and believes that further consultation with banks and the public is necessary to avoid the risk that the levy will have unintended consequences for the Australian economy and the efficient operation of financial markets."

According to Bligh, the affected banks were given only 39 hours to comment on the draft legislation before it was to be finalized on May 19. The legislation was introduced to Parliament on May 30.

Bligh added that a Government motion, introduced to the Senate on May 10, will enable it to effectively bypass the Senate Economics Legislation Committee process. The motion concerns "time-critical bills" with provisions commencing on or before July 1, 2017, that are introduced into the House of Representatives between May 11 and June 1, and states that they must be referred to committees for inquiry and report by June 13.

Bligh said it is unlikely that the Senate Economics Committee "would be able to hold appropriate public consultations to consider the major bank levy legislation before their reporting date of June 13." She added that the ABA is "concerned this motion impacts the Senate's ability to vote on major revenue legislation given there has been no independent scrutiny or guidance."

The ABA recommended that:

- The Committee subject the levy legislation "to the necessary rigorous analysis";
- The Committee insist that the Government conduct a detailed long-form Regulatory Impact Statement before the legislation is passed through Parliament; and

- The Government be required to conduct a public consultation on an exposure draft of the legislation and an accompanying explanatory memorandum.

Bligh added that, as the Government intends to spend the money raised on "budget repair," the legislation should include a sunset clause to ensure that the levy is abolished when the budget returns to surplus. She said the levy must be set at a fixed rate by the legislation.

The "major bank levy" of six basis points on banks with domestic liabilities above AUD100bn is expected to raise AUD6.2bn over four years.

New Zealand Budget To Cut Tax On Lower Earners

New Zealand's Parliament has passed legislation to increase income tax thresholds for lower- and middle-income earners.

In its Budget announced on May 24, the Government said the lowest tax bracket, under which a 10.5 percent tax rate applies to income up to NZD14,000 (USD9,871), would be increased to NZD22,000. The next tax bracket, which features a 17.5 percent rate, will be hiked from NZD48,000 to NZD52,000. There is no tax exempt threshold in New Zealand.

The increases to the thresholds would apply from April 1, 2018, providing the current government wins the upcoming election. Parliament approved the measures on May 26.

The Government said this will result in a tax reduction of NZD11 a week for people earning NZD22,000 or more, rising to NZD20 for those earning NZD52,000 or more.

The Budget includes plans to simplify the tax and transfer system. The legislation approved on May 26 would also repeal the Independent Earner Tax Credit.

Hong Kong Lawmakers Pass Budget Tax Measures

Lawmakers in Hong Kong on May 25 passed the numerous tax changes that were announced in the 2017/18 Budget.

The measures include widening marginal salaries tax bands from HKD40,000 (USD5,132) to HKD45,000; increasing the disabled dependent allowance from HKD66,000 to HKD75,000; and raising the dependent brother/sister allowance from HKD33,000 to HKD37,500.

In addition, the entitlement period for home loan interest deduction is extended from 15 years to 20 years, while the current deduction ceiling of HKD100,000 a year is maintained. The deduction ceiling for self-education expenses is increased from HKD80,000 to HKD100,000. All of the above adjustments together are estimated to reduce tax revenue by HKD2bn each year.

At a cost of HKD18.3bn, the legislation also introduces a one-off 75 percent reduction in salaries tax, tax under personal assessment, and profits tax for the year of assessment 2016/17, subject to a ceiling of HKD20,000 per case.

G20 Nations Should Work Together On Carbon Taxation: OECD

G20 countries should share experiences on taxing carbon dioxide emissions to develop more effective regimes, a new report from the OECD says.

The report states that Governments should "broaden the carbon pricing base, track impact and emissions reductions progress, and share policy experience of effective carbon pricing to inform flexible forward-looking policy decisions."

It added that they should "explore joint action in this area, such as minimum carbon prices, gradual increases in prices over time, and linking of emissions trading systems."

The OECD also said that these countries should "reassess and optimize national fiscal policies to increase investment on low-emission, climate resilient infrastructure."

Earlier this month the OECD published a report that argued that carbon tax schemes, if well-designed, can cut carbon dioxide emissions and also improve the affordability of energy for poor households.

That report proposes that using a third of revenues from well-designed taxes would support low-income families and environmental goals. It noted that carbon taxes are particularly regressive and therefore they should include provisions to redistribute revenues through subsidies.

It also proposes a best standard that countries considering a carbon tax could adopt to reach environmental goals and lower the cost of energy for low-income households. It proposes increasing taxes on domestic energy use to EUR45 (USD49.8) per tonne of CO_2 and EUR1 per gigajoule. This would increase energy prices by 11.4 percent on average for electricity, 15.8 percent for natural gas, and 5.5 percent for heating oil. The report found that transferring a third of the additional revenues resulting from this reform to poor households, by means of an income-tested cash transfer, would be sufficient to improve energy affordability across the 20 countries analyzed in the report.

Hungary Approves Advertising Tax Hike

The Hungarian parliament has approved an increase to the country's advertising tax, despite concerns that the measure breaches EU state aid rules.

The new legislation increases the advertising revenues tax from 5.3 percent to 7.5 percent beginning July 1, 2017. However, because companies do not pay the tax on revenues below HUF100m (USD364,000) per year, the Hungarian Government claims that the tax does not fall foul of EU state aid laws.

Under the state aid *de minimis* rule, the European Commission considers that public funding to a single recipient up to a certain amount over a three-year fiscal period has a negligible impact on trade and competition, and does not require notification. However, the *de minimis* threshold is currently set at EUR200,000 (USD225,000).

According to the legislation, companies that have benefited from the advertising tax allowance since 2014 will receive refunds of tax already paid.

Under Hungary's 2014 Advertisement Tax Act, companies were taxed at a rate depending on their advertising revenues. Companies with a higher turnover were subject to significantly higher, progressive tax rates, ranging from 0 percent to 50 percent. This, the Commission found in its initial investigation launched in March 2015, gave companies with a low turnover "an unfair economic advantage over competitors."

In July 2015, Hungary put in place an amended version of the tax, which maintained its progressive nature but reduced the range of tax rates from 0 percent to 5.3 percent. It also allowed companies to opt for retroactive application of the amended scheme.

However, in November 2016, the Commission said that while the changes represented a "step in the right direction," it took issue with the fact that Hungary failed to notify it of the amendments, and remained of the view that there is "no objective justification" for the ongoing progressiveness of the tax.

EU To Continue With Common Corporate Tax Base Talks

EU Vice-President Valdis Dombrovskis has said there is a broad consensus among EU finance ministers on the principle of greater tax harmonization, and that talks will continue on the proposed common corporate tax base (CCTB).

At a May 23 Ecofin meeting, ministers discussed the Commission's proposal for a CCTB in the EU.

The Commission intends first to introduce harmonized rules on the calculation of a company's tax base in all member states. After that, tax revenues would be collected and distributed among member states under a formulary apportionment approach, whereby revenues would be allocated based on factors such as turnover, sales, and employment levels.

The proposal was published in October 2016, following the collapse of talks on the Commission's original scheme for a common consolidated corporate tax base (CCCTB).

According to an Ecofin press release, the Council presidency (currently held by Malta) "confirmed its intention to continue discussions on new elements of the proposal, and that an appropriate degree of flexibility should be provided for."

The Council will consider the separate proposal for a CCCTB (phase two of the Commission's current plan) once the CCTB rulebook has been agreed.

Speaking after the meeting, Dombrovskis commented: "We note the wish of some member states to have broader flexibility and are ready to carry on the discussion. At the same time, we need to keep our eyes on the overall goal of greater harmonization and the simplification that consolidation offers."

"There was a broad consensus on this general principle today, but obviously more work is needed to be done in the months to come, in order to reach an agreement."

ANDORRA - LATVIA

Negotiations

Andorra and Latvia have begun negotiations on amending their DTA.

BAHRAIN - THAILAND

Signature

Bahrain and Thailand signed a DTA Protocol on April 25, 2017.

BARBADOS - CYPRUS

Signature

Barbados and Cyprus signed a DTA on May 10, 2017.

BRAZIL - VARIOUS

Forwarded

Brazil's Committee on Foreign Relations and National Defense on May 4, 2017, approved a DTA between Brazil and Russia, and a DTA Protocol between Brazil and India.

CYPRUS - SAN MARINO

Signature

Cyprus and San Marino signed a DTA Protocol on May 19, 2017.

GHANA - CZECH REPUBLIC

Signature

Ghana and the Czech Republic have signed a DTA.

IRELAND - KAZAKHSTAN

Signature

According to preliminary media reports, Ireland and Kazakhstan signed a DTA on April 27, 2017.

ITALY - BARBADOS

Forwarded

Italy's Chamber of Deputies approved a law to ratify the DTA with Barbados on May 2, 2017.

JAPAN - DENMARK

Negotiations

Japan announced that it had concluded DTA negotiations with Denmark on May 15, 2017.

JORDAN - THAILAND

Initialed

Jordan and Thailand agreed the text of a DTA on May 11, 2017.

LATVIA - SINGAPORE

Signature

Latvia and Singapore signed a DTA Protocol on April 20, 2017.

LUXEMBOURG - CYPRUS

Signature

Luxembourg and Cyprus signed a DTA on May 8, 2017.

MALDIVES - MALAYSIA

Negotiations

According to preliminary media reports, the Maldives and Malaysia have begun DTA negotiations.

MEXICO - ARGENTINA

Forwarded

Mexico's Senate on April 27, 2017, approved a DTA and an accompanying Protocol with Argentina.

MEXICO - SPAIN

Signature

Mexico's Senate on April 27, 2017, approved a DTA Protocol with Spain.

PAKISTAN - BULGARIA

Signature

Pakistan and Bulgaria signed a DTA on April 26, 2017.

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

THE AMERICAS

16th Annual International Mergers & Acquisitions Conference

6/6/2017 - 6/7/2017

International Bar Association

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

Key Speakers: TBC

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

Global Transfer Pricing Conference: DC

6/7/2017 - 6/8/2017

Bloomberg BNA

Venue: National Press Club, 529 14th St NW, Washington, DC 20045, USA

Key Speakers:TBC

https://www.bna.com/global-transfer-pricing-dc-2017/

Tax and Immigration Planning and Compliance for High Net Worth Individuals Acquiring US Citizenship, Green Cards and Expatriating

6/12/2017 - 6/12/2017

Bloomberg BNA

Venue: AMA Conference Center, 1601 Broadway (at 48th and Broadway), 8th Floor, New York, NY 10019, USA

Key speakers: TBC

https://www.bna.com/expatriation_ny2017/

10th Annual US–Latin America Tax Planning Strategies

6/14/2017 - 6/16/2017

American Bar Association

Venue: Mandarin Oriental Miami, 500 Brickell Key Dr Miami, FL 33131-2605, USA

Key speakers: TBC

http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=264529724

Basics of International Taxation 2017

7/18/2017 - 7/19/2017

Practising Law Institute

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

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), John L. Harrington (Dentons US LLP)

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2017/_/N-4kZ1z10oie?ID=299002

71st Congress of the International Fiscal Association

8/27/2017 - 9/1/2017

IFA

Venue: Winsor Barra da Tijuca, Av. Lúcio Costa, 2630 - Barra da Tijuca, Rio de Janeiro - RJ, 22620-172, Brazil

Key speakers: TBC

http://www.ifa2017rio.com.br/index.php

International Tax Issues 2017

9/11/2017 - 9/11/2017

Practising Law Institute

Venue: University of Chicago Gleacher Center, 450 N. Cityfront Plaza Drive, Chicago, Il 60611. USA

Chair: Lowell D. Yoder (McDermott Will & Emery LLP)

http://www.pli.edu/Content/Seminar/International_Tax_Issues_2017/_/N-4kZ1z10p5l?ID=288689

STEP Wyoming Conference 2017

9/15/2017 - 9/16/2017

STEP

Venue: Four Seasons Resort Jackson Hole, Bridger-Teton National Forest, 7680 Granite Rd, Teton Village, WY 83025, USA

Key speakers: Jennifer McCall (Pillsbury Winthrop Shaw Pittman LLP), Simon Beck (Baker & McKenzie LLP), Elizabeth Bawden (Withers Bergman LLP), Michelle Graham (Withers Bergman LLP), among numerous others

http://www.step.org/events/step-wyoming-conference-2017

Basics of International Taxation 2017

9/18/2017 - 9/19/2017

Practising Law Institute

Venue: PLI California Center, 685 Market Street, San Francisco, California 94105, USA

Chairs: Linda E. Carlisle (Miller & Chevalier

Chartered), John L. Harrington (Dentons US LLP)

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2017/_/N-4kZ1z10oie?ID=299003

Energy Tax Conference: Maximizing Value

9/25/2017 - 9/26/2017

BNA

Venue: Four Seasons Hotel, 1300 Lamar Street, Houston, TX 77010, USA

Key speakers: TBC

https://www.bna.com/energy-tax-conference-2017/

Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2017

10/18/2017 - 10/20/2017

Practising Law Institute

Venue: The Roosevelt Hotel, 45 East 45th Street, New York, NY 10017, USA

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), Eric Solomon (EY)

http://www.pli.edu/Content/Seminar/Tax_Strategies_for_Corporate_Acquisitions/_/N-4kZ1z10oic?ID=306525

The 24th World Offshore Convention Cuba 2017

10/25/2017 - 10/26/2017

Offshore Investment

Venue: Meliá Cohiba Hotel, Calle 1ra, La Habana, Cuba

Key speakers: TBC

http://www.offshoreinvestment.com/event/24th-world-offshore-convention-cuba-2017/

Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2017

11/15/2017 - 11/17/2017

Practising Law Institute

Venue: Hotel Allegro, 171 W. Randolph Street, Chicago, IL 60601, USA

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), Eric Solomon (EY)

http://www.pli.edu/Content/Seminar/Tax_Strategies_for_Corporate_Acquisitions/_/N-4kZ1z10oic?ID=306525

The New Era of Taxation: How to Remain on Top in a World of Constant Evolution

11/30/2017 - 12/1/2017

International Bar Association

Venue: International Bar Association TBC, Buenos Aires, Argentina

Key speakers: TBC

http://www.ibanet.org/Conferences/conf835.aspx

Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2017

12/6/2017 - 12/8/2017

Practising Law Institute

Venue: Intercontinental Los Angeles Century City, 2151 Avenue of the Stars, Los Angeles, CA 90067, USA

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), Eric Solomon (EY)

http://www.pli.edu/Content/Seminar/Tax_Strategies_for_Corporate_Acquisitions/_/N-4kZ1z10oic?ID=306525

ASIA PACIFIC

The 8th Offshore Investment Conference Hong Kong 2017

6/14/2017 - 6/15/2017

Offshore Investment

Venue: The Conrad Hong Kong, Pacific Place, One Pacific Place, 88 Queensway, Admiralty, Hong Kong

Key speakers: Michael Olesnicky (KPMG), Sharon Ser (Withers)

http://www.offshoreinvestment.com/event/8th-offshore-investment-conference-hong-kong-2017/

STEP Australia Conference 2017

8/2/2017 - 8/4/2017

STEP

Venue: The Langham, 1 Southgate Ave, Southbank VIC 3006, Australia

Chairs: The Hon. Justice Kate McMillan (Supreme Court of Victoria), Professor Rosalind Croucher (Australian Law Reform Commission), Dylan Alcott (Paralympian), The Hon. Tom Gray QC (Retired Justice of the Supreme Court of South Australia)

http://www.step.org/sites/default/files/Australia_2017_Programme_WEB_0.PDF

Digital Economy Symposium: Reimagining Taxation in the Age of Disruption

8/15/2017 - 8/16/2017

IBFD

Venue: TBC, Singapore

Key speakers: TBC

https://www.ibfd.org/IBFD-Tax-Portal/Events/Digital-Economy-Symposium-Reimagining-Taxation-Age-Disruption

8th IBFD International Tax Conference

9/22/2017 - 9/22/2017

IBFD

Venue: TBC, Beijing, China

Key speakers: TBC

https://www.ibfd.org/IBFD-Tax-Portal/Events/8th-IBFD-International-Tax-Conference

International Taxation Conference 2017

12/7/2017 - 12/9/2017

IBFD

Venue: ITC Maratha Hotel, Sahar Elevated Rd, Sahar, Airport Area, Andheri East, Mumbai, Maharashtra 400099, India

Chair: Pascal Saint-Amans (OECD)

https://www.ibfd.org/sites/ibfd.org/files/content/pdf/International-Taxation-Conference-2017.pdf

CENTRAL AND EASTERN EUROPE

8th Annual International Taxation in CEE, SEE & CIS

10/19/2017 - 10/20/2017

GCM Parker

Venue: TBC, Prague, Czech Republic

Key speakers: TBC

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

MIDDLE EAST AND AFRICA

STEP Israel Annual Conference

6/20/2017 - 6/21/2017

STEP

Venue: Dan Tel Aviv Hotel, Ha-Yarkon St 99, Tel Aviv-Yafo, 63432, Israel

Chairs: Meir Linzen (Herzog Fox & Neeman), Dr. Alon Kaplan (Alon Kaplan, Advocate and Notary), Daniel Paserman (Gornitzky & Co.)

http://www.step.org/sites/default/files/STEP%20Annual%20Conference%20program%202017.pdf

WESTERN EUROPE

Non-Dom, Residence & HMRC

6/21/2017 - 6/21/2017

Private Client Tax

Venue: TBC, London, UK

Chair: Jonathan Burt (Harcus Sinclair)

https://finance.knect365.com/non-dom-residence-hmrc/agenda/1

IFRS Foundation Conference: Amsterdam 2017

6/29/2017 - 6/30/2017

IFRS

Venue: Hotel Okura, Ferdinand Bolstraat 333, 1072 LH Amsterdam, Netherlands

Chair: Hans Hoogervorst (IASB)

http://www.ifrs-conference.org/

The 3rd Wealth Planning Conference London 2017

7/5/2017 - 7/6/2017

Offshore Investment

Venue: Marriott County Hall Hotel, London County Hall, Westminster Bridge Rd, Lambeth, London SE1 7PB, UK

Key speakers: TBC

http://www.offshoreinvestment.com/event/3rd-wealth-planning-conference-london-2017/

The 27th Offshore Investment Symposium Oxford 2017

9/3/2017 - 9/9/2017

Offshore Investment

Venue: Jesus College, Oxford, Turl St, Oxford OX1 3DW, UK

Chair: Nigel Goodeve-Docker (Former Solicitor & Former Director at HE Samson Ltd)

http://www.offshoreinvestment.com/event/27th-offshore-investment-symposium-oxford-2017/

International Tax Aspects of Permanent Establishments

9/5/2017 - 9/8/2017

IBFD

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

Key Speakers: Bart Kosters (IBFD)

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

Duets in International Taxation: Single Taxation?

10/5/2017 - 10/6/2017

IBFD

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

Chairs: Prof. Frans Vanistendael (KU Leuven), Prof. Pasquale Pistone (IBFD), Prof. Dennis Weber (ACTL, University of Amsterdam and Loyens & Loeff), Prof. Stef van Weeghel (University of Amsterdam, PWC global thought leader)

https://www.ibfd.org/IBFD-Tax-Portal/Events/Duets-International-Taxation-Single-Taxation#tab_program

ASIA PACIFIC

Australia

Chevron Australia is to appeal a decision from the Full Federal Court (FFC) in favor of the Australian Taxation Office's (ATO's) assessment that the company is liable to AUD340m (USD253.8m) in taxes and penalties.

A listing of recent key international tax cases.

The assessments relate to interest paid by Chevron Australia Holdings Pty Ltd (CAHPL) to Chevron Texaco Funding Corporation (CFC) under a 2003 agreement. Chevron had challenged the ATO's assessments for taxes owed in the income years 2004–2008.

The FFC ruled in favor of the tax authority, noting that:

> "Each of the assessments in question was in substance made upon the basis that the interest paid by CAHPL, an Australian company, to its United States subsidy, CFC, was greater than it would have been under an arm's length dealing between independent parties."

CAHPL had claimed tax deductions in Australia for the interest it paid to CFC and returned as income the dividends it received from CFC as non-assessable non-exempt income.

In its judgment, the FFC noted that the trial judge had accepted that:

> "the internal funding arrangements put in place resulted in CAHPL increasing its untaxed dividends from CFC as CAHPL's interest payments to CFC increased whilst CFC would make significant profits from borrowing at 1.2 percent and on-lending at 9 percent, which would not be taxed either in the United States or in Australia."

The FFC also agreed with the trial court's original judgment that CAHPL's debt level of USD2.5bn was chosen by Chevron because "it was the most tax efficient corporate capital structure and gave the best after-tax result for the Chevron group."

In a statement released on May 19, the company said:

> "Chevron Australia has decided to seek special leave to appeal to the High Court of Australia in relation to its financing dispute with the [ATO]. As recognized by the Full Federal Court, Chevron Australia's financing is a legitimate business arrangement, and the parties differ only in their assessments of the appropriate interest rate to apply.
>
> Chevron Australia pays a substantial amount of tax in Australia, including royalties, payroll tax, fringe benefits tax, excise, and interest withholding tax. Since 2009, we've paid about USD4.5bn in federal and state taxes and royalties. We are one of Australia's largest investors and employers. In addition to tax payments, Chevron will continue to deliver substantial economic benefits for decades to come."

https://www.chevronaustralia.com/news/media-statements/2017/05/19/chevron-seek-special-leave-to-appeal-high-court-of-australia

Australia's Full Federal Court: *Chevron Australia Holdings Pty Ltd v. Commissioner of Taxation*

WESTERN EUROPE

European Union (EU)

In a opinion expected to boost the UK's position in Brexit talks, the European Court of Justice (ECJ) has set out the extent to which member states must be involved in approving the free trade agreement (FTA) with Singapore.

The ECJ said the provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and states do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the member states.

The ruling means that a narrow FTA between the EU and the UK could be approved exclusively by the EU, providing it does not include such provisions. This would prevent individual member states from vetoing the deal, with tensions ongoing between the UK and Spain concerning Gibraltar's autonomy.

On September 20, 2013, the EU and Singapore initialed the text of an FTA. The agreement is one of the first "new generation" bilateral FTAs – a trade agreement which contains, in addition to the standard provisions on the reduction of customs duties and of non-tariff barriers in the field of trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition, and sustainable development.

The ECJ's opinion was released on May 16, 2017.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf

European Court of Justice: *Opinion of the Court pursuant to Article 218(11) TFEU (2/15)*

Luxembourg

The European Court of Justice (ECJ) has ruled that the courts of one member state may review the legality of requests for tax information sent by another member state. However, it said that review must be limited to verifying whether the information sought is not – manifestly – devoid of any foreseeable relevance to the tax investigation concerned.

In the course of a review of the tax affairs of French company Cofima, the French tax administration sent to the Luxembourg tax administration in 2014 a request for information concerning Cofima's Luxembourg parent company, Berlioz Investment Fund.

In response to the Luxembourg tax authorities' request, Berlioz provided all the information sought, except for the names and addresses of its members, the amount of capital held by each member, and the percentage of share capital held by each member.

According to Berlioz, that information was not foreseeably relevant to the checks being carried out by the French tax administration.

As a result of Berlioz's refusal to provide that information, in 2015 the Luxembourg tax administration imposed an administrative fine of EUR250,000 (USD277,300). Berlioz applied to the Luxembourg administrative courts for cancellation of the fine and annullment of the "information order" (the decision of the Luxembourg authorities directing Berlioz to provide the information at issue).

At first instance, the Administrative Tribunal of Luxembourg reduced the fine to EUR150,000 but declined to determine whether the information order was well founded. The Tribunal relied in that regard on Luxembourg law, under which it is possible to apply for cancellation or reduction of the fine, but not annullment of the request for the exchange of information or of the information order.

Berlioz then lodged an appeal with the Administrative Court of Luxembourg, arguing that its right to an effective judicial remedy, as guaranteed by the Charter of Fundamental Rights of the EU (CFR-EU), had been infringed. The Administrative Court of Luxembourg referred the matter to the ECJ for a determination, in particular, for whether it can examine the validity of the information order and, therefore, of the French tax administration's request for information serving as the basis for the information order.

In its May 16 judgment, the ECJ said, first of all, that the CFR-EU is applicable, since, by imposing a fine on Berlioz because of its refusal to provide the information sought, the Luxembourg tax authorities implemented the EU directive on administrative cooperation in the field of taxation.

Next, the ECJ noted that such an information order can be lawful only if the requested information is "foreseeably relevant" for the purposes of the tax investigation in the member state seeking it. It said the obligation imposed on the tax authorities of one member state to cooperate with the tax authorities of another member state extends only, according to the wording of the directive itself, to the communication of information that is "foreseeably relevant." Accordingly, the member states are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of the taxpayer concerned.

On the checks to be undertaken, the ECJ said the authorities of the requested member state (the Luxembourg tax authorities in this case) must not confine themselves:

> "to a brief and formal verification of the regularity of the request for information but must also satisfy themselves that the information sought is not devoid of any foreseeable relevance for the purposes of the tax investigation, having regard to the identity of the taxpayer under investigation and the purpose of that investigation."

The ECJ said the taxpayer must be able to argue against the legality of the information order and therefore the court in the requested state (the Luxembourg court in this case) must be able to review the legality of the request.

The ECJ said, however, "it must only verify that the information order is based on a sufficiently reasoned request for information concerning information that is not – manifestly – devoid of any foreseeable relevance to the tax investigation concerned." In addition, it said, "if the court of the requested State is to be able to conduct its judicial review, it must have access to the request for information and to any additional information which the authorities of the requested state may have been able to obtain from the authorities of the requesting state."

The ECJ added:

> "[T]he person to whom the information order is addressed may, however, be barred from having access to the request for information because it is secret, and that that person does not therefore have a right of access to the whole of that request. Nevertheless, in order to be given a fair hearing, that person must have access to key information in the request for information (namely the identity of the taxpayer concerned and the tax purpose for which the information is sought), and the court may provide that person with certain other information if it considers that the key information is not sufficient."

This judgment was released on May 16, 2017.

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d65e32621d9bce4694a1eca6a9a69da014.e34KaxiLc3qMb40Rch0SaxyLb3r0?text=&docid=190721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=620091

European Court of Justice: *Berlioz Investment Fund v. Director of the Direct Taxation Administration, Luxembourg (Case C-682/15)*

Luxembourg

The European Court of Justice (ECJ) has ruled that Luxembourg legislation relating to independent groups of persons (IGPs) does not comply with the EU VAT Directive.

The ruling supports both a decision by the European Commission and an opinion of an Advocate General of the ECJ that Luxembourg has transposed EU VAT law too widely in relation to services provided by independent groups to their members.

Under the VAT Directive, certain services supplied by a group to its members are exempt from VAT. This is to avoid making operations downstream more expensive for these members, given that the VAT cannot be deducted. Strict conditions must be complied with to benefit from the exemption.

Under Luxembourg law, the services provided by an independent group to its members are free from VAT provided that the members' taxed activities do not exceed 30 percent (or 45 percent under certain conditions) of their annual turnover. Group members are also allowed to deduct the VAT charged to the group on its purchases of goods and services from third parties. Lastly, operations by a member in his or her own name but on behalf of the group are regarded as outside the scope of VAT.

Under European law, in order to be exempt from VAT, the services provided by an independent group to its members must be directly required for their non-taxable or exempt activities. Moreover, group members should not be allowed to deduct VAT charged to the group.

In 2014, the Commission decided that arrangements in place in Luxembourg are not compatible with the EU's VAT rules. In addition, it argued that such arrangements would likely produce distortions of competition.

The Commission's decision was largely supported by ECJ Advocate General Kokott in October 2016.

The ECJ stated:

> "It follows that, by providing that the services rendered by an IGP to its members are exempt from VAT where the share of the members' taxed activities does not exceed 30 percent (or even 45 percent) of their annual turnover, Luxembourg has not correctly transposed the VAT Directive."

It continued:

> "In the light of the IGP's independence from its members, the latter may not, contrary to what the Luxembourg [legislation] permits, deduct from the amount of VAT which they are liable to pay the VAT payable or paid in respect of goods or services provided to the IGP (and not to those members directly). It follows that, in this respect also, Luxembourg has not correctly transposed the VAT Directive."

The court additionally found that Luxembourg has failed properly to transpose the VAT Directive "by providing that the transactions carried out by a member in his name but on behalf of the group may fall outside the scope of VAT for the group."

This judgment was released on May 4, 2017.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170046en.pdf

European Court of Justice: *Commission v. Luxembourg (C-274/15)*

United Kingdom

The European Court of Justice (ECJ) has ruled in favor of the taxpayer in a case concerning the value-added tax (VAT) treatment of certain catering and entertainment services provided by a UK college as part of the higher education courses that it provided.

Following court decisions against the UK tax agency, HM Revenue & Customs (HMRC), said it would appeal and released Brief 39 (2014) setting out its position.

The case concerned the VAT liability of restaurant meals provided to the public and charges for concerts and other performances put on by students as part of their further education courses. Both the Upper Tribunal (UT) and the First Tier Tribunal (FTT) ruled in favor of Brockenhurst College.

The FTT had concluded that the supplies in question were exempt as they were closely linked to education because:

- The College was an eligible body and so its principal supplies were exempt supplies of education;
- The supplies were integral and essential to those principal exempt supplies;
- The supplies were made at less than their cost;
- The supplies were not advertised to the general public. Instead, there was a database of local groups and individuals who might wish to attend the restaurant or performances; and
- The supplies were not intended to create an additional source of income for the College.

HMRC disagreed with the conclusion on the basis that the supplies were outside the education exemption because the students were not the beneficiaries of the supplies in question but only benefited from making them as part of their learning.

On appeal, the UT again rejected HMRC's argument and agreed with the FTT. It held that the supplies were closely related to the exempt supplies of education because they enabled the students to enjoy better education. The requirement in the domestic law for the supplies to be for the direct use of a student was met because they were of direct benefit to that student, the UT ruled.

The ECJ agreed that VAT exemption should apply "provided that those services are essential to the students' education and that their basic purpose is not to obtain additional income for that establishment by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT, which it is for the national court [the Court of Appeal] to determine."

This judgment was released on May 4, 2017.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=190325&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=561635

European Court of Justice: *HMRC v. Brockenhurst College (C-699/15)*

Dateline June 1, 2017

Poor governments. They rarely seem to learn the lessons of **bad tax policy**. And not only do they not seem to learn from experiences within their own boundaries, they fail to learn from the (often bad) examples of their peers.

Last week I observed how **Poland** had failed to heed warnings from the likes of international ratings agencies and the International Monetary Fund about the likely consequences of its bank asset tax. Well, if the IMF's latest assessment is anything to go by then the Polish Government was unwise to ignore them. As predicted, banks in Poland have reined in lending, and have chosen instead to invest in government bonds, a far from ideal outcome in the post credit crunch world when businesses are finding it more difficult to borrow to invest.

I also noted how **Australia** may travel down a similar path by rushing through a hastily drafted bank tax bill. And despite the almost daily warnings from Australia's big banks that the levy will hit profits and be passed on to consumers, the Government has merely promised to compile a regulatory impact statement on the proposal, rather than review it. Perhaps government ministers are too proud to admit that they might have got this wrong, and too afraid of the public backlash that may accompany the admission. But pride often comes before a fall.

However, perhaps **Hungary** is the master of the ill-conceived sectoral tax, and it is this country I wish to admonish this week.

Hungary thinks it will get away with its amended revenue-based **advertising tax** because the tax threshold is low enough to effectively fly under the EU's state aid radar. Except that the Hungarian ad tax has been flashing brightly on the European Commission's radar since it was introduced in 2014, and the two have already had run-ins over the measure. What's more, said threshold, at HUF100m, which at the time of writing converts to approximately EUR325,000, is surely too high, considering the EU deems state aid of more than EUR200,000 per year to any one recipient to be illegal and therefore recoverable.

It wouldn't be so bad if this was a one-off. But Hungary's rap sheet in this respect is by no means a short one. The Government has **targeted** financial services, tobacco companies, and telecommunications providers with special – and likely illegal as far as the EU is concerned – taxes. Indeed, in 2013, the Commission warned in an Occasional Paper that sectoral taxes had caused policy uncertainty and "contributed to historically low investment and productivity growth rates."

Hungary is in better shape fiscally and economically than it was four years ago, but the Government appears fixated with **special taxes**. And it was only when the public revolted against a proposed internet tax in 2014, in the process nearly bringing down the ruling Fidesz Party, that the proposal was withdrawn.

While businesses cannot protest against punitive taxes by taking to the streets *en masse*, in the era of globalization they arguably have an more effective weapon: they can vote with their feet and **invest elsewhere**. Admittedly, the attractions of a 9 percent corporate tax rate now make such a decision more difficult, and some taxpayers may consider sectoral tax risks a price worth paying for this.

On trade matters now, and credit goes to EU Trade Commissioner Cecilia Malmström for talking up the possibility of a **free trade agreement** between the **EU and the United States**. But is her optimism misplaced? That the 11 non-US signatories of the Trans-Pacific Partnership have agreed to forge ahead with what initially promised to be the most ambitious regional free trade to date suggests that they consider any attempt to renegotiate the deal with the US to be a waste of time.

So perhaps expecting the EU and the US to make progress on what could be the world's most complex FTA to date in the current political environment is unrealistic. Besides, the US perhaps has enough in its trade inbox to cope with for now after formally beginning the legislative process to renegotiate the North American Free Trade Agreement, which is unlikely to be a smooth ride all the way.

Coincidentally, Malmström was recently in **Mexico** – the southern third of the NAFTA trio – to discuss renegotiating the existing EU–Mexico FTA. It will be interesting therefore to see how these two negotiations progress over the coming months, as well as to compare the outcomes, should any outcomes be achieved. If Malmström is to be believed, the EU is confident that its new deal can be concluded by the end of this year, which is likely to be well ahead of any renegotiated NAFTA text. Or perhaps that's another piece of wishful thinking on her part.

The Jester