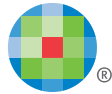

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GLOBAL TAX WEEKLY
a closer look

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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

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a closer look

Global Tax Weekly – A Closer Look

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a closer look

ISSUE 320 | DECEMBER 28, 2018

CONTENTS

FEATURED ARTICLES

The Birth, Demise, And Resurrection Of The "Rule In Hastings-Bass" And Jurisdictional Competition
Andrew P. Morriss, Texas A&M University 5

Administrative Cooperation In The European Union
Stuart Gray, Senior Editor, Global Tax Weekly 12

IRS Announces New Voluntary Disclosure Program For Willful Tax Delinquency
Joshua Ashman, CPA & Nathan Mintz, Esq., Expat Tax Professionals 21

Country Focus: Australia
Winson Liew, Hill Rogers, independent member firm of Morison KSi 25

Topical News Briefings: New Carrots, More Sticks
The Global Tax Weekly Editorial Team 29

Residence/Citizenship by Investment – New Developments
Maria Frolova, Daria Vasyatkina, EY Moscow 30

Topical News Briefing: Cautious Canada
The Global Tax Weekly Editorial Team 32

NEWS ROUND-UP

Compliance Matters 34

EU's BEPS Response Effective From January 1

Dutch Consultation Launched On Tax Avoidance Scheme Powers

Large Businesses Paying More Tax In Australia

Country Focus: United States 37

IRS Issues Guidance On Section 179 Expensing

US House Passes Year-End Tax Package

IRS Issues Guidance On Loss Limitation Rules

US Bill to Provide 'Tax Fairness' For Expats

Corporate Taxation 40

Greece To Cut Corporate Tax

Puerto Rico Set To Lower Corporate Tax

Polish Tax Reforms Take Effect Jan 1, 2019

Country Focus: Canada 42

Canadian Tax Regime To Be Enhanced From 2019

Canadian Tax Ombudsman Publishes Annual Report

Metals Giant Settles Canadian Transfer Pricing Dispute

VAT, GST, Sales Tax 45

Malta To Introduce 5pc VAT On E-Books On January 1

Bahrain Introducing VAT From January 1, 2019

Hungary To Raise VAT Registration Threshold

UK Legislates To Close Insurance VAT Loophole

Anti-Avoidance 49

Cyprus Delays CbC Reporting Deadline

Luxembourg Adopts Anti-Tax Avoidance Law

Australia's BEPS Treaty Amendments To Enter Into Force

TAX TREATY ROUND-UP 51

CONFERENCE CALENDAR 52

IN THE COURTS 57

THE JESTER'S COLUMN 68
The unacceptable face of tax journalism

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ISSUE 320 | DECEMBER 28, 2018

The Birth, Demise, And Resurrection Of The "Rule In Hastings-Bass" And Jurisdictional Competition

by Andrew P. Morriss, Texas A&M University

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The "rule in *Hastings-Bass*" was a feature of English trust jurisprudence from 1974 to 2013, when the UK Supreme Court reduced it to an irrelevancy with a comprehensive repudiation.[1] However, the rule lives on, in statutory form, in Jersey and Bermuda, and is showing signs of life in the Cayman Islands. The story of its rise, fall, and resurrection offers not just an exciting opportunity to delve into the intricacies the intersection of trust and tax law (with a bit of Perpetuities thrown into the mix!) but also an example of how jurisdictional competition can improve legal systems and why having different types of jurisdictions is a good thing for the world.

The Birth Of The Rule In Hastings-Bass

In the early 1970s case of *Re Hastings-Bass (Deceased)*[2], HMRC sought to persuade an English court that it should set aside a trustee's creation of a life interest because the trustee's creation of subsequent interests was voided for violating the Rule Against Perpetuities. HMRC argued that had the trustee known that the subsequent interests would be void, the trustee would not have created any of the chain of interests, including William's life interest. Without that life interest, HMRC stood to gain considerable additional tax.

The Court of Appeal ultimately rejected HMRC's argument, although the court accepted that it had the power to set aside a trustee's decision where the trustee did not take into account something the trustee should have or did take into account something the trustee should not have. With respect to the life interest, the court held that despite the voiding of the subsequent

interests, the trustee would have still created a life interest in William. Thus the "rule in *Hastings-Bass*" was born.

The Rule's Development

The rule's early years were quiet. No published opinion dealt with it until sixteen years later, when an English court restated the rule it with more clarity than the original opinion in *Hastings-Bass* had done in *Mettoy Pension Trustees v Evans,* an opinion dealing with actions by trustees of a pension trust.[3] Once again, the court held it had the power set aside decisions but declined to do so on the case's facts. Notably, this time HMRC did not participate in the case.

The rule continued to be discussed in an occasional opinion, but it first produced a change to a trustee's decision in the 2002 in *Green v Cobham*.[4] A lot was at stake in this case. The court addressed the impact of distributions by the trustees which led to capital gains tax being due on over GBP37m due to foreign trustees' misunderstanding (or perhaps a total lack of understanding) of English tax law's treatment of trustee tax residency and consolidation of trusts for inheritance tax purposes.

Despite the trustees having gotten tax advice from a UK tax lawyer (albeit, advice that turned out to be wrong), the court of first instance invalidated their exercise of their discretionary powers to make distributions in 1990 (the distributions that had created the tax problem). Parker J concluded that "what is entirely clear, in my judgment, is that had the trustees directed their minds, as they should have done, to considerations of capital gains tax, they would not under any circumstances have made an appointment which gave rise to any significant risk that [the trust] might thereafter become a United Kingdom resident trust for capital gains tax purposes."

On the facts of *Green*, the court was undoubtedly correct – no competent trustee would have made a distribution that resulted in GBP37m in gains being subject to tax if that could be avoided. And the provisions that resulted in the tax were complicated, involving the tax residency status of the trustees and how one of the trustee's retirement affected his residency. The case illustrated the power of the rule – undoing a decision taken 12 years earlier – and was an example of a family using a series of trusts to avoid income tax, just the sort of thing that upsets critics of IFCs. There was no hint that any particularly 'aggressive' tax avoidance strategy was being used.

One generation had placed shares of companies in a trust in another jurisdiction for the benefit of a following generation, and capital gains had accumulated. Moreover, the error was a highly

technical one unrelated to the substance of any of the trust's transactions. Application of the rule reduced the tax bill compared to what it would have been if the mistake had been allowed to stand, but there was no hint that the original strategy was improper in any respect. And the beneficiaries – who stood to lose due to the higher tax bill – had no real remedy. The trustees had not been negligent (they had consulted a reputable tax attorney for advice and received advice accurate at the time rendered). Perhaps the trustees could have sued the tax attorney for legal malpractice, but the tax attorney's failure to anticipate the future retirement of a trustee, which changed the trustee's tax residency, hardly seems to rise to that level. In short, this was a textbook case for the application of the rule.

A number of subsequent English decisions, most notably *Sieff v Fox* which comprehensively restated the rule in 2005, continued to refine and apply the rule.[5] Academic and judicial criticism of the rule began to appear, with commentators complaining that the rule unfairly advantaged those seeking to avoid tax. Significantly, HMRC once again took an interest in the rule (prodded by Lloyd LJ's decision in *Sieff*, which had suggested HMRC ought to be making its views known). In 2006, HMRC issued a bulletin criticizing the rule as overly broad and suggesting it be effectively eviscerated.[6] And the rule spread beyond England, with courts in the Cayman Islands (in one decision applying Cayman law and in another applying BVI law) and Jersey recognizing the rule.[7]

The Rule's Demise

In 2010, HMRC intervened for the first time since its efforts in *Re Hastings-Bass (deceased)* to create the rule, appearing in two cases (which were ultimately consolidated in the Court of Appeal and UK Supreme Court) to argue against the rule.[8] In *Futter v Futter,* trustees had made distributions under the mistaken belief (based on erroneous advice from tax counsel) that the distributions could be offset by losses in the recipients' personal portfolios and so avoid tax. In *Pitt v Holt*, HMRC sought to prevent use of the rule by a widow who, acting as receiver for her husband, had made decisions about money he had received as compensation for a devastating auto accident. Her decisions, taken with erroneous tax advice, meant his estate was largely consumed by taxes which she could have easily avoided with more accurate tax advice.

While the judges in the court of first instance found both to be easy cases for the application of the *Hastings-Bass* rule, the Court of Appeal and UK Supreme Court both rejected its application and severely pruned it, leaving it as a mere shadow of its former self. In short, the comprehensive

opinions by both courts put a stake through the heart of the rule. In the Court of Appeal, Lloyd LJ (who had been the author of *Sieff's* comprehensive restatement of the rule) concluded that the "true principle" of the rule in *Hastings-Bass* was not in *Hastings-Bass* itself, and so he rejected most of the case law applying the rule as "not a correct statement of the law." In the Supreme Court, Walker L was equally firm in rejecting what nearly everyone had believed the rule to be. In some respects, his opinion was a bit of a surprise, given that he had been what one commentator termed "the most adept of tax planners in the context of trust rearrangements" prior to joining the bench.[9] (The UK Supreme Court did manage to provide relief for the receiver in *Pitt* on grounds of mistake.) Having had a stake put through its heart by the Supreme Court, it looked like it was time to say "R.I.P. *Hastings-Bass*." Indeed, Mike Truman gave the case a fitting eulogy after the Court of Appeal opinion, entitled, "*So long, Billy Bass.*"[10]

Resurrecting Hastings-Bass

And yet … it lives! Jersey and Bermuda, two jurisdictions with substantial trust businesses, accurately read the writing on the wall and took steps to revive the rule. They saw the growing opposition to the rule in England as a signal that its position in the courts was weakening. There were ample signs. Legal commentators and judges wrote articles and gave speeches criticizing the rule, and those seeking to preserve the rule realized they needed to act. Sir Gavin Lightman, author of an important early decision on the rule as a first instance court judge, called for the appellate courts to "sweep aside" the rule in an editorial in *Trusts & Trustees*.[11] Sir Robert Walker (who would ultimately write the UK Supreme Court opinion demolishing the rule) attacked the rule in an article written while he sat on the Court of Appeal bench.[12] Lord Neuberger said it allowed "Dr. Equity … [to] administer a magical morning after pill to trustees suffering from post-transaction remorse."[13] The leading trusts text *Underhill & Hayton* suggested the rule was "too good to be true" and that it allowed trustees "to wriggle out of the reckless or negligent decisions which turn out to have unfortunate consequences."[14]

To preserve the rule in their jurisdictions, Jersey and Bermuda created statutory versions of the rule. Jersey began work in 2011, with a committee of leading members of the legal community, Jersey Finance (the trade group for the financial services industry), and the Jersey Economic Development Department collaborating on developing a draft law. The result was the Trusts (Amendment No. 6) (Jersey) Law, which passed the States Greffe in July 2013 and received the Royal Asset in October 2013.

More than just a restatement of the common law rule, the Jersey statute comprehensively set out the grounds for overturning a decision by trustees both on *Hastings-Bass* grounds and on grounds of mistake. It answered a number of open questions about the common law rule (such as whether or not trustee decisions found to violate it were void or voidable, with the statute opting for the latter). Bermuda followed suit soon thereafter, adopting the Trustee Amendment Act 2014, which restated the common law rule comprehensively and resolved the open questions on the rule's scope.

Jurisdictional Competition

The resurrection of the rule in Bermuda and Jersey makes this story of interest to more than legal historians. Given the sustained criticism the rule endured from UK bench, bar, and academy, what possessed those jurisdictions to resurrect it through a statute?

Critics of IFCs have a ready answer: this is yet another example of a "race-to-the-bottom" by jurisdictions seeking business at the expense of the integrity of other jurisdictions' tax systems. But if that was the case, why was there no general rush by IFCs to adopt a statutory *Hastings-Bass*? And why was a statute even necessary? Surely IFC courts could themselves have simply rejected *Futter's* rejection of *Hastings-Bass* and preserve the rule. However, initial indications from courts in several IFCs suggested that *Futter* was likely to be seen as persuasive. This is unsurprising – justifying the rule based on the original decision in *Re Hastings-Bass (deceased)* is problematic, as both Lloyd LJ and Walker L noted in their opinions in *Futter*. But whether the rule was properly derived from the original opinion is a different question from whether or not it is a valuable part of trust jurisprudence.

Rather than a tale of predatory jurisdictions depriving HMRC of revenue, the story of *Hastings-Bass*'s birth, death, and resurrection undermines the "race-to-the-bottom" story and illustrates an important role IFCs play in the world economy. Indeed, my argument is that the rule is an example of something smaller jurisdictions like Jersey and Bermuda can do which larger jurisdictions such as the UK cannot. Jersey and Bermuda have three key advantages over the UK.

First, the evolution of the rule revealed some weaknesses in the common law version. The debate over *Hastings-Bass* in England went deeper than whether or not the rule itself was valuable. There was controversy over whether or not the rule voided transactions that fell within it or merely made them voidable; over the scope of the decisions subject to it; and over whether

the standard was that trustees would have decided things differently or might have done so. With fewer than two dozen English decisions during the rule's life, most from courts of the first instance, these questions remained unanswered. Both Jersey and Bermuda's statutes resolved these questions, greatly clarifying the rule's parameters. As more evidence against the "race-to-the-bottom" claim, both jurisdictions opted not to give their statutory rules the broadest possible scope.

Second, both Jersey and Bermuda have well-developed statutory trust laws and bodies of trust law decisions, together with well-respected judiciaries which regularly see trust cases. The combination of judicial expertise and coherent bodies of law make both jurisdictions well suited to discretionary equitable doctrines. In part, this reflects those jurisdictions' specialization in trust law which attracts business. By contrast, trust cases make up a much smaller proportion of cases heard by judges in larger jurisdictions. Judges in Jersey and Bermuda are thus better positioned than their English counterparts to apply rules like *Hastings-Bass*.

Third, the race-to-the-bottom critiques of *Hastings-Bass* generally ignore the value the rule provided. Beneficiaries of trusts are at risk in ways that individuals dealing with their own property are not. If a trustee seeks tax advice from a reputable tax attorney, who makes an error that leads to a substantial tax bill for the trustee, the beneficiary will rarely have an avenue for redress. The trustee, in seeking advice from a well-qualified tax attorney, has taken appropriate steps to fulfill his or her fiduciary obligations. The beneficiary generally has no claim against the tax attorney, since that attorney had not rendered advice to the beneficiary. If beneficiaries are to be protected, some other avenue than professional negligence is necessary. The statutory versions of *Hastings-Bass* created by Jersey and Bermuda accomplish this.

Conclusion

Rather than seeing differences in legal regimes as problematic, we should recognize that different jurisdictions have different strengths and so differences in rules should be expected. In a small jurisdiction with an expert judiciary and a comprehensive legal framework for a particular body of law – such as Jersey and Bermuda in trust law – giving judges power to fix errors is not the same thing as doing it in a larger jurisdiction. Moreover, where a jurisdiction has staked its reputation on persuading people to bring it business in a particular area of the law, having a safety valve for errors is a useful feature. Within the context of a jurisdiction like Jersey or Bermuda, the rule in *Hastings-Bass* plays a different role than it did in England. Both provide legal environments in

which constraining the rule's application can be entrusted to the judiciary with greater confidence than it might be in a larger jurisdiction.

Endnotes

1 *Futter v Commissioners* [2013] UKSC 26.

2 Ch. 25 (CA (Civ Div); [1974] STC 211.

3 [1990] 1 WLF 1587.

4 [2002] STC 820.

5 [2005] EWHC 1312 (Ch).

6 *HMRC and the Hastings-Bass Principle*, Tax Bulletin No. 83 2, 4 (2006).

7 In the matter of the *Green GLG Trust, 2002 JLR571; Barclays Private Bank & Trust (Cayman) Limited v Chamberlain et al*., unreported, 5th May 2005, 9 ITELR 302; *A and Ors v Rothschild Trust Cayman Limited* [2004-05] CILR 485, [2006] WTLR 1129.

8 Edward Hewitt, *HMRC v* Re Hastings-Bass*: the battle begins,* 16(7) Trusts & Trustees 548, 553 (2010).

9 Frank Hinks, *Setting aside trust transactions under the rue in* Hastings-Bass *or on the basis of equitable mistake – a case study of Futter v HMRC and Pitt v HMRC [2013] UKSC 26*, 20(1&2) Trusts & Trustees 79 (2014).

10 Taxation 9 (5 May 2011).

11 Sir Gavin Lightman, *Guest editorial on Hastings-Bass,* 15 Trusts & Trustees 184, 185 (2009).

12 Sir Robert Walker, *The Limits of the Principle in* Re Hastings-Bass, 13 K.C.L.J. 173 (2002).

13 Lord Neuberger of Abbotsbury, *Aspects of the Law of Mistake: Re Hastings-Bass*, 15(4) Trusts & Estates 189 (2009).

14 Underhill & Leyton, 18th ed., at 57.24.

Administrative Cooperation In The European Union

by Stuart Gray, Senior Editor,
Global Tax Weekly

The automatic exchange of information between tax authorities for the purposes of tax enforcement has only recently been accepted as the global standard for information exchange. However, the European Union already has a comprehensive framework in place providing for the automatic exchange of several categories of information. This framework is summarized here, along with the first report on the data shared by member states.

Directive 2011/16/EU (DAC1)

Council Directive 2011/16/EU[1] (the Directive on Administrative Cooperation, or DAC 1) establishes the framework for better cooperation between EU tax authorities. This replaced the previous legal basis for administrative cooperation in the field of taxation provided by the 1977 legislation 77/799/EEC.

After having been formally adopted by the European Council of Finance Ministers (Ecofin) on February 15, 2011, the national laws, regulations, and administrative provisions implementing the Directive entered into force on January 1, 2013, with the provisions relating to automatic exchange of information entering into force on January 1, 2015.

According to the Council of the European Union, enhanced administrative cooperation between tax authorities was needed to help governments combat growing levels of cross-border tax avoidance and fraud in an increasingly globalized economy. "In the light of greater taxpayer mobility and a growing volume of cross-border transactions, the Directive sets out to fulfill the member states' growing need for mutual assistance – especially via the exchange of information – so as to enable them to better assess taxes due," the Council said at the time the new Directive was adopted.

The Directive is also designed to prevent a member state from refusing to supply information concerning a taxpayer of another member state on the sole grounds that the information is held by a bank or other financial institution. Further, it identifies certain details that must be specified in requests for information, namely the identity of the person under investigation and the tax purpose for which the information is sought.

The Directive provides for the exchange of information that is of "foreseeable relevance" to the administration and the enforcement of member states' tax laws. In addition, the Directive:

- Extends cooperation between member states to cover direct taxes of any kind;
- Establishes time limits for the provision of information on request and other administrative enquiries;
- Allows officials of one member state to participate in administrative enquiries on the territory of another member state;
- Provides for feedback on the exchange of information; and
- Provides that information exchange be made using standardized forms, formats, and channels of communication.

Forms of information exchange

Under spontaneous exchange, a country provides its treaty partner with information about likely tax evaders if it happens to uncover such information during its own audits. Each competent national authority must communicate information to the competent authority of any other EU country in the following situations:

- The competent authority of one EU country has reason to suppose that there may be a loss of tax in the other EU country;
- A person liable to tax obtains a reduction in, or an exemption from, tax in one EU country which would give rise to an increase in tax or to liability to tax in the other EU country;
- Business dealings between two persons liable to tax in different EU countries are conducted through one or more countries in such a way that a saving in tax may result in either or both of the EU countries;
- The competent authority of one EU country has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; and
- Information forwarded to one EU country by another EU country's competent authority has enabled information to be obtained which may be relevant in assessing liability to tax in the latter EU country.

Automatic exchange consists of the automatic provision of information by one country to another on income of residents of the second country and, in the case of cross-border tax rulings and advance pricing arrangements, the automatic provision of information to all member states and the Commission. This form of exchange is normally made in electronic form and usually on a mutually agreed periodic basis.

Information exchange on request is a response by one country to a request by another country for information. Upon receipt of a request, an authority must communicate to the requesting authority any relevant information that it has in its possession or that it obtains from administrative enquiries.

In order to obtain the requested information or to conduct the administrative enquiry requested, the authority must follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own country. As mentioned, EU countries may not refuse to supply information solely because this information is held by a bank or other type of financial institution.

Scope

The Directive encompasses all taxes of any kind with the exception of VAT, customs duties, excise duties, and compulsory social contributions. These taxes are already covered by other EU legislation on administrative cooperation.

The type of person covered by the Directive depends on the type of exchange involved, but in general, natural persons (*i.e.*, individuals), legal persons (*i.e.*, companies), associations of persons, and any other legal arrangements are included within its scope.

With effect from January 1, 2015, the Directive provides for the mandatory exchange of information in respect of five non-financial categories of income and capital, where such information is available. These are: income from employment; directors' fees; life insurance products not covered by other directives; pensions; and ownership of, and income from, immovable property.

Time limits

The Directive requires that information exchanges must take place within certain deadlines, in an effort to improve the system's effectiveness. As such, in cases where information is to be exchanged on request, tax authorities must respond to the request within seven days, and provide the requested information within six months. If the authority receiving the request already possesses the information, it must be provided within two months of that date.

For spontaneous exchanges, the transmission of the relevant information must take place no later than one year after the information becomes available.

Timelines for automatic exchanges vary, depending on the situation. However, in general, the communication of information must take place at least once a year, within six months following the end of the tax year of the member state during which the information became available.

Financial accounts (DAC2)

Under an amendment to the Directive, adopted by Ecofin on December 9, 2014,[2] certain items of financial information were brought within the scope of the legislation. These items included interest, dividends, and similar types of income, gross proceeds from the sale of financial assets and other income, and account balances. DAC2 effectively implements the requirements of the OECD Common Reporting Standard in the EU.

EU financial institutions are also required to collect the following items of personal information from their customers:

- Name
- Address
- Place of birth (for Individual and Controlling Persons)
- Date of birth (for Individual and Controlling Persons)
- Country(ies) of tax residence
- Taxpayer identification number(s)
- Place of registration/incorporation (for Entities)
- Entity Type (for Entities)
- Controlling Persons for certain Entity Types

The term Controlling Person means the natural person(s) who exercises a controlling interest over the Entity. The term Controlling Person is consistent with the definition of "beneficial owner" in the anti-Money Laundering Directive.

EU member states started collecting information on other member states' tax residents on January 1, 2016 (with the exception of Austria, which began collecting information on January 1, 2017), and the first information exchanges between tax administrations took place by September 2017.

Tax rulings (DAC3)

Another amendment to the Directive was adopted by Ecofin on December 8, 2015,[3] which provides for the exchange of information regarding cross-border tax rulings and advanced transfer pricing arrangements between member states. This amendment entered into force on January 1, 2017, and requires national tax authorities to transmit a report to a central depository listing all cross-border tax rulings issues every six months. Other member states are able to check these lists and ask the issuing member state for more detailed information on a particular ruling.

The Directive has a wide scope that includes taxpayers of all business forms, for example legal persons like companies and legal arrangements such as trusts and foundations. Rulings that relate only to natural persons are not included in the Directive.

All taxpayers receiving such a ruling and pricing arrangement will be included irrespective of their country of residence. For example, a ruling or pricing arrangement issued by the competent authority of a member state to a taxpayer resident in a non-EU country will also need to be registered in the central directory database.

Member states must register the following information on their cross-border tax rulings and advance pricing arrangements:

- The identity of the person, other than a natural person, and where appropriate the group of persons (i.e. group companies) to which the taxpayer belongs;
- The summary of the content of the advance cross-border ruling or advance pricing arrangement, including the amounts of the transactions;
- The date of issuance, amendment or renewal of the cross-border ruling or the advance pricing arrangement;
- The start date and end date of the period of validity of the cross-border ruling or the advance pricing arrangement;
- For advance pricing arrangements the set of criteria and the method used for the transfer pricing;
- The identification of the other member state or persons in the other member state, other than natural persons, likely to be affected by the advance cross-border ruling or advance pricing arrangement.

The first exchanges of tax rulings and pricing arrangements should have taken place no later than September 1, 2017, and from January 1, 2018, all member states must provide information on rulings issued since the beginning of 2012.

Country-By-Country Reporting (DAC4)

On May 26, 2016, the EU Council approved a Directive[4] on the country-by-country (CbC) reporting of tax information by multinational entities (MNEs) and automatic exchange of that information between EU tax authorities. The Directive transposed the OECD recommendation on CbC reporting under base erosion and profit shifting Action 13 into a legally binding EU instrument, and requires a multinational corporation with total consolidated group revenue of at least EUR750m (USD852m) to file a CbC report to the tax authorities of the member state where it is tax resident.

Information to be reported, on a CbC basis, includes revenues, profits, taxes paid, capital, earnings, tangible assets, and the number of employees. The Directive requires EU tax authorities to exchange these details automatically to assess tax avoidance risks related to transfer pricing.

The Country-by-Country Report has to be filed in the member state in which the ultimate parent entity of the MNE Group or any other reporting entity is a resident for tax purposes. The member state will communicate the report to any other member states in which one or more Constituent Entities of the MNE Group are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment. The MNE group will have to file a Country-by-Country Report with respect to its reporting fiscal year no later than 12 months after the last day of the reporting fiscal year of the MNE group.

Beneficial Ownership (DAC5)

Another extension to the Directive saw the EU Council adopt an amendment on December 6, 2016,[5] granting tax authorities access to information held by authorities responsible for the prevention of money laundering. Effective from January 1, 2018, the legislation requires authorities with anti-money laundering responsibilities in any EU member state to automatically share certain information, including information on the beneficial ownership of companies, trusts, and other entities, along with information on bank account balances, interest income, and dividends. They will also have access to the customer due diligence records kept by companies.

Currently, where a financial account holder is an intermediary structure, banks are required to look through that entity and report its beneficial ownership. Applying that provision relies on information held by authorities responsible for the prevention of money laundering.

Intermediaries (DAC6)

On May 25, 2018, Ecofin adopted the European Commission's proposal from June 2017[6] on new transparency rules for intermediaries that design or sell potentially harmful tax schemes. The directive will require intermediaries such as tax advisors, accountants, and lawyers that design and/or promote tax planning schemes to report schemes that are considered potentially aggressive. EU member states will be required to automatically exchange the information they receive through a centralized database.

The draft directive establishes "hallmarks" to identify the types of schemes that will need to be reported to the tax authorities by intermediaries, such as tax advisers, accountants, banks, and lawyers, although in certain circumstances the reporting obligation will fall on taxpayers themselves. Such hallmarks include: the use of cross-border losses to reduce tax liability; the use of special preferential tax schemes; or arrangements through countries that do not meet international good governance standards.

EU member states have until December 31, 2019, to transpose the directive into their national laws and regulations. The new reporting requirements will apply from July 1, 2020. Member states will be obligated to exchange information every three months, within one month from the end of the quarter in which the information was filed. The first exchanges should therefore be completed by October 31, 2020.

Third Country Agreements

The EU has also signed automatic information exchange agreements with five European non-EU countries: Andorra, Liechtenstein, Monaco, San Marino, and Switzerland. The contents of these agreements are similar to the directive on the automatic exchange of financial account information.

Results

A report published by the European Commission on December 17, 2018,[7] provided the first indication of how this system exchange of information is working in practice. This showed that

up to June 2017, member states automatically exchanged information concerning nearly 16 million taxpayers, relating to incomes and capital amounting to over EUR120bn. Most of this information concerned income from employment and pensions which represent over 80 percent of the taxpayers and 95 percent of the total value. Significantly, this was a twofold increase on the volume of information exchanged between 2015 and 2016

Unsurprisingly, France, Germany, Italy, and the UK were among the top senders and top receivers of information. However, there were marked differences in the categories of information sent and received by these countries. France and Germany are by far the largest senders for employment and pension income, while a substantial share of the information they receive concerns immovable property. By contrast, a large share of the information transmitted by Italy, Portugal, and Spain relates to immovable property, with these countries receiving information mostly concerning pensions.

The analysis also found that exchange patterns are mostly consistent with intra-EU migration patterns, with emigration countries being net receivers of information. Notably, Poland receives information on 14 times more taxpayers (equaling 19 times the amount) than it sends information about. The opposite applies in net immigration countries, for example Luxembourg which sends information on five times as many taxpayers as it receives information on, and on over thirty times the value.

However, the bulk of exchanges, the report said, take place along two axes, the one connecting Germany and France with Spain and Portugal, and the one linking Germany and Italy, with two additional significant flows between France and Italy and the Netherlands and Poland. The three largest flows, accounting for more than EUR9bn, originate from Luxembourg towards Belgium, France, and Germany. This is supplemented by a significant flow from France to Portugal.

Nevertheless, it is not immediately clear how beneficial the EU automatic EoI framework is to member states in terms of additional revenues. According to the report, member states have said it is difficult ascertain the revenue impact of tax data received from abroad, as usually this is only part of the information used by authorities to assess additional taxes. In fact, only five member states have been able to calculate the monetary benefits arising from DAC1 information: Belgium, Estonia, Finland, Poland, and Slovenia. Nevertheless, the report concludes that such information remains beneficial as it allows member states to profile risky and compliant taxpayers, while automatic EoI may also provide a deterrent effect and help to prevent aggressive tax avoidance and evasion.

Future Extensions?

It is likely that in the near future we will see additional amendments to these directives to increase the scope of information that can be exchanged between EU tax authorities, or to ensure other types of information is automatically exchanged. Indeed, the Commission has said it views further improvements to the Directive to be a priority and has already proposed that the lists of financial and non-financial items of information subject to mandatory automatic exchange of information be extended.

Endnotes

1 http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32011L0016

2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0107

3 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2376

4 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0881

5 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016L2258

6 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018L0822

7 https://ec.europa.eu/taxation_customs/sites/taxation/files/report-automatic-exchanges-taxation-dac-844_en.pdf

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IRS Announces New Voluntary Disclosure Program For Willful Tax Delinquency

by Joshua Ashman, CPA & Nathan Mintz, Esq., Expat Tax Professionals

On September 28, 2018, the IRS officially terminated[1] its increasingly unpopular Offshore Voluntary Disclosure Program (OVDP), leaving willfully delinquent taxpayers open to the full gambit of potential criminal and civil penalties.

While the termination was expected at some point due to repeated warnings by the IRS that the program would not last forever, the move still seemed like an abrupt ending to a program that was at least initially quite successful in encouraging a large group of delinquent taxpayers to come clean with the IRS.

In its wake, however, the IRS recently announced[2] that it has essentially reopened the program, but with major changes as to its scope and implications. In this blog, we compare the former OVDP with the new modified program.

Former OVDP

The former OVDP was designed for taxpayers who were concerned that their failure to report income, and failure to disclose foreign financial accounts, might be viewed by the IRS as willful and who seek to avoid potential criminal penalties.

US expats were required to file delinquent tax returns, with all required information returns, and FBARs for the prior 8 years.

A taxpayer who complied with the procedures would have to pay back taxes with interest. In lieu of all other penalties that may apply to the undisclosed foreign assets and entities including FBAR, a reduced penalty of 27.5 percent was calculated based on the highest aggregate balance in foreign bank accounts/entities or value of foreign assets during the period covered by the

voluntary disclosure. The penalty was increased to 50% if the taxpayer had a foreign financial account, or had a facilitator who helped the taxpayer establish or maintain an offshore arrangement, and the financial institution or the facilitator had been publicly identified as being under investigation by the IRS or Department of Justice.

New Voluntary Disclosure Program

In a significant contrast to the former OVDP, the new "VDP" applies to all voluntary disclosures, whether domestic or offshore.

Under the new program, voluntary disclosures will generally include a six-year disclosure and examination period, but can vary depending on the circumstances of the taxpayer. Taxpayers must submit all required returns and reports for the disclosure period, and then examiners will determine applicable taxes, interest, and penalties under existing law and procedures.

As stated in the IRS announcement, penalties under the new program will be imposed as follows:

i. The civil penalty under I.R.C. § 6663 for fraud or the civil penalty under I.R.C. § 6651(f) for the fraudulent failure to file income tax returns (together, the "civil fraud penalty") will apply to the one tax year with the highest tax liability.
ii. In limited circumstances, examiners may apply the civil fraud penalty to more than one year in the six-year scope (up to all six years) based on the facts and circumstances of the case, for example, if there is no agreement as to the tax liability.
iii. Examiners may apply the civil fraud penalty beyond six years if the taxpayer fails to cooperate and resolve the examination by agreement.
iv. Willful FBAR penalties will be asserted in accordance with existing IRS penalty guidelines
v. A taxpayer is not precluded from requesting the imposition of accuracy related penalties under I.R.C. § 6662 instead of civil fraud penalties or non-willful FBAR penalties instead of willful penalties. Given the objective of the voluntary disclosure practice, granting requests for the imposition of lesser penalties is expected to be exceptional. Where the facts and the law support the assertion of a civil fraud or willful FBAR penalty, a taxpayer must present convincing evidence to justify why the civil fraud penalty should not be imposed.
vi. Penalties for the failure to file information returns will not be automatically imposed. Examiner discretion will take into account the application of other penalties (such as civil fraud penalty and willful FBAR penalty) and resolve the examination by agreement.

vii. Penalties relating to excise taxes, employment taxes, estate and gift tax, etc. will be handled based upon the facts and circumstances with examiners coordinating with appropriate subject matter experts.
viii. Taxpayers retain the right to request an appeal with the Office of Appeals.

Streamlined Program Still Lives On

In announcing the new voluntary disclosure program, the IRS made sure to confirm that the current program for non-willfully delinquent tax filer, known as the "Streamlined Filing Compliance Procedures"(SFCP), still remains open.

These procedures generally can be used if: (1) the taxpayer has failed to report income from a foreign financial asset and failed to pay the required tax, and may have failed to file a required FBAR, and (2) The taxpayer has committed the failures due to non-willful conduct.

Under this program, US expats are required to file delinquent tax returns, with all required information returns, for the prior 3 years, and file any delinquent FBARs for the prior 6 years. They must also file a non-willful certification with their submission.

A taxpayer who complies with the procedures will have to pay previously unpaid taxes with interest, but will not be subject to failure-to-file and failure-to-pay penalties, accuracy-related penalties, information return penalties, or FBAR penalties.

Most of our expat clients entering the disclosure programs choose the Streamlined Procedures due to the non-willful nature of their tax delinquency and the desire to come clean without incurring onerous penalties. The cost-effectiveness of this program makes it a great way to get on track with your taxes and put your IRS worries behind you for good.

The Takeaway For US Expats

Currently, an estimated 9 million US citizens are living abroad. A growing number of expats have begun to realize that their US tax compliance obligations did not end upon their change in residency.

Constant changes to the voluntary disclosure programs should come as a stark warning that these programs may come to a complete end at some point in the not-so-distant future.

For now, the Streamlined Procedures remain a great option for coming clean with the IRS. Several other amnesty options are also available, depending on your situation. Each option has its advantages and disadvantages, and choosing the best way forward requires a careful analysis of your particular facts and circumstances.

For more information on the matters discussed above, please contact the authors.

Endnotes

[1] https://www.expattaxprofessionals.com/irs-announces-official-end-offshore-voluntary-disclosure-program/

[2] https://www.irs.gov/pub/spder/lbi-09-1118-014.pdf

Country Focus: Australia

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Accessing The Lower Corporate Tax Rate For Small-To-Medium Australian Companies

In Australia, the general corporate tax rate is 30 percent. To assist smaller businesses in becoming more competitive with larger corporations, over the last few years the Australian Government has introduced various law changes (with only some passing into law) to allow small and medium Australian companies (or SMEs) to access a lower corporate tax rate. These changes have led to a multitude of new concepts, different tax rates and turnover thresholds, additional eligibility requirements and flow-on implications that need to be analyzed and understood by corporate taxpayers and their advisers.

More recently, the new definition of a 'base rate entity' (BRE) passed into law on August 31, 2018 with effect from July 1, 2017. This new BRE definition effectively replaces the previous definition of a small business entity (SBE) for the purposes of accessing the lower corporate tax rate from the 2017/18 income year (see Table). As the changes have caused significant confusion and uncertainty, we have summarized the latest position on accessing the lower corporate tax rate and potential flow on tax implications to franked dividends.

Broadly, if a company passes the following two tests then it should be able to access the lower corporate tax rate:

- BRE passive income test (replaces the 'carrying on a business' test from the 2017/18 income year); and Aggregated turnover is under the threshold for the relevant income year (aggregated turnover includes the annual turnover of connected entities and affiliates).

The New Test: Base Rate Entity Passive Income

The new BRE definition replaces the 'carrying on a business' test with a 'BRE passive income test' from July 1 2017 (i.e. the 2017/18 income year onwards). Broadly, if less than 80 percent of a company's assessable income is BRE passive income, then this test is satisfied.

Table 1 – Eligibility criteria for relevant income years impacted by changes to corporate tax (Au$)

Income year*	Classification	Test 1: SBE / BRE	Test 2: Aggregated turn-over threshold	Lower corporate tax rate
2015/16	SBE	Carrying on a business test	AUD2m (USD1.4m)	28.5%
2016/17	SBE	Carrying on a business test	AUD10m	27.5%
2017/18	BRE	BREPI test	AUD25m	27.5%
2018/19	BRE	BREPI test	AUD50m	27.5%
2019/20	BRE	BREPI test	AUD50m	27.5%
2020/21*	BRE	BREPI test	AUD50m	26%
2021/22*	BRE	BREPI test	AUD50m	25%

BRE, base rate entity; BREPI, base rate entity passive income; SBE, small business entity.

**Note: The standard income year in Australia ends on 30 June. The progressive reduction of the company tax rate to 25 percent has been brought forward to start from the 2021/22 income year (previously proposed to start from 2026/27) and only for SMEs. This change passed into law on October 25, 2018.*

BRE passive income includes (but is not limited to) the following amounts:

- Dividends, other than a nonportfolio dividend,[1] and franking credits attached to such a distribution
- Interest
- Royalties
- Rent
- Net capital gains
- Assessable income of a partner in a partnership or beneficiary of a trust estate to the extent the amount is referable to BRE passive income.

From the 2017/18 income year, an analysis of a company's assessable income is now required on an annual basis to determine whether a company passes the BRE passive income test. In some cases, identifying whether an amount of assessable income is BRE passive income or not requires tracing through specific components of income of the entity (or entities) making distributions to the recipient company.

Example 1: Determining the applicable corporate tax rate in 2017/18

For illustration purposes, a simple example of how the BRE passive income test is worked out is included below.

For the 2017/18 income year, a company's:

- Aggregated turnover is AUD26m
- Total assessable income is AUD24m
- BRE passive income is AUD19m (*i.e.* 79.2 percent).

Although the company's BRE passive income is below 80 percent, its aggregated turnover is above the AUD$25m threshold applicable for the 2017/18 income year. Therefore, the company in this example would not be eligible for the lower corporate tax rate of 27.5 percent for 2017/18 and its applicable corporate tax rate would be 30 percent.

Impact On Dividend Imputation And Franking Credits

Australia has a dividend imputation system in which some or all of the tax paid by a company may be attributed (or imputed) to shareholders by way of a tax credit (or franking credit) to reduce the income tax payable on a distribution. For the purposes of working out the corporate tax rate for dividend imputation purposes, the company must assume that its aggregated turnover, assessable income, and BRE passive income will be the same as the previous income year and compare this to the current year's aggregated turnover threshold.

Because of the way that the franking percentage is worked out based on previous year figures combined with the various changes to the corporate tax rate, situations could arise where a company's tax rate is different to its franking percentage for a particular year.

Importantly, taxpayers need to be aware of and plan for potential franking issues going forward whereby companies can only frank dividends at the lower corporate tax rate (*i.e.* 27.5 percent

for 2017/18) on profits from previous years that have presumably been taxed at the higher 30 percent. While franking credits do not expire and may be carried forward indefinitely, the practical result is that the tax differential (2.5 percent for 2017/18) on historical franking credits taxed at 30 percent is effectively 'trapped' in the company.

Example 2: Determining the applicable franking percentage in 2018/19

Following from Example 1 above, for the 2018/19 income year the company's:

- Aggregated turnover is AUD32m
- Total assessable income is AUD28m
- BRE passive income is AUD22m (*i.e.* 78.6 percent).

As the company's BREPI is below 80 percent and aggregated turnover is below the 2018/19 threshold (*i.e.* AUD50m), it would be eligible for the lower corporate tax rate of 27.5 percent in 2018/19. However, based on the company's prior (2017/18) income year results, it would only be able to frank dividends it pays in the 2018/19 year at 27.5 percent despite the fact that it would have paid corporate tax at 30 percent in 2017/18 (and presumably also in previous years).

Endnote

1 A non-portfolio dividend is broadly dividend from a company in which you have a voting interest of 10 percent or more.

Topical News Briefings: New Carrots, More Sticks

by the Global Tax Weekly Editorial Team

Amid fears of a race to the bottom on corporate tax, the OECD is frequently heard advising countries that they should refrain from taxing corporate and personal incomes too harshly, and instead focus revenue-raising efforts on less economically distorting forms of taxation.

It is a message that many jurisdictions have received loud and clear. Globally, the corporate tax rate trend is firmly to the downside, although many believe that average rates will eventually settle somewhere around the 20 percent mark or slightly less. Indeed, businesses in several jurisdictions will be able to take advantage of additional corporate tax rate reductions that are due to take effect on January 1, 2019. Greece, Puerto Rico, Luxembourg, and Uzbekistan are among those jurisdictions set to lower corporate tax next year.

Yet, the OECD demands a quid pro quo. This is mostly obviously seen with the BEPS project, the OECD's flagship global reform initiative which is arguably now the major influence on tax policy at national level, and which has been indirectly responsible for hundreds of the legislative and regulatory changes in the area of taxation globally. And that bargain involves the widening of corporate tax bases and, above all, a much greater emphasis by governments and tax authorities on preventing tax avoidance and promoting compliance.

This tension between competition and economic imperatives on the one hand, and anti-tax avoidance and revenue generation on the other, is reflected in daily tax developments. However, just as there are those who are warning that tax competition has become too cut-throat, there are others who would say that, on balance, with the BEPS project in its implementation phase, compliance has taken precedence over competitiveness. At any rate, governments are treading a difficult line between the two necessities, and as we look forward to 2019 and beyond, that is likely to remain the case.

Within such an environment, businesses can still expect to be rewarded for their investments in certain jurisdictions with favorable tax conditions. But while there is likely to be no shortage of tax carrots around the world for multinational businesses, the sticks are growing ever larger and more numerous.

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Residence/Citizenship by Investment – New Developments

by Maria Frolova, Daria Vasyatkina,
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On November 20, the OECD published on its website an updated list of countries, which offer potentially high-risk schemes for obtaining residence that may be used to circumvent the rules on the automatic exchange of information (CRS) (the OECD list of Residence/Citizenship by investment (CBI/RBI) schemes).

The OECD recently conducted a review of CRS-committed countries offering high-risk schemes for obtaining residence/citizenship that may be used to circumvent CRS rules (the OECD list of Residence/Citizenship by investment (CBI/RBI) schemes). It analyzed over 100 schemes whereby residence or citizenship is offered in exchange for local investments or flat fees (so-called "golden visas") in CRS-committed jurisdictions. The OECD considers such schemes as high-risk where the jurisdiction concerned gives a resident access to a low personal income tax rate (less than 10 percent) on offshore financial assets and does not require significant physical presence (at least 90 days) in the jurisdiction offering the CBI/RBI scheme. In the OECD's view, such schemes may be misused by individuals to hide their assets held abroad without actually residing in the jurisdiction offering the CBI/RBI scheme.

The original "blacklist" included 21 countries and territories, namely Antigua and Barbuda, the Bahamas, Bahrain, Barbados, Colombia, Cyprus, Dominica, Grenada, Malaysia, Malta, Mauritius, Monaco, Montserrat, Panama, Qatar, Saint Kitts and Nevis, Saint Lucia, the Seychelles, Turks and Caicos, the UAE and Vanuatu.

In the month that followed RBI/CBI schemes release, however, Colombia, Mauritius, Monaco, Montserrat and Panama officially refuted the OECD's announcement and denied that their schemes may lead to inaccurate or incomplete reporting under the CRS. They also announced additional measures to prevent the misuse of RBI/CBI schemes by account holders by putting

in place an exchange of information mechanism that will ensure that the information on applicants of RBI/CBI schemes will be made available to their jurisdictions of tax residence. This has resulted in citizenship schemes offered in the jurisdictions in question being excluded from the OECD's list. The updated list as at November 20, 2018 now contains 16 countries.

The main objective of publishing the list is to provide financial institutions with additional tool which, according to the OECD, they are required to take into account in carrying out CRS due diligence procedures in relation to account holders. In particular, financial institutions are required to apply reasonableness ("reason to know") test in relation to self-certifications and documentary evidence provided by a client; where there is reason to know that information received from a client is unreliable or incorrect, financial institutions are obliged to take appropriate measures to ascertain the tax residency (ies) of such person, including by seeking additional information and explanations. More detailed information about the published list and the OECD's guidance in this respect may be found on the OECD website.[1]

This is an important issue both for financial institutions, mainly from the point of aligning their CRS client identification processes, and for individuals who are tax residents in concerned jurisdictions.

Endnote

1 http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/

Topical News Briefing: Cautious Canada

by the Global Tax Weekly Editorial Team

This year's substantial corporate tax cut in the United States, combined with other favorable aspects of the Tax Cuts and Jobs Act (TCJA), have undoubtedly ratcheted up the competitive pressure on economies around the world, and several governments are scrambling to react. However, nowhere is this heat being felt more keenly than in Canada.

Both businesses and members of Canada's federal Parliament have been warning of the impact of tax cuts south of the border on Canada's relative competitiveness. However, to the Government's credit, the warnings appear to have been heeded. In November 2018, the Government announced long-anticipated measures to designed to prevent any exodus of Canadian businesses to the United States. These were centered around allowing businesses to write off investments much faster than they can at present, and were intended as a direct response to similar measures enacted in the US as part of the TCJA.

Furthermore, as reported in this week's issue of *Global Tax Weekly*, smaller businesses in Canada will receive an additional helping hand from January 2019 in the form of reduced rates of corporate tax. According to the Government, these measures will provide small firms with the lowest combined corporate tax rate in the G7, and the fourth-lowest in the OECD.

The key question is, however, is will these and other enhancements to Canada's tax regime due to take effect on January 1, 2019, be sufficient to meet the demands of an increasingly competitive global tax environment. That remains to be seen. The Government chose not to further reduce Canada's federal headline rate of corporate tax in response to the TCJA as it feared this could significantly impact tax revenues without much discernible gain. But this is a situation that may need to be kept under regular review into 2019.

However, it is not only the tax policies of Canada's competitors that the country's businesses and Government must worry about. According to a recent report by the Canadian Chamber of Commerce, the US's "America First" approach to trade relations, Brexit, increasing tariffs, and the threat of a trade war between the US and China all have implications for Canadian businesses.

The Chamber also reported that, in addition to the issue of trade uncertainty, competitiveness issues such as tax and regulations are prompting businesses to proceed with caution when it comes to major capital outlays, and they might well be hoping that the Government isn't quite so cautious on tax in the next year and beyond.

EU's BEPS Response Effective From January 1

Four of the five elements of the European Union Anti-Tax Avoidance Directive (ATAD I) will become effective from January 1, 2019.

The Anti-Tax Avoidance Directive contains five legally binding anti-abuse measures, which all member states are required to apply against common forms of aggressive tax planning. These measures, says the Commission, are intended to create "a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses."

The directive covers all taxpayers that are subject to corporate tax in EU member states, including subsidiaries of companies based in third countries. It does the following:

- Limits the amount of interest that a corporate taxpayer is entitled to deduct in a tax year, to discourage the practice of artificially shifting debt to jurisdictions with more generous deductibility rules;
- From 2020, establishes exit taxation rules, to prevent tax base erosion in the state of origin;
- Introduces a general anti-abuse rule, to cover gaps that may exist in member states' specific anti-abuse legislation;
- Introduces controlled foreign company (CFC) rules, to reattribute the income of a low-taxed controlled foreign subsidiary to its (usually more highly taxed) parent company; and
- Introduces rules on hybrid mismatches, to prevent companies from taking advantage of disparities between national tax systems to reduce their overall tax liability.

The directive will ensure that the anti-BEPS measures drawn up by the OECD are implemented in a coordinated manner by EU states, including by the six member states that do not belong to the OECD. Three of the five areas covered by the directive implement OECD recommendations, namely the interest limitation rules, the CFC rules, and the rules on hybrid mismatches.

EU member states have until December 31, 2018, to transpose the directive into their national laws and regulations, with the exception of the exit taxation rules, which must be transposed by December 31, 2019. Member states that have targeted rules that are equally effective to the interest limitation rules may apply them until the OECD reaches an agreement on a minimum standard, or until January 1, 2024, at the latest.

Dutch Consultation Launched On Tax Avoidance Scheme Powers

On December 19, 2018, the Dutch Government commenced a public consultation on proposed legislation to implement incoming European Union rules for the reporting of potentially aggressive cross-border tax arrangements.

EU Directive 2018/822, which entered into force on June 25, 2018, is intended to enable new risks of tax avoidance within the EU to be identified earlier and for measures to be taken to block harmful arrangements. EU member states will be required to automatically exchange the information they receive through a centralized database.

The draft directive establishes "hallmarks" to identify the types of schemes that will need to be reported to the tax authorities by intermediaries, such as tax advisers, accountants, banks, and lawyers, although in certain circumstances the reporting obligation will fall on taxpayers themselves. Such hallmarks include: the use of cross-border losses to reduce tax liability; the use of special preferential tax schemes; or arrangements through countries that do not meet international good governance standards.

EU member states have until December 31, 2019, to transpose the directive into their national laws and regulations. The new reporting requirements will apply from July 1, 2020. Member states will be obligated to exchange information every three months, within one month from the end of the quarter in which the information was filed. The first exchanges should therefore be completed by October 31, 2020.

In addition, the Government has proposed the publication of the names of advisers who have been fined, to deter taxpayers from obtaining services from previously non-compliant intermediaries.

This consultation concludes on February 1, 2019, and the Government expects that legislation to implement this measure will be submitted to Parliament in the fall of 2019, so it can enter into force on January 1, 2020.

Large Businesses Paying More Tax In Australia

The Australian Taxation Office (ATO) has published its corporate tax transparency report for 2016-17, which shows that there was a 19.6 percent increase in tax payable by large companies.

The ATO is required under Australian law to publish tax information reported to it by certain companies each year. Its report for the 2016-17 year includes tax information on 2,109 large companies operating in Australia. The total income tax payable for these companies was AUD45.7bn (USD34.1bn).

Compared to 2015-16, this represents a net increase of 68 entities and an increase in tax payable of 19.6 percent or AUD7.5bn. The ATO said that the increase in tax payable was primarily driven by the mining, energy, and water sectors, broadly reflecting a recovery of commodity prices.

The report covers: 1,721 Australian public and foreign-owned companies with an income of AUD100m or more; 388 Australian-owned resident private companies with an income of AUD200m or more; and 14 entities with petroleum resource rent tax (PRRT) payable. Australian public entities contributed most to the increase in tax payable (AUD6.4bn), followed by foreign-owned entities (AUD626m), and Australian private entities (AUD429m).

Of the 2,109 entities in the 2016-17 report, 66 percent paid tax and the remainder did not. Of the latter group, 251 entities reported a taxable income but prior-year losses were available to deduct against that profit, meaning that no tax was payable. 59 entities reported taxable income but were also entitled to offsets at least equal to the tax otherwise payable, while 117 entities reported an accounting profit but reconciliations (such as tax deductions allowed at higher rates than accounting permits) resulted in a tax loss. 295 entities reported an accounting loss.

The ATO stressed that, when interpreting the data, undue attention should not be paid to figures which show either no tax or a small amount of tax paid relative to gross income. It stated that corporate income is payable on profits rather than gross income, and that a significant percentage of companies make losses each year, while current profits can be offset against accumulated past losses. The ATO also pointed out that many single entities that did not pay tax are members of a corporate group that did pay tax.

The ATO has also released its company tax gap analysis for the 2015-16 income year, which provides an estimate of the difference between the total amount of tax collected and the amount it would have collected had all taxpayers been fully compliant. The estimated level of compliance of large corporate groups increased from 94 percent to over 95 percent, with the majority of the tax paid voluntarily. The estimated overall tax gap for large corporates was 4.4 percent, down from 5.8 percent in 2014-15.

Commenting on the figures, Jennifer Westacott, Chief Executive of the Business Council of Australia, said: "Over the past four years of data, large businesses have paid AUD168bn of company tax. That's revenues that governments can invest in the projects and services that matter."

IRS Issues Guidance On Section 179 Expensing

On December 21, 2018, the US Internal Revenue Service issued Revenue Procedure 2019-08 to provide guidance on deducting expenses under Section 179(a) of the Internal Revenue Code and on deducting depreciation under Section 168(g).

Section 179 allows taxpayers to deduct the cost of certain property as an expense when the property is placed in service. As a result of changes brought about by the Tax Cuts and Jobs Act (TCJA) of 2017, for tax years beginning after 2017, the maximum Section 179 expense deduction increased from USD500,000 to USD1m, and the phase-out limit increased from USD2m to USD2.5m. These amounts are indexed for inflation for tax years beginning after 2018.

The Section 179 deduction applies to tangible personal property such as machinery and equipment purchased for use in a trade or business and, if the taxpayer elects, qualified real property. The TCJA amended the definition of qualified real property to mean qualified improvement property and some improvements to non-residential real property, such as roofs; heating, ventilation, and air-conditioning property; fire protection and alarm systems; and security systems. Revenue Procedure 2019-08 explains how taxpayers can elect to treat qualified real property as Section 179 property.

The TCJA enables a farming business to elect out of the interest deduction limit of Section 163(j). However, if it does so, the business must use the alternative depreciation system (ADS) for property with a recovery period of 10 years or more. Similarly, a real property trade or business that elects out of the Section 163(j) limit must also use the ADS for non-residential real property, residential rental property, and qualified improvement property. Revenue Procedure 2019-08 explains how electing real property trades or businesses or farming businesses change to the ADS for property placed in service before 2018, and provides that it is not a change in accounting method.

Finally, the TCJA changed the ADS recovery period of residential rental property. For property placed in service after 2017, the recovery period is 30 years, down from 40 years. Revenue Procedure 2019-08 provides an optional depreciation table for residential rental property depreciated under the ADS with a 30-year recovery period.

US House Passes Year-End Tax Package

On December 20, 2018, the United States House of Representatives approved a package of proposals which includes disaster tax relief, enhancements to retirement and savings accounts, relief from various Obamacare taxes, Internal Revenue Service (IRS) reform, and other tax provisions.

The main provisions of the bill include:

- Targeted and temporary tax relief for taxpayers hit by storms and natural disasters in Alabama, California, Florida, Georgia, Hawaii, Indiana, North Carolina, South Carolina, Texas, Virginia, Wisconsin, American Samoa, Guam, and the Northern Mariana Islands.
- Provisions from the House-passed Family Savings Act, including expansion of 529 savings accounts, as well as the Retirement Enhancement and Savings Act, which modifies requirements for tax-favored retirement savings accounts and employer-provided retirement plans.
- Delays to the Medical Device Tax for five years, the Health Insurance Tax for two years, the Cadillac Tax for one year, and the permanent repeal of the Tanning Tax.
- Several minor and time-sensitive technical corrections to the Tax Cuts and Jobs Act.
- Provisions for tax-exempt entities, including repealing a tax on transportation fringe benefits for such entities and repealing the Johnson Amendment, which prevents non-profit organizations from endorsing political candidates.
- Bipartisan provisions which passed the House in April 2018 to redesign the IRS by modifying its organizational structure, enforcement procedures, and services.

IRS Issues Guidance On Loss Limitation Rules

On December 18, 2018, the Internal Revenue Service issued guidance on excess business loss limitations and net operating losses following law changes in the Tax Cuts and Jobs Act (TCJA) of 2017.

The TCJA modified existing tax law on excess business losses by limiting losses from all types of business for non-corporate taxpayers.

An excess business loss is the amount by which the total deductions from all trades or businesses exceed a taxpayer's total gross income and gains from those trades or businesses, plus USD250,000, or USD500,000 for a joint return.

Excess business losses that are disallowed are treated as a net operating loss carryover to the following taxable year.

The TCJA also modified net operating loss (NOL) rules. Most taxpayers no longer have the option to carryback a NOL. For most taxpayers, NOLs arising in tax years ending after 2017 can only be carried forward. Exceptions

apply to certain farming losses and NOLs of insurance companies other than a life insurance company.

For losses arising in taxable years beginning after December 31, 2017, the new law limits the NOL deduction to 80 percent of taxable income.

US Bill to Provide 'Tax Fairness' For Expats

Americans Citizens Abroad, the advocacy group for American expats, welcomed the introduction of a bill in the United States House of Representatives on December 20, 2018, that would provide an exclusion on foreign-earned income for non-resident US citizens in lieu of existing citizenship-based taxation.

Currently, US citizens must file US tax returns and pay US tax on their worldwide income, even if they do not live in or travel to the US. Most other jurisdictions in the world tax individuals on the basis of residency. However, US expats may qualify to exclude from income a certain amount of foreign earnings that is adjusted annually for inflation. In 2018, this exclusion is USD104,100. In addition, US expats can exclude or deduct certain foreign housing amounts.

According to ACA, the proposals would provide an alternative regime alongside the existing foreign earned income and housing cost exclusions that would enable non-resident US citizens to elect to be taxed as "qualified nonresident citizens." As such they would be able to exclude (and be exempt from) foreign earned income, without limit, and specified foreign unearned income related to their foreign residency (time abroad). However, all nonresident citizens would remain subject to tax on any US source income.

Applauding the proposals, introduced in the House by Rob Holding (R-NC), ACA said that the bill would provide a tax regime "that is simpler, fairer, and more competitive for Americans around the world."

"This bill takes a meaningful step to address the discriminatory double taxation of Americans abroad, eases the burden of dual tax filing requirements, and ensures that Americans around the world are able to accurately plan and save for their future without the fear of punishing tax liabilities," ACA stated.

ACA has long lobbied Congress to introduce a residence-based tax regime, under which US residents – whether Americans or foreigners – would be subject to US income, estate, and gift taxation, while Americans resident abroad would be subject to essentially the same rules applicable to nonresident aliens and only be taxed by the United States on US-source income.

Greece To Cut Corporate Tax

Greece will gradually lower the rate of corporate tax over the next four years, under proposals announced in September and recently approved by the Greek Parliament.

Under the changes, corporate tax will be reduced from 29 to 28 percent in 2019, to 27 percent in 2020, to 26 percent in 2021, and to 25 percent in 2022 and subsequent years.

However, credit institutions will continue to pay corporate tax at the existing 29 percent rate.

Puerto Rico Set To Lower Corporate Tax

Puerto Rico's corporate tax rate is set to fall on January 1, 2019. under tax legislation signed into law by Governor Ricardo Rossello on December 10, 2018.

Under law no. 257 of 2018, the headline corporate tax rate will fall from 20 to 18.5 percent. The progressive corporate surtax rates will remain at five to 19 percent. This will result in a combined corporate tax of 37.5 percent from December 31, 2018.

Additionally, the law phases out the four percent sales tax on certain designated professional services, the so-called business-to-business (B2B) tax, in place since October 1, 2015. As a result of the changes, the B2B tax will fall to three percent effective January 1, 2019, and to zero percent effective January 1, 2020, for businesses with annual revenues up to USD200,000.

Another sales tax measure will see the effective sales and use tax (SUT) on foods prepared by restaurants reduced from 11.5 percent to seven percent from October 2019.

Polish Tax Reforms Take Effect Jan 1, 2019

Polish legislation providing for a reduced rate of tax for small companies and an IP box regime will become effective from January 1, 2019.

Under the tax reforms, small firms with revenues up to EUR1.2m (USD1.4m) will pay a reduced rate of nine percent. Under current rules, companies with revenues up to EUR1.2m pay corporate tax at 15 percent, with the headline rate currently set at 19 percent.

The amendments also provide for a preferential corporate tax rate of five percent on qualifying intellectual property income, including patents and designs. IP income would have to be linked with research and development expenditure in order to qualify for the preferential tax rate.

The IP box regime follows the OECD modified nexus approach to special IP tax regimes agreed by countries under Action 5 of the OECD's base erosion and profit shifting project. This stipulates that a taxpayer would only be allowed to benefit from an IP regime, and its beneficial tax rates, to the extent that it can show that it itself incurred expenditures, such as on research and development, that gave rise to IP income in that territory.

A consultation is ongoing on various aspects of the new IP box regime, including how to calculate eligible income and transitional provisions, until January 15, 2019.

Canadian Tax Regime To Be Enhanced From 2019

Canada's small business tax rate will be reduced from 10 percent to nine percent from January 1, 2019, as part of a suite of new year tax changes.

The rate was previously reduced from 10.5 percent in January 2018.

The federal Government said that, thanks to this reduction, the combined federal, provincial, and territorial average income tax rate for small business will be 12.2 percent. It said this rate is the lowest in the G7 and the fourth lowest among members of the OECD. The measure should save small businesses up to CAD7,500 (USD5,556) in federal taxes a year.

The taxation of non-eligible dividends – generally dividends distributed from corporate income taxed at the small business rate – will be adjusted to reflect the reduction in the small business rate.

Canada's Fall Economic Statement also included new write-off and investment incentives, to be effective from January 1, 2019.

The Government will allow businesses to immediately write off the full cost of machinery and equipment used for the manufacturing and processing of goods, as well as the full cost of specified clean energy equipment. It will introduce an Accelerated Investment Incentive, to allow businesses of all sizes and in all sectors to write off a larger share of the cost of newly acquired assets in the year the investment is made.

Other tax changes taking effect in 2019 include:

- Measures to limit the ability of Canadian-controlled private corporations holding significant passive investments to benefit from the small business tax rate, and to restrict Canadian-controlled private corporations from obtaining refunds of taxes paid on investment income while distributing dividends from income taxed at the general corporate rate;
- As part of the phase-out of the accelerated capital cost allowance rate for mining, the percentage of the additional allowance that a taxpayer can claim will be reduced from 80 percent to 60 percent;
- Eligible oil and gas corporations will generally no longer be able to treat the first CAD1m of Canadian Development Expenses as Canadian Exploration Expenses when renounced to shareholders under a flow-through share agreement;
- The tax exemption for insurers of farming and fishing property will be eliminated; and

- The goods and services tax/harmonized sales tax (GST/HST) treatment of investment limited partnerships will be brought into line with the GST/HST treatment of other investment plans such as mutual funds, segregated funds, and pension plans.

Canadian Tax Ombudsman Publishes Annual Report

Canada's Taxpayers' Ombudsman has published a report on the service provided by the Canada Revenue Agency over the past fiscal year.

The purpose of the Office of the Taxpayers' Ombudsman is to enhance the CRA's accountability in its service to, and treatment of taxpayers and benefit recipients through independent reviews of service-related complaints and systemic complaints. It has published its report on CRA service in 2017-18.

The Ombudsman said that there had been a 29 percent increase in the number of complaints received from the previous fiscal year, bringing the total to 1,922. A total of 2,255 issues were closed, up 40 percent from 2016-17.

The most common areas of complaint included delays in processing individual tax and benefit (T1) returns and adjustment requests, and a lack of clarity in the information taxpayers received from the CRA concerning T1 returns. Taxpayers also complained about a lack of consistent information when dealing with agents at the individual tax enquiries telephone line, and a lack of fairness with regard to debt collection processes for T1 returns.

Metals Giant Settles Canadian Transfer Pricing Dispute

Wheaton Precious Metals has announced that it has reached a settlement with the Canada Revenue Agency in a transfer pricing dispute.

The settlement concerns the reassessment under transfer pricing rules of the 2005 to 2010 taxation years related to income generated by Wheaton's wholly owned foreign subsidiaries outside of Canada.

Wheaton said that under the settlement, foreign income on earnings generated by Wheaton International will not be subject to tax in Canada. The service fee charged by Wheaton for the services provided to Wheaton International will adjusted to: include capital-raising costs associated with Wheaton for the purpose of funding streaming transactions entered into by Wheaton International; and increase the mark-up applied to Wheaton's cost of providing services to Wheaton International. This additional service fee will result in increased income generated by Wheaton in Canada that is subject to Canadian tax.

Wheaton also said that under the terms of the settlement, transfer pricing penalties in the reassessments will be reversed. Interest will be adjusted consequentially to the service fee

adjustments. These transfer pricing principles will also apply to all taxation years after 2010, including the 2011 to 2015 taxation years which are currently under audit and on a go forward basis.

Wheaton does not anticipate any additional cash taxes will arise, after the application of non-capital losses, in respect of the 2005 to 2010 taxation years as a result of the settlement.

Randy Smallwood, Wheaton's President and CEO, said: "This settlement removes uncertainty with the use of our business model going forward and puts the tax issue behind us so that we can continue to focus on what we do best."

Malta To Introduce 5pc VAT On E-Books On January 1

Malta will be among the first EU member states to introduce cut-rate value-added tax on electronic publications from January 1, 2019.

The decision to make such supplies subject to a five percent rate of VAT follows EU Council approval of a change to the EU Directive to explicitly permit member states to levy the same rate of VAT on electronic publications as for traditional, tangible publications.

Background

Until that decision, EU member states were permitted only to apply a reduced rate of VAT to printed publications, such as books, newspapers, and periodicals. Digital publications however must be subject to the normal VAT rate.

In March 2015, the ECJ ruled as unlawful the decisions of the governments of France and Luxembourg to impose reduced rates of VAT on electronic books, in cases Commission v. France (C-479/13) and Commission v. Luxembourg (C-502/13).

These rulings concerned paid-for books supplied via download or web streaming to a computer, smartphone, e-reader, or other such system.

Ruling in favor of the Commission in its challenge, the ECJ argued that a reduced VAT rate can apply only to supplies of goods and services covered by Annex III to the VAT Directive, which refers to the "supply of books... on all physical means of support."

The ECJ concluded that the reduced VAT rate is applicable to a transaction consisting of the supply of a book found on a physical medium. While it agreed that to be able to read an electronic book, physical support (such as a computer) is required, that support is not included in the supply of electronic books; therefore the supply of such books is not included within the scope of Annex III.

Additionally, the ECJ observed that, under the VAT Directive, the possibility of a reduced VAT rate being applied to "electronically supplied services is excluded." It confirmed that an e-book is such a service.

The ECJ ruled in each case that, by applying a reduced rate of VAT to the supply of digital or electronic books, both France and Luxembourg had failed to fulfill their obligations under Articles 96 and 98 of the VAT Directive.

The new e-books directive endorsed by the Council amends Annex III to provide for reduced rated treatment of the following supplies, in Annex III, point (6):

"[the] supply, including on loan by libraries, of books, newspapers and periodicals either on physical means of support or supplied electronically or both (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), other than publications wholly or predominantly devoted to advertising and other than publications wholly or predominantly consisting of video content or audible music;"

Bahrain Introducing VAT From January 1, 2019

On January 1, 2019, Bahrain is expected to become the third member of the six-member Gulf Cooperation Council bloc to introduce a value-added tax system.

The regime will initially introduce new compliance obligations only for those businesses whose annual turnover exceeds BHD5m (USD13.3m), which were required to register by December 20.

To cushion the impact of the introduction of VAT on low-income households, 94 basic foodstuffs will be exempt from VAT as well as other basic goods and services, such as education and health services.

Having introduced value-added tax on January 1, 2018, the United Arab Emirates and Saudi Arabia became the first two states of the six-member Gulf Cooperation Council grouping to follow through on the bloc's commitment to introduce a harmonized value-added tax.

Initially, the tax was supposed to have been in place by 2012, but certain member states struggled to lay the technical and administrative foundations for the measure. Furthermore, there was a great deal of internal resistance to the proposals from politicians, taxpayers, and businesses. As a consequence of these problems, the timetable slipped for the introduction of VAT repeatedly.

Finally, in June 2016, GCC finance ministers approved the VAT framework, which sets out the parameters of the regime that will apply in all member states. This was eventually signed in 2017, and the framework was published in May of that year, with a view to VAT being introduced across the GCC on January 1, 2018. However, the VAT framework did not stipulate that the tax must be introduced simultaneously by the member states on a certain date and so far only two have done so. The other member states are Qatar, Oman, and Kuwait.

The framework provides for a basic VAT rate of five percent, with individual states permitted to exempt or zero-rate certain supplies as they see fit, including education, local transportation, health services, and real estate sales. In addition, each member state may zero-rate

the oil and gas sector under the framework. A number of other supplies are zero rated, including medicines and medical equipment, international transport services, precious metals, and exports to jurisdictions outside the GCC.

Hungary To Raise VAT Registration Threshold

Hungary's value-added tax registration threshold will rise to HUF12m (USD42,486) from January 1, 2019.

The move follows an EU Council decision, published in the Official Journal of the EU on October 8, 2018, authorizing Hungary to derogate from the VAT Directive in exempting from VAT taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR48,000 at the time of Hungary's accession to the EU.

Under a previous decision, Hungary was permitted to introduce a VAT registration threshold of no higher than EUR35,000.

The new derogation was approved until December 31, 2021, in Council Implementing Decision (EU) 2018/1490.

UK Legislates To Close Insurance VAT Loophole

On December 11, 2018, the UK Government tabled The Value Added Tax (Input Tax) (Specified Supplies) (Amendment) Order 2018 before the House of Commons to close a VAT avoidance loophole that is exploited by some UK insurers.

The legislation is intended to prevent offshore looping, a VAT avoidance technique that involves UK insurers setting up associates in non-VAT territories and using these associates to supply their UK customers. It will be effective from March 1, 2019.

Currently, the Specific Supplies Order allows companies who export certain financial services from the EU to reclaim the VAT they incur while providing those services. When these services are supplied inside the EU, this VAT cannot be reclaimed. The Order is currently being exploited by companies that form arrangements with organizations outside of the EU to re-supply or "loop" those services back to United Kingdom consumers, allowing themselves to reclaim the VAT.

The legislation will restrict the application of the Specified Supplies Order in certain circumstances to prevent offshore looping. The Government previously said that, in response to feedback it received during a consultation that concluded at the end of September 2018, it will refine the measure to target it more tightly on the known cases of avoidance. As such, it will now apply to insurance intermediary supplies only and VAT recovery will only be restricted when the principal supply is made to consumers located within the UK,

rather than within the UK and the EU as originally drafted.

At present, intermediary services (as described in item 4, group 2, schedule 9 Value Added Tax Act 1994) that are supplied to a person outside of the EU are specified, allowing recovery of input VAT no matter who the final consumer of those supplies is. Intermediary services made in respect of a principal supply which is made to a customer belonging in the UK will no longer be specified, and therefore no longer have a right to recover input tax.

Cyprus Delays CbC Reporting Deadline

On December 18, 2018, Cyprus's Tax Department pushed forward the country-by-country report submission deadline for the year 2017 to January 31, 2019.

The deadline had been December 31, 2018.

In December 2016, Cyprus issued a decree introducing CbC reporting obligations for multinational enterprises with consolidated group revenue of EUR750m (USD884m) or more.

CbC reporting was recommended by the OECD under Action 13 of its base erosion and profit shifting project. A CbC report should contain certain information relating to the global allocation of MNE income and taxes paid, together with information on where the group's economic activity takes place.

Luxembourg Adopts Anti-Tax Avoidance Law

On December 18, 2018, Luxembourg's Parliament approved legislation that will implement the European Union Anti-Tax Avoidance Directive (ATAD I).

ATAD I contains five legally binding anti-abuse measures, which all member states are required to apply against common forms of aggressive tax planning. These include an exit tax, controlled foreign company rules, a general anti-avoidance rule, limitations on interest deductions, and rules to prevent the double non-taxation of certain income. Member states are required to transpose ATAD I by December 31, 2018, with the exception of the exit tax rules, which must be transposed by December 31, 2019.

The legislative proposals, included in Draft Law No.7318, are intended to align Luxembourg's tax law with the requirements of ATAD I.

The legislation also includes additional amendments unrelated to ATAD I which modify the definition of permanent establishment status and rules relating to the conversion of debt to equity.

The new law is generally applicable from January 1, 2019, except measures relating to the exit tax, which will apply from January 1, 2020.

Australia's BEPS Treaty Amendments To Enter Into Force

The OECD's Multilateral Instrument, which allows countries to quickly modify their bilateral tax treaties, will enter into force for Australia on January 1, 2019.

Australia ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on September 26, 2018.

The Convention – commonly known as the Multilateral Instrument – provides a method by which countries can bring their double tax agreements into line with new international standards without having to negotiate amendments bilaterally. Countries that use this method can transpose the recommendations made by the OECD's BEPS project into their existing tax treaties, subject to agreement with the cosignatory state.

From January 1, 2019, the Multilateral Instrument will operate to modify six of Australia's 44 bilateral tax treaties. It will affect the agreements with France, Japan, New Zealand, Poland, Slovakia, and the United Kingdom. More of Australia's treaties will be modified in the future, as other partner states ratify the Convention.

CHINA - SPAIN

Signature

On November 28, 2018, China and Spain signed a DTA.

COSTA RICA - KOREA, SOUTH

Into Force

On November 13, 2018, the TIEA between Costa Rica and South Korea entered into force.

CROATIA - UNITED ARAB EMIRATES

Into Force

On September 28, 2018, the DTA between Croatia and the United Arab Emirates entered into force.

HONG KONG - INDIA

Into Force

On November 30, 2018, the DTA between Hong Kong and India entered into force.

SERBIA - ISRAEL

Signature

On November 22, 2018, Serbia and Israel signed a DTA.

TURKEY - BOTSWANA

Negotiations

On November 19, 2018, Turkey and Botswana commenced negotiations towards a DTA.

URUGUAY - PARAGUAY

Ratified

On November, 9 2018, Uruguay ratified its DTA with Paraguay.

ISSUE 320 | DECEMBER 28, 2018

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

THE AMERICAS

2019 Midyear Tax Meeting

1/17/2019 - 1/19/2019

ABA

Venue: Hyatt Regency New Orleans, 601 Loyola Ave, New Orleans, LA 70113, USA

https://www.americanbar.org/events-cle/mtg/inperson/331481127/

Key speakers: TBC

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

2/4/2019 - 2/5/2019

STEP

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

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

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

TP Minds Americas 2019

2/25/2019 - 2/28/2019

Informa

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

Key speakers: Michael Lennard (United Nations), Carlos Pérez-Gomez (Mexican Tax Administration), Nick Scott (Bunge), Terri Ziacik (Microsoft), among numerous others

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

OffshoreAlert Conference Miami 2019

4/28/2019 - 4/30/2019

OffshoreAlert

Venue: The Miami Beach EDITION, 2901 Collins Avenue, Miami Beach, FL 33140, USA

Key speakers: TBC

https://www.offshorealert.com/conference/miami/#about

ASIA PACIFIC

Financial Services Taxation Conference

2/6/2019 - 2/8/2019

The Tax Institute

Venue: QT Gold Coast, 7 Staghorn Ave, Gold Coast QLD 4217, Australia

Key speakers: Adam Boyton (Business Council of Australia), John Freebairn (University of Melbourne), Tony Frost (Greenwoods & Herbert Smith Freehills), Michael Barbour (Westpac Banking Corporation), among numerous others

https://www.taxinstitute.com.au/professional-development/key-events/financial-services-taxation-conference

Investment Immigration Summit Mumbai

2/20/2019 - 2/22/2019

Beacon Events

Venue: Address TBC, Mumbai, India

Key speakers: Tajinder Pal Singh (Network Law Offices), James Hall (ANZ Migration), among numerous others

https://investmentimmigrationsummit.com/mumbai/

5th International Conference on Accounting Business and Economics

3/8/2019 - 3/10/2019

IPN Education Group

Venue: Address TBC, Bandung, Indonesia

Key speakers: TBC

http://icabe2019.weebly.com/

The Tax Institute's 34th National Convention

3/13/2019 - 3/15/2019

The Tax Institute

Venue: Hotel Grand Chancellor Hobart, 1 Davey St, Hobart TAS 7000, Australia

Key speakers: Bob Deutsch (The Tax Institute), Denise Honey (Pitcher Partners), Julianne Jaques (Victorian Bar), Chris Jordan (Commissioner of Taxation), among numerous others

https://www.taxinstitute.com.au/professional-development/key-events/national-convention

STEP Australia 2019

5/15/2019 - 5/17/2019

STEP

Venue: The Stamford Plaza, Brisbane, Australia

Key speakers: TBC

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

3rd Interdisciplinary Conference on Accounting, Management, Business and Technology 2019

7/2/2019 - 7/3/2019

YSN Conference Management

Venue: Address TBC, Langkawi, Malaysia

Keynote speakers: Prof. Dr. Abdel Rahman Mohammad Said Al-Tawaha (Honorary Advisor IPN.org), Dato' Syed Azuan Syed Ahmad Al-Idrus (Honorary Advisory MDSG)

https://icambt2019.weebly.com/

5th 2019 International Conference Statistic, Accounting and Management (ICSAM 2019)

8/23/2019 - 8/25/2019

IPN Education Group

Venue: Address TBC: Kuala Lumpur, Malaysia

Key speakers: Makhmud Kharun (RUDN University), Kei Eguchi (Fukuoka Institute of Technology), Napat Watjanatepin (Rajamangala University of Technology Suvarnabhumi), Wan Rosli Wan Ishak (Universiti Sains Malaysia), among numerous others

https://icsam2019.weebly.com/

CENTRAL AND EASTERN EUROPE

CIS Wealth Moscow 2019

2/18/2019 - 2/19/2019

CIS Wealth

Venue: Marriott Grand Hotel, 26/1 Tverskaya St., Moscow, Russia

Key speakers: Sergey Nazarkin (Amond & Smith Ltd Law Firm), Christian Groess (Amergeris Wealth Management Group), Alexander Zakharov (Paragon Advice Group), Amiran Gogiberidze (MGAP Attorneys at law), among numerous others

http://moscow2019.cis-wealth.com/

Wealth Management & Private Banking Summit - Russia & CIS

4/10/2019 - 4/11/2019

Adam Smith Conferences

Venue: Marriott Grand Hotel, Tverskaya St, 26/1, Moskva, 12500, Russia

Key speakers: TBC

http://www.russianwealthmanagement.com/

MIDDLE EAST AND AFRICA

Investment Immigration Summit MENA

2/24/2019 - 2/26/2019

Beacon Events

Venue: Shangri-la Hotel Dubai, Sheikh Zayed Rd Near Financial Metro Station, Dubai

Key speakers: Bruno L'ecuyer (Investment Migration Council), Kripa Upadhyay (Orbit Law), Sam Bayat (Bayat Legal Services), Amir Mayo (Deloitte Middle East), among numerous others

https://investmentimmigrationsummit.com/mena/

WESTERN EUROPE

Tax Treatment of Employment Related Securities 2019

1/24/2019 - 1/24/2019

Informa

Venue: Address TBC: London, UK

Key speakers: Mahesh Varia (Travers Smith), David Bowes (Bruce Sutherland & Co), Ian Shaw (Orrick), Andy Goodman (BDO), among numerous others

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

8th Annual IBA Finance & Capital Markets Tax Conference

1/28/2019 - 1/29/2019

International Bar Association

Venue: etc.venues St Paul's, 200 Aldersgate, St. Pauls, London, EC1A 4HD, UK

Chair: Jack Bernstein (Aird & Berlis)

https://www.ibanet.org/Conferences/conf936.aspx

Russian Wealth Advisor Forum

1/30/2019 - 1/31/2019

Adam Smith Conferences

Venue: Zürich Marriott Hotel, Neumühlequai 42, 8006 Zürich, Switzerland

Key speakers: Paul Stibbard (Rothschild Trust), Charlie Willcox (Stonehage Fleming), Steven Kempster (Withersworldwide), Richard Hay (Stikeman Elliott), among numerous others

http://www.russianwealthzurich.com/

Tax Planning for the Family Company & Business

2/26/2019 - 2/26/2019

Informa

Venue: Address TBC: London, UK

Key speakers: Gary Heynes (RSM Tax and Advisory Services LLP), Martin Roberts (HMRC), Caroline Harwood (Crowe U.K.), Pete Miller (The Miller Partnership), among numerous others

https://finance.knect365.com/tax-planning-family-company-business/

TP Minds International 2019

3/18/2019 - 3/21/2019

Informa

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

Key speakers: Pascal Saint-Amans (OECD), Dr Max Lienemeyer (European Commission), Karine Halimi-Guez (FEDEX), Jens Svolgaard (Spotify), among numerous others

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

Tax Planning for Entertainers & Sports Stars 2019

3/19/2019 - 3/19/2019

Informa

Venue: Address TBC, London, UK

Key speakers: Dick Molenaar (All Arts Tax Advisers), Patrick Way (Field Court Tax Chambers), Charles Bradbrook (SLRV Accountants), Pete Hackleton (Saffery Champness LLP), among numerous others

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

Alternative Accountancy Strategic IT Conference 2019

3/19/2019 - 3/20/2019

ICAEW

Venue: Forest of Arden Marriott Hotel and Country Club, Maxstoke Lane Meriden, Birmingham, CV7 7HR, UK

Key speakers: TBC

https://events.icaew.com/pd/11905/alternative-accountancy-strategic-it-conferen?st_t=49&st_ti=430&returncom=productlist&source=search

International Tax Planning Association Meeting

3/20/2019 - 3/22/2019

ITPA

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

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

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

Practice 2019: Annual Conference and Expo

11/14/2019 - 11/15/2019

ICAEW

Venue: Address TBC, UK

Key speakers: Fiona Wilkinson (ICAEW), Rachel Balchin (Bulldog), Trevor Williams (University of Derby), among numerous others

https://events.icaew.com/pd/12123/practice-2019-annual-conference-and-expo?st_t=49&st_ti=430&returncom=productlist&source=search

THE AMERICAS

Canada

The Ontario Government has taken the next step in its challenge to the federal administration's carbon pricing policy, filing key documents with the provincial Court of Appeal.

A listing of recent key international tax cases.

In August, Ontario launched a constitutional reference case in the provincial Court of Appeal to challenge the federal Government's ability to impose a carbon tax on the province. On November 30, the provincial Government filed a factum with the Court, which provides a summary of its position.

The factum argues that the provinces, not the federal Government, have the primary responsibility to regulate greenhouse gas emissions. It also alleges that the charges the federal legislation seeks to impose are unconstitutional disguised taxation.

Ontario was, under its previous Government, signed up to the Pan-Canadian Framework on Clean Growth and Climate Change, which stipulates that the federal Government will impose a carbon floor price in provinces that do not have their own pricing systems in place from this year. In July, the new administration scrapped the province's cap-and-trade system.

In October, the federal Government confirmed that federal fuel charge rates will apply in Ontario, New Brunswick, Manitoba, and Saskatchewan. The carbon price will apply at a rate of CAD20 (USD15.18) per tonne of carbon dioxide equivalent in 2019, rising by CAD10 a year to reach CAD50 per tonne in 2022.

Saskatchewan has also launched a constitutional reference case in its provincial Court of Appeal. The Manitoban Government had announced plans to implement an output-based pricing system that would meet the federal administration's required minimum pricing level in 2019 but not after that point; it dropped the plans after the federal Government confirmed it would impose

its higher tax on Manitoba from 2020. Neither province was signed up to the Pan-Canadian Framework.

Caroline Mulroney, Ontario's province's Attorney General, said: "Our Government cannot stand by and let this unconstitutional tax eliminate jobs and hurt families who are already struggling to get ahead in Ontario ... The federal carbon tax takes money from families' pockets and makes job creators less competitive."

On November 29, Ontario published its new plan for tackling climate change. Environment Minister Rod Phillips said that the plan "puts Ontario on a path to meet our target, which matches Canada's commitment under the Paris Agreement."

"Most importantly, it does all of this without imposing an ineffective, regressive carbon tax on the hardworking families of our province," he added.

https://news.ontario.ca/ene/en/2018/11/ontario-takes-next-legal-step-to-challenge-the-federal-carbon-tax.html

Court of Appeal For Ontario: *Ontario Government v. Federal Government*

WESTERN EUROPE

Belgium

The European Court of Justice has ruled in favor of three Belgian companies that had challenged the legality of France's decision to refuse a refund of withholding tax collected on dividends paid by a resident company to a loss-making non-resident company.

Between 2008 and 2011, Belgian companies Sofina, Rebelco, and Sidro received dividends as shareholders in French companies, it said.

A French resident company receiving dividend income would include such income in its corporate income tax taxable income but that income would effectively be exempt from tax, due to tax relief provisions for loss-making companies, temporarily if the company is not profitable, and permanently if that company never returns to profitability and/or ceases trading.

However, Belgian companies receiving income from a French resident are liable to French withholding tax, reduced under the Belgian-French DTA to 15 percent. The Belgian recipient was

likewise loss-making and never returned to being profitable. The Belgian companies' request for a refund of that tax, owing to the disparity in treatment, was rejected.

That difference in treatment of companies in different member states in the same circumstances was said to constitute a restriction from the free movement of capital under Article 63 of the Treaty on the Functioning of the European Union (TFEU).

The French Council of State referred questions to the ECJ, asking whether Articles 63 and 65 of the TFEU must be interpreted as meaning that the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability, constitutes in itself a difference in treatment characterizing a restriction on the free movement of capital?

The ECJ found in favor of the Belgian companies, agreeing that the difference in treatment between a loss-making resident company and a loss-making non-resident company created an advantage for the resident company.

It ruled: "The national legislation at issue in the main proceedings is liable to procure an advantage for loss-making resident companies, since it gives rise, at the very least, to a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results."

Such a difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter non-resident companies from investing in companies established in France, and investors residing in France from purchasing holdings in non-resident companies.

The Court said it follows that the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) of the TFEU.

The Court also said that the restriction cannot be justified against the tests in established EU case-law; that any difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest.

The ECJ ruled: "Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a member state, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends."

http://curia.europa.eu/juris/document/document.jsf?text=&docid=207970&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5536634

European Court of Justice: *Case C-575/17*

WESTERN EUROPE

Ireland

Investigations by the Irish Revenue into information contained in the Panama Papers and Paradise Papers have yielded just EUR400,000 (USD452,288) in settlements so far.

Irish Finance Minister Donohoe was asked to provide details to Parliament of Revenue's response to the revelations made in the Panama Papers and Paradise Papers.

In a written response, Donohoe said that Revenue has examined the information published by the International Consortium of Investigative Journalists (ICIJ) "to identify any cases with links to Ireland." Revenue was able to identify "offshore companies, individuals, addresses, and intermediaries of possible interest."

Donohoe explained that these cases were then profiled "and it was found that, in many instances, no further action was required." There were also instances "where the nature or age of the published information, or the current status of the entity concerned (liquidated, dormant, or non-resident) meant that further action was not possible."

However, enquiry letters were issued in over 100 cases. A majority of these cases were closed with no Irish tax issues identified. Settlements were made in six cases, yielding EUR400,000. Revenue is following up on the remaining cases.

Donohoe added that Revenue has written to two banks to ask if they had any information or records on the opening of offshore accounts or the depositing of funds in offshore accounts on behalf of Irish residents that had not previously been disclosed to Revenue under various High Court orders. The banks confirmed that all information had been covered by these orders.

More broadly, Revenue has worked with the OECD's Joint International Taskforce on Shared Intelligence and Collaboration in relation to the Panama and Paradise papers. Donohoe said that there is increasingly close cooperation between tax authorities worldwide "in targeting those who seek to hide profits or gains offshore."

Revenue has concluded 190 interventions, with a yield of EUR1.2m, in cases involving previously undisclosed offshore assets.

https://www.oireachtas.ie/en/debates/question/2018-12-12/76/?highlight%5B0%5D=cases&highlight%5B1%5D=tax&highlight%5B2%5D=tax

Written response from Irish Finance Ministry: *Panama Papers*

WESTERN EUROPE

United Kingdom

A legal challenge brought by 13 UK expats against the decision of the EU Council to endorse the start of negotiations with the UK on exiting the European Union has been rejected by the General Court of the EU, which said that the arguments put forward were inadmissible. The expats, among other things, argued that the decision to authorize the start of negotiations without any assurances with regards to their future status as EU citizens contravened their rights under EU treaties.

The General Court said the challenges were inadmissible as the challenged decision – the EU's decision to authorize the opening of negotiations on Brexit – did not affect the legal situation of the British citizens who brought the action.

Their legal challenge focused on two areas; that, due to their expatriation from the UK, they were unable to vote in the referendum, and that the EU Council, in approving the start of Brexit negotiations, did not include the objective of ensuring that UK expats would maintain their

status as EU citizens. They submitted that the withdrawal procedure is void in the absence of constitutional authorization.

They argued that the action brought before the General Court is the only way they could challenge the legitimacy of the decision of the UK and the EU to begin negotiations towards the UK exiting the European Union – a process that could result in the inescapable loss of their status as EU citizens on March 29, 2019, should the UK and the EU fail to agree terms for an orderly withdrawal of the UK from the EU that includes reciprocal provisions safeguarding in particular the residency rights of UK citizens in EU states.

The EU Council was successful in asking the General Court to declare the action admissible and to hold that it cannot accordingly be heard, since, it argued, the contested decision may not be challenged by individuals or companies, arguing that the applicants have no interest or standing to bring proceedings against it.

It said the contested decision does not affect the applicants' legal situation; it is merely a preparatory act and draws the consequences of the UK's notification of its intention to withdraw. It is therefore only at the end of the Article 50 Treaty on European Union procedure (*i.e.* when the UK ceases to be a member of the EU) that the rights of the applicants are to be affected.

In ruling that the challenge is inadmissible, the Court said that, although the decision of the Council authorizing the opening of the Brexit negotiations has legal effects as regards the relations between the EU and its member states and between the EU institutions, in particular the Commission, which is authorized by that decision to open negotiations for an agreement with the UK, it does not directly affect the legal situation of the applicants.

The Court takes the view that the decision does not alter the legal situation of British citizens residing in an EU member state other than the UK, whether that be their situation at the date of the contested decision or their situation as from the date of the UK's withdrawal from the EU.

Therefore, according to the Court, the applicants are wrong to claim that they are directly affected, among other things as regards their status as EU citizens and their right to vote in European and municipal elections, their right to respect for their private and family life, their freedom to move, reside and work, their right to own property, and their right to social security benefits. The Court adds that, although it is true that the applicants' legal situation, particularly as regards their status

as EU citizens, is likely to be affected when the UK withdraws from the EU, whether or not a withdrawal agreement can be concluded, such a potential effect on their rights – the nature and extent of which cannot, moreover, be known at the present time – does not result from the contested decision.

The Court stated, in addition, that the contested decision does not contain any decision approving or accepting the UK Government's notification of intention to withdraw of March 29, 2017, and takes the view, therefore, that the applicants are not justified in claiming that the contested decision constitutes an implicit act by which the Council accepted the notification of intention to withdraw of March 29, 2017, or that the contested decision acknowledged the UK's exit from the EU.

The EU said that the contested decision is merely a preparatory act and that a final agreement between the EU and UK will set out how UK citizens' rights will be affected.

The General Court therefore dismissed the action as inadmissible since the decision of the Council authorizing the opening of negotiations on Brexit does not produce binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-11/cp180184en.pdf

European Court of Justice: *Case T-458/17 Shindler and Others v Council of the European Union*

WESTERN EUROPE

United Kingdom

The UK's Upper Tribunal has ruled in favor of a taxpayer who had relied on previous HMRC guidance, issued in 2006, which allowed a VAT exemption for card handling services.

The ruling in *Vacation Rentals (UK) Ltd (formerly known as The Hoseasons Group Ltd) v. HMRC* was released on November 22, 2018.

The case concerned a taxpayer that acted as a booking agent between holidaymakers and property owners. It had followed HMRC's published guidance on the treatment of its services as

exempt. Following a ruling from the European Court of Justice that such services should be taxable, HMRC issued assessments to the company contrary to its earlier guidance. The taxpayer brought an appeal arguing that it had legitimate expectation that it would be taxed in accordance with the published guidance. The Upper Tribunal agreed, stating that the guidance was clear and unequivocal in providing that such services should be exempt and dismissed arguments put forward by HMRC.

Relevant case-law

The Court of Appeal's judgment in *Bookit v HMRC* ([2006] STC 1367) clarified the position surrounding the VAT treatment of card handling services at that time. In that case it was held that the supply by the taxpayer of card handling services was exempt from VAT. The supply comprised the following four components:

- Obtaining the card information with the necessary security information from the customer;
- Transmitting that information to the card issuers;
- Receiving the authorization codes from the card issuers; and
- Transmitting the card information with the necessary security information and the card issuers' authorization codes to the intermediary bank (known as the "merchant acquirer") which liaises between the card issuer and the taxpayer.

After that judgment, the UK Court of Session overturned an earlier tribunal decision and found that a taxpayer in a later case, SEC, was also carrying out an exempt card handling service, based on the tests set out in Bookit, even though such card handling services were earlier found by the Tribunal to be ancillary to a larger supply.

In SEC, the Tribunal stated that SEC was providing a single taxable booking service, with the taxable card handling service representing an ancillary aspect that enhanced the main service. The Court of Session overturned the tribunal decision, finding that SEC was carrying out an exempt card handling service. The Court based its judgment on the decision of the Court of Appeal in Bookit and on an assumption of similar facts.

Later, it was finally determined by the European Court of Justice (ECJ) in *National Exhibition Centre v. HMRC* ([2016] STC 2132) that card handling services consisting of the four components were in fact taxable rather than exempt. The ECJ stated that none of the four components

identified in Bookit individually, or taken together, could be considered to be carrying out a specific, essential function of a payment or transfer transaction within the meaning of the exemption.

Prior to that ECJ ruling, HMRC issued guidance in Business Brief 18/06 (BB 18/06). In such, HMRC said the judgments provided further guidance on when a service of credit or debit card handling by an agent is VAT-exempt. It said: "If an agent, acting for the supplier of the goods or services, makes a charge to the customer over and above the price of the actual goods or services, for a separately identifiable service of handling payment by credit or debit card, and that service includes the fourth component listed above, then the additional charge will be exempt under item 1, Group 5 of Schedule 9 to the VAT Act 1994. However, where an agent provides some or all of the first three components without providing the fourth, the charge is taxable at the standard rate of VAT."

BB 18/06 provided the following instructions to taxpayers: "Agents supplying card handling services that meet the criteria set out above, and who have been treating the charge as taxable at the standard rate, should exempt such services from the date of this Business Brief. Conversely, agents supplying card handling services that do not meet the criteria set out above, and have been treating those services as exempt, should now charge tax."

Facts of the case

In the present case, when the taxpayer collected payment from holidaymakers via credit or debit card an additional fee was charged to reflect the extra work and extra costs involved in effecting such payments by the banking system.

However HMRC argued before the Upper Tribunal in this case that its guidance was limited to circumstances where the agent, not the merchant acquirer, obtains the authorization code from the card issuer and the merchant acquirer does not know the authorization code until it is transmitted to it by the agent.

HMRC regarded it as an important point of distinction that the merchant acquirer did not obtain the authorization code for the first time from the Claimant, unlike the position in Bookit where the findings were that the authorization code was obtained by Bookit directly from the card issuer and transmitted to the merchant acquirer at a later stage in the process.

Ruling

The Upper Tribunal said: "It is clear from the wording of BB 18/06 that HMRC did not draw a distinction between the judgment in Bookit and that in SEC. In our view, that indicates that at the time of publication of BB 18/06 they could not have regarded it as essential to the availability of the exemption that the supplier communicated directly with the card issuer to obtain the authorization codes."

"The wording of the specific guidance again makes it clear that where an agent makes a charge over and above the price of goods or services for a separately identifiable service of handling payment by credit or debit card and that service involves the Fourth Component, then the additional charge will be exempt; but where some or all of the first three components are provided without the fourth the charge is taxable at the standard rate."

Ruling for the taxpayer, the Court said: "The distinction that HMRC seek to make between direct and indirect communications between the agent and the card issuer is of no material significance to the guidance, just as it was of no material significance to the decisions in Bookit and SEC."

Further, the Upper Tribunal said that the taxpayer had legitimate expectation that it should be able to rely on the guidance to exempt its supplies. HMRC did not dispute that Business Briefs, as statements of HMRC's policy, are capable of giving rise to a legitimate expectation. However, HMRC say that BB 18/06 does not clearly, unambiguously and without qualification give rise to the particular legitimate expectation alleged by the taxpayer.

However, the Upper Tribunal rejected this, stating: "The arguments advanced by HMRC are a mixture of over-literalism, unjustified by the terms or the purpose of the exemption in question, and reading into the terms of the Fourth Component words that are simply not there, such as "for the first time" after "transmitting.'"

"Furthermore, even if HMRC were right in saying that BB 18/06 had to be read by reference to the full judgments in Bookit and SEC (which we do not accept) those judgments do not lend any support to the argument that the exemption was being limited to the precise facts found in Bookit. On our reading of BB 18/06 it would appear that HMRC understood that to be the position when the guidance was issued," the Tribunal said.

The Court therefore granted the claimant's request for an order that HMRC be prohibited from collecting the VAT assessed.

https://assets.publishing.service.gov.uk/media/5bf6c413e5274a3b3368a95e/Queen_oao_Vacation_Rentals_formerly_Hoseasons_v_HMRC.pdf

UK Upper Tribunal: *Vacation Rentals (UK) Limited v. HM Revenue and Customs*

Dateline December 28, 2018

Given that this is the last entry of 2018, I thought it fitting to go back to the beginning of the year, when arguably the world's most significant tax changes took effect, courtesy of the **United States Tax and Jobs Act**. So, let us not BEAT about the bush any longer!

Ok, December 22, 2017 wasn't quite the day the earth stood still. But certainly the Hill stood still as Washington as President Donald Trump signed the TCJA, **a foundation-shaking set of tax reforms** that were beginning to look impossible to achieve in an increasingly partisan Congress. Not only did it include an unprecedented 14 percent cut in the federal corporate tax, it also added some unique features to the US tax landscape, particularly with respect to its international aspects. A quasi-territorial corporate tax, a transition tax, GILTI (Global Intangible Low Tax Income), FDII (Foreign Derived Intangible Income), the aforementioned BEAT (Base Erosion Anti-Abuse Tax), and a new deduction for personal business income were all unveiled, among others.

They key question is though, has the TCJA improved tax conditions for companies in the United States? Given the scale of the corporate tax cut and the 100 percent deduction on foreign income, on balance corporate taxpayers would probably say that it has.

Has the TCJA made the tax code simpler? That's much more debatable. If you've ever spent an afternoon trying to wrap your grey matter around BEAT, GILTI, and FDII (it's not recommended), you'd probably say emphatically not. If you are a small business owner, or a partner in one, and are still trying to figure out a) if you actually qualify for the pass-through income deduction and b) how it actually applies in practice, you also might feel somewhat skeptical. There's certainly little danger of the tax advisory community going into decline in the US any time soon, put it that way.

The fact that we don't yet know the full implications of the TCJA on the business side of things underlines that **this tax reform was no tax simplification**. Indeed, barely a week has gone by since the majority of the TCJA went into effect on January 1, 2018, that the Treasury Department and the IRS haven't issued guidance, regulations, or proposed regulations of some sort on various aspects of the legislation, or sections of the tax code indirectly affected by it. And this is likely to be an ongoing process for the foreseeable future. Not only this, Republicans have been lining up proposed legislation intended to correct technical anomalies and other glitches

in the TCJA, the result of a law-making process that took place with uncharacteristic gusto in December last year, as the GOP rushed to give President Trump arguably his first major legislative victory.

However, as if all this wasn't food for thought enough for taxpayers in the US, **November's mid-term elections have potentially thrown a wrench in the works**. The Democrats have opposed the TCJA from the get-go. And from 2019 they will have control of the House of Representatives. So we now face the prospect that the Democrats will spend the next couple of years attempting to pick the tax reforms apart. They probably won't have enough votes in the Senate to do that. But we'll certainly be kept on our toes for another 12 months at least, I've no doubt.

And as if worrying about tax uncertainty in the United States wasn't a burden enough for taxpayers with cross-border affairs, such concerns remain global in scale thanks to **BEPS**. And in terms of the changes this project has brought about since 2015, I would posit that we have gone past the point of no return. According to a BEPS progress reported published by the OECD in July 2018, the BEPS Inclusive Framework includes 116 members representing over 95 percent of global GDP.

175 preferential tax regimes have been reviewed. More than 130 regimes have already been amended or abolished or are in the process of being amended or abolished. 17,000 tax rulings have already been identified and exchanged. Country-by-country reports are now being filed and transmitted between tax authorities around the globe. Jurisdictions the world over have identified more than USD100bn in additional revenue. Taxpayers, says the OECD, are changing their behaviour. So, say businesses, are tax authorities, and where they are concerned, not necessarily for the better.

Indeed, if I could use one word to sum up 2018 it would be **change**. Yet the BEPS project is far from done. The thorny issue that is the taxation of digital business models reared its ugly head earlier this year thanks to the European Union's haste to act in this area, and we've got over a year to go before the OECD makes any final pronouncements on **digital taxation**. That's probably going to be a year in which several more jurisdictions lose their patience, as the EU more broadly, and the UK, Italy, and Spain have done already, and begin looking for national solutions.

Change is as good as a rest, so it is said. Many taxpayers, I suspect, would beg to differ; a rest from the change would be far more preferable. Unfortunately, to channel Winston Churchill in

his wartime pomp, for 2019 I have nothing to offer you but change, upheaval, confusion, and, well, more change.

Perhaps the most astonishing thing of all though, is that I've got to the end this week's edition without mentioning Brexit!

The Jester