GLOBAL TAX WEEKLY
a closer look

ISSUE 311 | OCTOBER 25, 2018

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a closer look

Global Tax Weekly – A Closer Look

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GLOBAL TAX WEEKLY
a closer look

ISSUE 311 | OCTOBER 25, 2018

CONTENTS

FEATURED ARTICLES

NEWS ROUND-UP

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ISSUE 311 | OCTOBER 25, 2018

Owners Of Fiscal Year Foreign Corporations To See Higher Transition Tax Rates

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

Owners of fiscal-year foreign corporations (*i.e.*, corporations that do not have a tax year end of December 31) owing "transition tax" generally have the luxury of waiting until next year's tax season to deal with reporting and paying the one-time tax liability.

Such individuals may be surprised to find out, however, that their transition tax rate will actually be significantly higher than owners of calendar-year foreign corporations who were tasked with filing and paying the tax this year.

In this article, we review the basics of the transition tax and its calculation and demonstrate why the transition tax rate should increase next year.

The Transition Tax – How Does It Work?

As part of the transition to a so-called participation exemption system (which we describe more fully here,[1] new Section 965 of the Internal Revenue Code uses the mechanics under Subpart F to impose on US shareholders owning at least 10% of a foreign subsidiary a one-time mandatory "repatriation tax" or "transition tax" on the undistributed, non-previously taxed post-1986 foreign earnings and profits ("E&P") of a "specified foreign corporation" ("SFC").

A SFC is defined as (i) any CFC, and (ii) any foreign corporation with respect to which one or more domestic corporations is a 10 percent United States shareholder. It should be noted that a PFIC that is not a CFC is exempted from being treated as a SFC.

Section 965 specifies, importantly, that the transition tax applies to the greater of the accumulated post-1986 deferred foreign income (essentially the previously untaxed earnings and profits) of the foreign corporation determined as of November 2, 2017 or as of December 31, 2017. In order to prevent pre-transition tax avoidance planning, the section adds that E&P is determined by essentially ignoring dividends distributed during the 2017 taxable year (other than dividends distributed to another specified foreign corporation).

Does The Transition Tax Apply To Individual Shareholders?

The IRS's recently promulgated proposed Section 965 regulations[2] confirm that Section 965 does not distinguish US corporate shareholders from other US shareholders, so the transition tax potentially applies to any US person (including an individual) owning at least 10 percent of a foreign subsidiary.

The Preamble to the regulations notes that "numerous comments were received requesting guidance exempting individuals from the application of Section 965," however, the "statute is clear that Section 965 applies to all United States shareholders." As support, the Preamble also quotes the Conference Report on the bill enacting the transition tax, which states that "In contrast to the participation exemption deduction available only to domestic corporations that are US shareholders under Subpart F, the transition rule applies to all US shareholders."

How Is The Transition Tax Calculated?

The transition tax calculation can be tricky, particularly because it is not set out as a particular rate of tax. Instead, the tax is applied at ordinary rates (as would be the case with other Subpart F income), but only after the undistributed, non-previously taxed post-1986 foreign E&P of the SFC have been reduced by a certain "plug deduction."

For US shareholders of calendar-year SFCs, the plug deduction is 55.7 percent in the case of E&P comprising cash (and certain cash equivalents described in the statute) and 77.1 percent in the case of any remaining E&P. The 55.7 percent plug is determined by applying a ratio that is 15.5 percent over 35 percent, while the 77.1 percent plug is determined by applying a ratio that is 8 percent over 35 percent. The 35 percent denominator represents the maximum corporate tax rate for the 2017 tax year, which is the year of the transition tax inclusion for U.S. shareholders of calendar-year SFCs. After applying the plug deductions, the ultimate transition tax rate for individuals taxed at the highest 2017 ordinary rate of 39.6 percent should therefore be approximately **17.5 percent in the case of E&P comprising cash and cash equivalents** (100 percent – 55.7

percent times 39.6 percent) and approximately **9.1 percent in the case of any remaining E&P** (100 percent – 77.1 percent times 39.6 percent).

For US shareholders of fiscal-year SFCs (*i.e.*, foreign corporations with a tax year end that is not December 31), the year of the transition tax inclusion should be the 2018 tax year and not the 2017 tax year. Because of this, the plug deduction will be significantly lower because the maximum corporate tax rate for the 2018 tax year is 21 percent, a significant reduction from the previous rate of 35 percent. In the case of E&P comprising cash (and cash equivalents), the plug deductions should instead be 26.2 percent, and in the case of any remaining E&P, the plug deduction should instead be 61.9 percent. After applying the plug deductions, the ultimate transition tax rate for individuals taxed at the highest 2018 ordinary rate of 37 percent should therefore be approximately **27.3 percent in the case of E&P comprising cash and cash equivalents** (100 percent – 26.2 percent times 37 percent) and approximately **14.1 percent in the case of any remaining E&P** (100 percent – 61.9 percent times 37 percent).

We are not aware of guidance from the IRS that specifically recognizes the increase in the transition tax rate, but the above analysis is what seems to follow from the current language of the Section 965 statute and the accompanying proposed regulations.

Further Guidance From The IRS

For further guidance, the IRS has a FAQ page dedicated to explaining the nuances of the transition tax and its reporting rules.

The page can be found here: https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns

Endnotes

1 https://www.expattaxprofessionals.com/tax-reform-officially-arrived-mean-u-s-expats-2/

2 https://www.federalregister.gov/documents/2018/08/09/2018-16476/guidance-regarding-the-transition-tax-under-section-965-and-related-provisions

The Road To A Level EU VAT Playing Field For E-Books

by Stuart Gray, Senior Editor, Global Tax Weekly

It has taken several years of legal challenges and negotiations, but earlier this month an agreement was finally reached by European Union member states that will level the value-added tax playing field between printed publications and those supplied in electronic format. This article looks at the background to the incoming changes, the European Commission's proposal, and the Council's agreement on an amendment to the EU VAT Directive.

The Current Rules

The EU VAT Directive (2006/112/EC)[1] allows member states to apply reduced, super-reduced or zero rates of VAT to supplies of publications in physical format. However, electronically supplied publications must be taxed at a member state's standard rate, unless they are supplied in a physical format such as a CD-ROM.

Background

Member states have argued that the existing VAT rules are inflexible, have failed to take account of technological developments and breach the principle of fiscal neutrality. Two EU countries – France and Luxembourg – subsequently decided to effectively defy the VAT directive and cut the rate of VAT on e-publications.

In the case of France, a reduced rate of 5.5 percent was applied to e-book supplies from January 1, 2011, while Luxembourg levied VAT at three percent on these supplies from the same date.

Predictably, both measures were challenged by the European Commission, which launched infringement proceedings against France and Luxembourg in July 2012. While acknowledging that the VAT treatment of e-books needed addressing, the Commission argued that the two member states had nevertheless failed to fulfill their obligations under the VAT Directive.

Furthermore, since the VAT rate that was charged on supplies of electronic publications to consumers was based on the location of the supplier (rather than based on the location of the consumer, following reforms that took effect from January 1, 2015), the measures were said to encourage suppliers to establish in member states with the lowest VAT rates. Therefore, France and Luxembourg's reduced rates distorted competition in the single market, according to the Commission.

After failing to address the Commission's concerns in what it deemed to be a timely fashion, France and Luxembourg were referred to the European Court of Justice (ECJ) in February 2013. Commenting on the decision, then-Commissioner for Taxation Algirdas Semeta observed that: "Questions concerning the tax treatment of physical books and e-books must certainly be tackled. And this is exactly what the Commission is doing as part of the wider review of reduced VAT rates. However, in the meantime, the member states must play fair. Infringement of the VAT rules for e-books distorts the single market and runs counter to the fundamental EU principle of fair tax competition."[2]

The Commission's rulings were upheld by the ECJ in a decision released in March 2015. In *Commission v. France* (Case C-479/13)[3] and *Commission v. Luxembourg* (Case C-502/13),[4] the Court pointed out that a reduced rate of VAT can apply only to supplies of goods and services covered by Annex III to the VAT Directive. That Annex refers in particular to the "supply of books ... on all physical means of support."

The Court also concluded that the reduced rate of VAT is applicable to a transaction consisting of the supply of a book found on a physical medium. And while physical support (such as a computer) is required in order to be able to read an e-book, the Court argued that such support is not included in the supply of electronic books, meaning that Annex III does not include the supply of such books within its scope.

Moreover, the Court found that the VAT Directive excludes any possibility of a reduced VAT rate being applied to "electronically supplied services." The Court held that the supply of electronic books is such a service. The Court rejected the argument that the supply of electronic books constitutes a supply of goods (and not a supply of services). Only the physical support enabling an electronic book to be read could qualify as "tangible property" but such support is not part of the supply of electronic books.

The Commission had also criticized Luxembourg for applying a super-reduced VAT rate of three percent, even though the VAT Directive prohibits, in principle, VAT rates lower than five percent. The Court recalled that, according to the VAT Directive, a member state may apply reduced VAT rates lower than five percent, provided that, among other things, the reduced rates are in accordance with EU legislation. Since the Court held earlier that the application of a reduced rate of VAT to the supply of electronic books does not comply with the VAT Directive, the requirement that it comply with EU legislation is not met with the result that Luxembourg cannot apply a super-reduced VAT rate of 3 percent to the supply of electronic books.

The ECJ also confirmed that the judgments delivered by the Court do not prevent member states from introducing a reduced rate of VAT for books on physical support, such as paper books.

The Road To Change

The Commission and member states have long acknowledged that the VAT rules as they apply to e-books needed to be reviewed and possibly changed. However, the long road towards an agreement to amend the VAT directive began only in May 2016, when the European Council (the legislative organ representing the member states) adopted the conclusions of the Action Plan on VAT.[5] This invited the European Commission to present, by the end of 2016, a legislative proposal that would permit more flexible VAT rates for e-publications in line with the EU's digital market initiative.

The Commission's Proposals

The Commission duly published its proposal on December 1, 2016.[6] This observed that the current rules on VAT rates do not fully take into account technological and economic developments with regard to e-books and electronic newspapers:

> The VAT Directive prevents Member States from applying the same VAT rates to e-publications as they currently apply to physical publications and the result is a markedly less favorable VAT treatment of e-publications in most Member States. While acknowledging the differences between printed publications and e-publications with regard to the format, they offer the same reading content for consumers.

> Since 1 January 2015, with the entry into force of new "place of supply" rules, a harmonization of VAT rates for electronically supplied services and in particular electronically supplied publications is no longer a requirement. VAT is since then levied, where the customer is based and suppliers can no longer benefit from being located in Member States with the lowest VAT rates.
>
> As stated in the Commission's Action Plan on VAT 1 the current rules on VAT rates do not fully take into account technological and economic developments with regard to e-books and electronic newspapers. Modernizing VAT for the digital economy is also a key objective of the Digital Single Market Strategy

The Commission therefore proposed to grant all member states the freedom (but not the obligation) to apply the same VAT rates to electronically supplied publications as they can to printed publications, including reduced, super-reduced and zero rates.

In order to enable Member States to harmonize the VAT rate treatment of e-publications with the treatment of printed publications and publications on all physical means of support, three amendments to the VAT Directive were proposed by the Commission. The text of the Commission's proposals is as follows:

> **1. Amending Annex III:** Under point 6 of Annex III references to "all physical means of support" and to specific formats for printed publications "(brochures, leaflets and similar printed matter, children's picture, drawing or coloring books, music printed or in manuscript form, maps and hydrographic or similar charts)" will be deleted and the condition "other than publications wholly or predominantly consisting of music or video content" will be introduced.
>
> **2. Amending Article 98:** Under the current Directive all electronically supplied services have to be taxed under the standard VAT rate to which an exception for electronically supplied publications is introduced.
>
> **3. Amending Article 99:** A paragraph 3 is added to Article 99 to allow member states to apply reduced rates lower than the minimum laid down in this Article or to grant exemptions with deductibility of the VAT paid at the preceding stage to the supply of the goods and services mentioned under the amended point 6 of Annex III.

Striking out the references to format and referring in general to books, newspapers and periodicals is a requirement to cover as well e-publications and member states would be able to continue to restrict the application of reduced rates to certain books, newspapers and periodicals, e.g. by excluding specific formats or content.

The supply of pure music and video content would continue to be taxed at the standard VAT rate, as would publications that predominantly consist of music and video content. Member states would have the discretion to specify the term "predominantly" in their national VAT law. This solution would also allow member states to continue to apply a reduced rate for audio books, audio newspapers and periodicals for people with sight loss.

This proposal does not put forward any EU level definition of the terms book, newspaper and periodical at EU level. E-publications are evolving and any specific definition of what is a book, newspaper or periodical risks being outdated within a short time. Given the unanimity requirement for EU legislation in tax matters, Member states are generally able to adapt the rules to future needs in a more timely fashion than the EU could.

The third amendment of the VAT Directive acknowledges the fact that several member states were granted derogations and apply rates lower than reduced rates (including zero rates) to certain printed publications. The possibility to apply an additional reduced rates lower than the current minimum of 5 percent or granting exemptions with deductibility of the VAT paid at the preceding stage to the supply of books, newspaper and periodicals will be granted to all member states, so as to enable them to align VAT rates for e-publications with the VAT currently in force for printed publications.

The Council Agreement

The Council's Working Party on Tax Questions began to look at the proposals in December 2016, and EU finance ministers held an "orientation debate" on them in March 2017. However, the proposals hit a snag later in the year when, on June 16, 2017, the Economic and Financial Affairs Council failed to reach a compromise proposal offered by the then-Estonian presidency of the Council. It took another year before the Council revisited the proposals, first on May 25, 2018, then again on July 13. But ministers were unable to agree on a definitive legislative amendment on either occasion.

A breakthrough finally occurred on October 2, 2018, when the Council agreed to allow member states to apply reduced, super-reduced, or zero VAT rates to electronic publications, subject to certain conditions, including: that super-reduced and zero rates will only be allowed for member states that currently apply them to physical publications; and, as proposed by the Commission, that the standard rate would continue to apply to publications that "predominantly" consist of music and video content (with member states given the discretion to define the term "predominantly").[7]

The agreed amendment would replace the wording in Annex III (point 6) with the following text: "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 coloring 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 audible music or video content."

The new rules are to apply temporarily, pending the introduction of the proposed "definitive" VAT system.

According to the Council, the directive will be adopted without further discussion once the text has been finalized in all official languages. The Directive will then enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Applauding the agreement, Luxembourg's Finance Minister, Pierre Gramegna, announced that: "I welcome this decision, which puts an end to the difference in VAT rates between printed and electronic publications. Luxembourg, together with its partners, has managed to make itself heard, defending the principle of technological neutrality, I am delighted that from now on, from a tax point of view, 'a book is a book' regardless of its [means of delivery]."[8]

Conclusion

Gramegna's statement suggests that Luxembourg is certainly keen on reinstating reduced rates of VAT for electronically supplied publications. If so, it remains to be seen how many other member states will follow suit. However, given member states were eventually able to unanimously support the compromise agreement, we can expect to see at least some of them take advantage of this new flexibility in the EU VAT rules.

Endnotes

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0112

2 http://europa.eu/rapid/press-release_IP-13-137_en.htm

3 http://curia.europa.eu/juris/document/document.jsf;jsessionid=E49B8084427CC0B4AA5E32526D08324C?text=&docid=163558&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2464518

4 http://curia.europa.eu/juris/document/document.jsf?text=&docid=163557&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2464745

5 http://data.consilium.europa.eu/doc/document/ST-9494-2016-INIT/en/pdf

6 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0758:FIN

7 https://www.consilium.europa.eu/media/36517/st12622-en18.pdf

8 https://mfin.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniques%2B2018%2B10-octobre%2B02-taxation-livres-electroniques.html (In French)

Reclassification Of Payments To Foreign Contract Partners As Passive Income For Withholding Tax Purposes

by Vladimir Zheltonogov,
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On September 7, Russia's Supreme Court issued a ruling on the case involving GaloPolimer Kirovo-Chepetsk OOO[1] in which it supported the conclusions of the tax authorities and the trial court[2] that payments to a foreign company under a service contract should be reclassified as passive income subject to withholding tax in Russia.

Background

In 2012, GaloPolimer Kirovo-Chepetsk OOO transferred money to the Canadian company Clean Development Investment S.A. on the basis of service and work contracts. The Russian company refrained from withholding tax when making the transfers, as in its view the payments in question constituted income from "active operations" in accordance with clause 2 of Article 309 of the Tax Code.

The tax authorities and the trial court found that the payments were not connected with genuine business activities carried on by the foreign company, and the documentation underlying the transactions concerned was artificial in nature. As a result, the Russian company was charged additional Russian withholding tax of approximately 26 million roubles and corresponding penalties.

The appellate[3] and cassation[4] courts issued rulings in the taxpayer's favor, but the Supreme Court upheld the conclusions of the trial court and came down on the side of the tax authorities.

Below we examine the key arguments of the parties involved and the position of the Supreme Court and the trial court on this dispute.

The Tax Inspectorate's Arguments:

The tax inspectorate took the view that the payments to the Canadian company were effectively made on a non-reciprocal basis, were not connected with any actual business operations (were devoid of economic substance) and constituted passive income that was taxable at source in Russia. Its reasoning was as follows:

- The work and services provided for in the contracts with the Canadian company were actually performed by other persons, including employees of the Russian company itself. This fact is confirmed, in particular, by the conclusions reached by arbitration courts in another court case involving the Russian company in question in relation to the same payments. Furthermore, the company also submitted revised VAT returns for 2011-2013 to the tax authority in this connection.
- The fact that the Russian company filed a suit with the Superior Court of Quebec for the recovery of the amounts paid to the foreign company does not alter the fact that the foreign company received income that is taxable in Russia. Indeed, the attempt to recover the money through the courts was itself a contrived exercise.
- According to information from the Canadian competent authorities, the foreign company did not, in the period under review, report income received from the Russian company in its tax returns or pay taxes in Canada. Furthermore, the Canadian company did not have assets or other income and did not carry on actual business activity, its director was a nominal figure who denied any connection with the company, and its location was a "mass registration" address. Checks regarding the company's British shareholder failed to produce any evidence that the latter actually existed.

The Russian Company's Arguments:

Objecting to the tax inspectorate's conclusions, the Russian company asserted that:

- The relationship with the Canadian company cannot be described as non-reciprocal, since it is clear from the content of the contracts in question that the foreign company has obligations to provide services to the Russian company. This is further proven by the fact that the Russian company filed an action with the Canadian courts for the recovery of amounts paid and obtained a favorable decision.
- The tax inspectorate's arguments that the Canadian company was registered and operated in name only and that the Russian company's attempts to recover amounts paid were contrived are not supported by proper evidence.

- Income received by the Canadian company from the Russian company may have been reported in the jurisdiction in which funds were credited to its bank account, i.e. in Switzerland.
- The withholding tax in question should be recovered from the foreign company, and not the tax agent (the Russian company).

The Court's Position:

After considering the arguments put forward by the parties, the Supreme Court upheld the tax inspectorate's arguments, asserting that:

- Where a dispute arises over whether a Russian entity that pays income to a foreign entity has responsibilities as a tax agent, the tax authorities must prove that the following conditions are met: the payments made may be classed as passive income, and the income is connected with Russia.
- Where income of foreign entities from "active" operations actually proves to be passive income in a disguised form, the tax authorities may reclassify the payments concerned in accordance with the unjustified tax benefit concept.
- The tax authorities proved that there was no genuine business relationship between the Russian company and the Canadian company and that the Russian company had artificially created documentation relating to the performance of contracts that had no reasonable business purpose with a view to obtaining an unjustified tax benefit.
- Since the payments to the Canadian company were not connected with any actual business activity carried on by that company, what effectively took place was the distribution of a part of the Russian company's assets (capital) to the foreign company on a non-reciprocal basis. The income in question must be classified as passive income, and specifically as "other income" under Article 21 of the Russian/Canadian tax treaty, meaning that it is subject to withholding tax in Russia.

Conclusions

This case is the latest in a series of disputes over the reclassification of payments by Russian entities to foreign contract partners as concealed distributions of passive income through the application of the unjustified tax benefit concept. Now that Article 54.1 of the Tax Code has come into force, and with Russia about to ratify the Multilateral Convention to Implement the BEPS Plan, the interest of the Russian tax authorities and courts in situations of this kind is only set to increase.

What is more, the case demonstrates the thorough approach taken by the tax authorities to the process of evidence-gathering in such disputes.

Endnotes

1 http://kad.arbitr.ru/PdfDocument/9e9eae22-b2ce-43a3-8694-3fd7591bf9e4/53962925-25a8-4075-95c6-528c9fe93615/A50-16961-2017_20180907_Opredelenie.pdf (In Russian)

2 http://kad.arbitr.ru/PdfDocument/9e9eae22-b2ce-43a3-8694-3fd7591bf9e4/c00672c4-2b7b-4cdb-8015-4a5120998ae8/A50-16961-2017_20170811_Reshenija_i_postanovlenija.pdf (In Russian)

3 http://kad.arbitr.ru/PdfDocument/9e9eae22-b2ce-43a3-8694-3fd7591bf9e4/f4d3eb32-7f7b-48eb-ac17-1e5b71c279a4/A50-16961-2017_20171016_Reshenija_i_postanovlenija.pdf (In Russian)

4 http://kad.arbitr.ru/PdfDocument/9e9eae22-b2ce-43a3-8694-3fd7591bf9e4/21c92ee8-6075-4bd7-abb5-5b6c5a0b3316/A50-16961-2017_20180209_Reshenija_i_postanovlenija.pdf (In Russian)

Swiss Authorities Level The Playing Field For Non-Resident Companies Selling Into Switzerland

by Laurent Lattmann, Tax Partner AG, Taxand Switzerland

With effect from January 1, 2019 VAT registration and VAT accounting obligations will now exist for many foreign companies selling into the Swiss market.

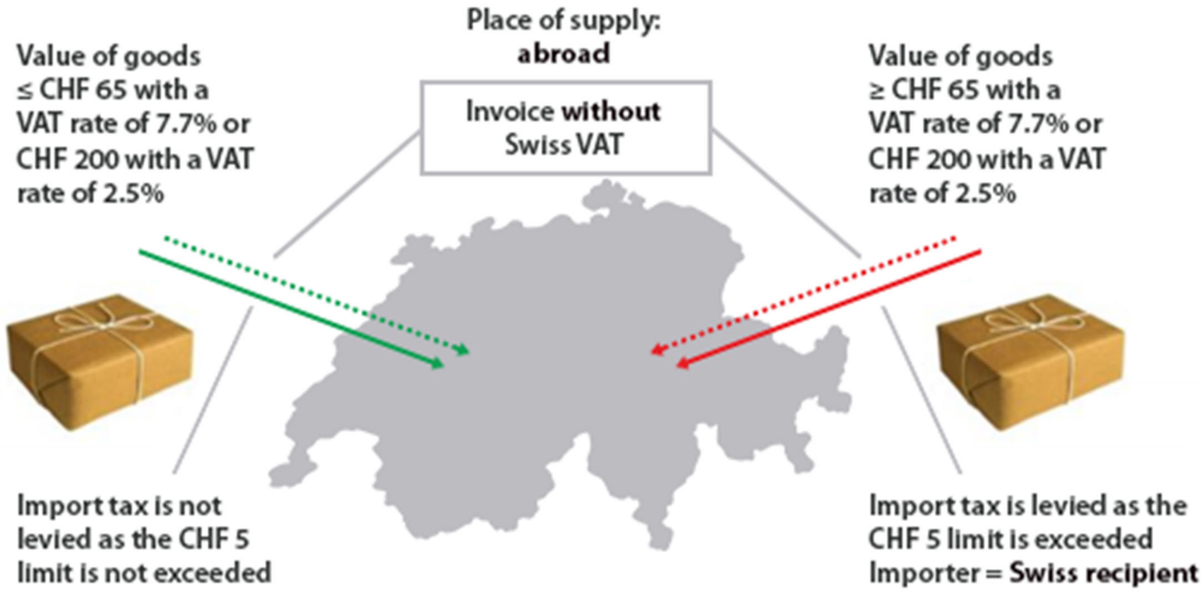
Change Of The Distance Selling Regulations As Of January 1, 2019

The partial revision of the Swiss VAT Act entered into force on January 1, 2018. However, it will not be completed until the enactment of the change regarding the distance-selling rules which has been postponed to January 1, 2019. Earlier this year, the Swiss Federal Tax Administration (FTA) published information on the new legal situation as well as the relating obligations for the taxpayers in more detail. However, the corresponding provisions of the Swiss VAT Ordinance have not yet been adopted and certain amendments may therefore still be necessary. In the following the new regulations and what distance selling companies need to know about the new rules are explained.

What Is The Issue Under The Current Legal Situation?

The aim of the recent revision was to reduce the competitive distortion occurring between foreign and Swiss-based suppliers. Most of the unequal treatments have now been eliminated. However, there remains an inequality between foreign distance selling companies and Swiss-based suppliers. When goods are imported into Switzerland, VAT amounts of up to CHF5 (USD5.03) are not levied on the imports of goods (import tax) for collection efficiency reasons. This rule is also known as the Low Value-Consignment-Relief (LVCR). Contrary to the LVCR of the EU, the LVCR applies on the tax amount rather than on the assessment value. Given the relatively low VAT rates, the VAT amount of CHF5 corresponds to a value of CHF 65 for goods subject to the standard VAT rate of 7.7 percent and CHF200 for goods subject to the reduced VAT rate of 2.5 percent respectively. The assessment basis includes other costs such as shipping or customs duties.

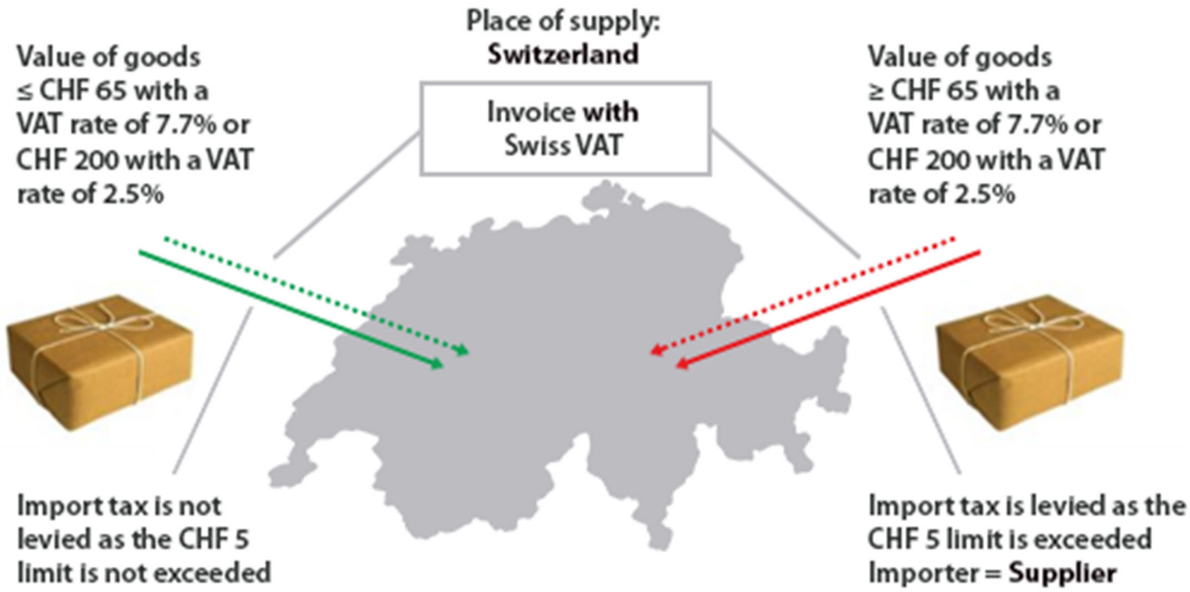
As a result, low value consignments shipped from abroad can benefit from a loophole, which leads to a competitive distortion between Swiss distance sellers and their foreign competitors.



New Rules As Of January 1, 2019

Switzerland decided not to abolish the LVCR rules on the import of such shipment. The reasons here are clear, as this would only increase the administrative costs of the import VAT collection. Instead, Switzerland decided to implement a new place of supply rule that does not depend on who acts as the importer of record of such shipments.

The new rules foresee that if a distance selling company realizes an annual turnover of at least CHF100,000 from such LVCR shipments to Swiss clients, the place of supply is automatically shifted into Switzerland and, therefore, considered as domestic supplies which are subject to Swiss VAT. Furthermore, the foreign supplier is deemed to be the importer of record. The new rules regarding the importer of record will however not be relevant at all given the fact that no import VAT is levied on the individual shipment if the VAT amount is below the LVCR amount of CHF5. It is, however, relevant that the foreign distance selling company must register and charge VAT on its shipments to Swiss clients, irrespectively whether import VAT is collected upon importation or not. Furthermore, it is also important to note that due to the force of attraction of a Swiss VAT registration, all other local supplies rendered by such a company will become subject to VAT. This typically includes services rendered to Swiss recipients which would fall under the reverse-charge provisions if the supplier was not VAT registered in Switzerland.



Are There Any Other Things To Know About The New Distance Selling Provisions?

The FTA will publish on its website a list of the foreign based companies which are performing distance-sales and are registered in the Swiss VAT register. Once the company applies for a Swiss VAT registration and informs the FTA that it will carry out a distance selling activity, it will be listed. The purpose of this list is to allow providers of customs clearance services to identify who will be responsible for the payment of the potential import VAT should import VAT be due. Therefore, the FTA requires that a foreign distance selling company identifies itself and contacts the VAT authority in case the company is not listed for whatever reason.

If a foreign company is already registered for Swiss VAT purposes due to other local supplies than small consignments and starts a distance selling activity to Switzerland, these will not become domestic supplies and continue to be considered foreign turnover provided the threshold of CHF100,000 per year from small consignment deliveries is not exceeded. The same applies if a foreign company is not registered at all and performs distance selling activities for less than CHF100,000 per year.

Overall, foreign companies affected by the new rules should start adapting their processes when selling goods into Switzerland that were considered LVCR shipments in the past. Apart from the VAT registration, it will be key to adapt the pricing, the invoicing, the General Terms and Conditions as well as providing clear instructions to the freight carrier in charge of the shipments. In order to speed up the importation process and to ensure a fast and uncomplicated claim of any import VAT levied on such shipments, companies might also envisage to open a Customs Clearance Account on which customs duties and import VAT is charged separately. Such Customs Clearance Accounts do not prevail the payment of the import duties and import VAT, but provides a payment term of three days (import duties) and 60 days respectively for the import VAT. Furthermore, it helps tracing the import VAT that a company can reclaim when it files its quarterly VAT returns.

In summary, the Swiss distance selling rules will significantly change going forward and increase the complexity for distance selling traders. It remains to be seen if this will really level out the playing field. Maintaining the current LVCR provisions which will not lead to an increase of the workload for the Customs Administration seems more important to the Swiss Government than the correct levying of the VAT on such sales. Whether or not foreign distance sellers decide to be compliant, especially if the FTA does not have any enforcement possibilities, is not yet clear. It might well be that these rules, that differ from the EU-rules and that require a combined effort from the supplier and from the customs agent or the freight forwarder, will remain applicable on paper, but not in practice.

Topical News Briefing: Canada - Keeping Up With The Joneses?

by the Global Tax Weekly Editorial Team

Until recently, Canada was praised internationally for tax reforms, including a series of corporate tax cuts, that made the country one of the most competitive on tax in the G7. That serious concerns are now being expressed by businesses and parliamentarians domestically about Canada's relative lack of tax competitiveness is a measure of how quickly the international tax environment is evolving in the post-BEPS era.

For Canada, the principle area of concern is the tax reforms that have taken place in the United States. As reported in this week's issue of *Global Tax Weekly*, the Senate Committee on Banking, Trade, and Commerce has published a report asking whether Canada can still be considered open for business given the Government's lack of response to the tax cuts that have taken place south of the border. And according to this report, the US tax cuts are already having a meaningful impact on investment flows: witnesses to the committee's investigation "stated that the changes in the United States have caused business investment to decrease in Canada and existing capital to relocate."

This is far from the first time that this issue has been raised. Last month, a study commissioned by the Business Council of Canada and undertaken by PwC Canada concluded that that the reforms passed last year have made the US "a substantially more attractive place to locate capital-intensive businesses" and "eliminated one of Canada's main competitive advantages."

The OECD has also urged the Canadian Government to review the country's tax regime in the wake of the tax reforms in the US. In its most recent Economic Survey of Canada, published in July 2018, the OECD suggested that the Government should renew efforts to make the tax system more internationally competitive, noting that the US corporate tax cut "will hold back investment."

The International Monetary Fund joined the chorus, highlighting the serious nature of this issue in a report published shortly before the OECD's Economic Survey.

The key question therefore is: what is the Government doing in response to these warnings? We do at least know that it began to evaluate the impact of the US tax reforms earlier this year, as Finance Minister Bill Morneau revealed in a pre-Budget meeting with economists last February. However, the Government has been largely silent on the matter since.

The Canadian Government's inactivity on tax reform is probably the result of its intention to not react "in an impulsive manner" to the US tax cuts, as Morneau put it. This suggests that Canada will not be hurried into any corporate tax reforms of its own. In any case, it would be unlikely that the Government would announce any major changes to tax until the next Budget, which will be delivered early next year. Although, given that the US tax cuts are said to be already impacting investment in Canada, an early move in this area cannot be ruled out entirely.

It is increasingly evident, though, that by standing still on corporate tax over the last few years while other developed and major emerging economies cut rates of corporate tax, Canada has effectively gone backwards on tax competitiveness. Nevertheless, judging by the Government's reticence to react in a knee-jerk way to the US tax reforms, taxpayers should expect little in the way of major change in the short-term. But as much as the Government may prefer the keep the staus quo, the economic consequences of the US tax reforms may force it into action at some point.

The Carryback Of Foreign Taxes In The Foreign Branch Basket

By Stewart R. Lipeles, Julia Skubis Weber, Ethan S. Kroll, and Matthew S. Jenner, Baker & McKenzie LLP

I. Introduction

On December 22, 2017, the President signed the Tax Cuts and Jobs Act (the "TCJA") into law, which substantially revised the international tax provisions of the Code.[1] The TCJA included, among many other changes, significant revisions to the foreign tax credit ("FTC") provisions, effective for tax years of foreign corporations beginning after December 31, 2017, and tax years of U.S. shareholders in which or with which such tax years of foreign corporations end.[2]

The TCJA introduced two new separate FTC limitation categories or "baskets" in Code Sec. 904 — one for foreign branch income and another for global intangible low-taxed income ("GILTI").[3] The new foreign branch income basket includes the "business profits" of a U.S. person that are "attributable to" one or more qualified business units ("QBUs"), but does not include passive category income.[4] As the Senate explained, the purpose of this new branch basket is to prevent taxpayers from cross-crediting "foreign taxes attributable to low-tax subpart F income with [foreign taxes] attributable to high-tax branch income [to] minimize overall tax liability."[5]

Congress also amended Code Sec. 904(c) to provide that taxpayers cannot carry foreign taxes back or forward if such foreign taxes fall in the new GILTI basket.[6] Foreign taxes in the new foreign branch income basket, however, remain subject to the normal carryback and carryforward rules contained in Code Sec. 904(c). Going forward, taxpayers can apply these rules similar to how they applied them in the past, but neither Congress nor Treasury has issued guidance regarding FTC carrybacks (or carryforwards) to assist taxpayers in their transition to this new FTC regime. Thus, it is not clear whether it is permissible to carry back excess foreign taxes allocated to the foreign branch income basket and paid or accrued in the taxpayer's first post-tax reform year to the previous taxable year when the foreign branch income basket did not exist.

This question is of particular interest in fact patterns involving the much-discussed "glitch" in a cross-reference in Code Sec. 904(d). Code Sec. 904(d)(2)(H)(i) provides the basketing rule for foreign taxes imposed on an amount that does not constitute income under U.S. tax principles (*i.e.*, a base difference). The rule requires taxpayers to treat the foreign taxes as imposed on income described in Code Sec. 904(d)(1)(B) . Prior to the TCJA, this subsection described general basket income. With the enactment of the TCJA, Congress replaced the general basket with the branch basket in subsection (d)(1)(B) and moved the general basket to subsection (d)(1)(D), but neglected to update the cross-reference in Code Sec. 904(d)(2)(H). As a result, taxpayers with base difference taxes are presented with the question of whether to allocate the corresponding foreign tax to the branch basket. Practitioners and taxpayers reasonably expect that Congress or Treasury eventually will address this "glitch." In the meantime, the possibility of branch basket treatment for base difference items increases the possibility of taxpayers having excess credits in the foreign branch basket in 2018. This, in turn, raises the question of whether and how branch basket taxes can be carried back and claimed in 2017.

Below, we describe the current state of carrybacks under Code Sec. 904(c) and prior transitional guidance provided by Congress and Treasury. We then discuss how taxpayers should interpret these provisions, given the current lack of guidance and policy considerations. We conclude by suggesting that Treasury provide clarity to taxpayers by issuing guidance in regulations.

II. Code Sec. 904(C) Carrybacks and Carryforwards

Code Sec. 904(a) limits a U.S. taxpayer's allowable FTCs to the amount of U.S. income tax it would otherwise owe on its foreign source income. The effect of Code Sec. 904(a) is to limit a taxpayer's FTC for a given taxable year to: (i) the taxpayer's foreign source taxable income for the year, multiplied by (ii) the effective U.S. tax rate on the taxpayer's worldwide taxable income for the year. The objective of this limitation is to prevent a taxpayer from reducing U.S. tax on its U.S. source income with FTCs.

Code Sec. 904(d)(1) requires taxpayers to determine their FTC limitations separately for each limitation category or basket of income. Prior to the enactment of the TCJA, Code Sec. 904(d) identified only two baskets of income: (i) passive category income; and (ii) general category income.[7] As mentioned above, the TCJA provided for two additional baskets: (iii) GILTI income; and (iv) foreign branch income.

In any given taxable year, the foreign taxes paid or accrued by a U.S. taxpayer for a particular basket of income may exceed the applicable limitation amount under Code Sec. 904(a).[8] Code Sec. 904(c) a one-year carryback and a 10-year carryforward for excess FTCs that are currently unused by a U.S. taxpayer due to such limitation. As mentioned above, this rule applies to all FTC baskets except the GILTI income basket.

The amount of foreign taxes that may be carried back or forward to another taxable year is limited to the amount by which the Code Sec. 904(a) limitation for such other year "exceeds the sum of the taxes paid or accrued to foreign countries or possessions of the United States for such preceding or succeeding taxable year and the amount of the taxes for any taxable year earlier than the current taxable year which shall be deemed to have been paid or accrued in such preceding or subsequent taxable year."[9] In other words, foreign taxes can only be carried back or forward to another taxable year to the extent the taxpayer had "excess limitation" for that other year.

Similar to the FTC limitation rule, Code Sec. 904(c) must be applied separately to each FTC basket.[10] Stated differently, excess FTC carrybacks and carryforwards generally are limited to the FTC baskets in which they arise, effectively preventing any cross-crediting among FTC baskets between years.

III. Prior Transitional Guidance

Historically, as the FTC provisions of the Code have been revised, Congress and Treasury have provided guidance regarding FTC carrybacks and carryforwards to assist taxpayers in their transition to the new FTC regime. While neither Congress nor Treasury has issued similar guidance following the enactment of the TCJA, prior FTC transition rules may be informative as to any FTC transition rules that Congress or Treasury will promulgate in the future.

The FTC limitation traces its roots back to the Revenue Act of 1921 when Congress decided that a limitation was necessary to prevent taxpayers from using foreign taxes to offset U.S. taxes on U.S.-source income. In 1932, Congress introduced the "per-country" limitation whereby taxpayers had to calculate the FTC limitation on a country-by-county basis. However, no carryback or carryforward rule was in place at the time.

Congress preserved the "per-county" limitation when it passed the Internal Revenue Act of 1954.[11] It was not until 1958, however, that Congress enacted Code Sec. 904(c), allowing taxpayers to carry excess foreign taxes back two years or forward five years.[12] At the time, it was not necessary to provide any transition rules because the FTC limitation itself did not change.

Beginning in 1976, Congress repealed the "per-country" FTC limitation rules, which effectively reduced the number of FTC baskets from several to one.[13] To assist taxpayers with this change, Congress included a transition rule in Code Sec. 904(e), which provided:

> [A]ny carryback from a taxable year beginning after December 31, 1975, may be used in taxable years beginning before January 1, 1976, to the extent provided in [Section 904(c)], but only to the extent such carryback could have been used in such preceding taxable year if the per-country limitation continued to apply to all taxable years beginning after December 31, 1975.[14]

This rule required taxpayers to reanalyze foreign taxes paid or accrued in taxable years beginning after December 31, 1975, as if the foreign taxes had been paid or accrued under the prior rules that applied during the previous taxable year. This rule made sense because it effectively applied the applicable law of the carryback year.[15]

Congress first created the FTC baskets in 1987, expanding the number of FTC baskets from what was effectively one to nine following the enactment of the Tax Reform Act of 1986.[16] In an "off-Code" provision, the Act provided a transition rule for carrybacks, which stated:

> Any taxes paid or accrued in a taxable year beginning after 1986 which (after the application of [Section 904(a)]) are treated as paid or accrued in a taxable year beginning before 1987 shall be treated as imposed on income described in section 904(d)(1)(E) of the Internal Revenue Code of 1954 (as in effect on the day before the date of the enactment of this Act). No taxes paid or accrued in a taxable year beginning after 1986

> with respect to high withholding tax interest … may be treated as paid or accrued in a taxable year beginning before 1987.[17]

Prior to the Tax Reform Act of 1986, Code Sec. 904(d)(1)(E) was, in effect, the residual or general basket. Because there was effectively only one basket in prior years, it was permissible to carryback excess FTCs (other than those associated with taxes imposed on high withholding tax interest) paid or accrued during the 1987 taxable year, without limitation.

Most recently, the American Jobs Creation Act of 2004 reduced the number of FTC baskets from nine to two: (i) passive category income and (ii) general category income.[18] The reduction in baskets applied for taxable years beginning after December 31, 2006, and Code Sec. 904(d)(2)(K)(i) provided a transition rule for FTC carryforwards while also authorizing Treasury to issue regulations regarding FTC carrybacks.

In response, Treasury issued Reg. Sec.1.904-2(i)(2)(i), which provided that FTC carrybacks "shall be allowed only to the extent of the excess limitation in the pre-2007 separate category, or categories, to which the taxes would have been allocated if the taxes were paid or accrued in a taxable year beginning before January 1, 2007." In other words, to determine whether FTC carrybacks were permissible, taxpayers were required to reanalyze their income as if it had been earned in the prior year under the previous FTC regime consistent with prior transitional guidance. Treasury determined that a transitional rule was necessary "to allow a taxpayer to reconstruct separate categories of income earned and excess taxes paid or accrued in its first post-2006 taxable year as if the pre-2007 rules applied."[19] This rule was substantially similar to the transition rule Congress provided in 1975. In addition, Treasury provided a safe harbor rule whereby a taxpayer could elect to allocate all post-2006 passive income to the pre-2007 passive basket and all other unused foreign taxes to the pre-2007 general basket.[20]

No transitional guidance has been provided for the new FTC baskets created by the TCJA. While none of the transitional rules discussed above continues to apply to the new FTC baskets, they demonstrate that Congress and Treasury have consistently provided guidance regarding FTC carrybacks whenever there are significant revisions to the FTC basketing provisions of the Code. Although Congress did not include any FTC transition rules and did not explicitly direct Treasury to issue transition regulations, Treasury has authority to do so under Code Sec. 904(d) and Code Sec. 7805(a) .[21] These earlier rules may be informative as to any FTC transition rules that Treasury will promulgate in the future.

IV. The Proper Treatment of Excess Taxes in the Foreign Branch Income Basket

A. Plain Language of Code Sec. 904

In the absence of any FTC transition rules, taxpayers must apply the Code as amended by the TCJA. The relevant sentence in Code Sec. 904(c) contains two important clauses.[22] First, any foreign taxes in excess of the FTC limitation in a given year "shall be deemed taxes paid … to foreign countries … in the first preceding taxable year and in any of the first 10 succeeding taxable years, in that order and to the extent not deemed taxes paid or accrued in a prior taxable year…"

Second, the amount of foreign taxes that may be carried back or forward to another taxable year is limited to the amount by which the Code Sec. 904(a) limitation for such other year "exceeds the sum of the taxes paid or accrued to foreign countries or possessions of the United States for such preceding or succeeding taxable year and the amount of the taxes for any taxable year earlier than the current taxable year which shall be deemed to have been paid or accrued in such preceding or subsequent taxable year." Finally, as mentioned above, the FTC carryback rule under Code Sec. 904(c) applies separately to each FTC basket pursuant to Code Sec. 904(d).

There are at least two ways to interpret these clauses. The interpretations vary depending on whether the amount limitation in the second clause is a condition precedent to applying the deemed carryback in the first clause.[23] If the amount limitation is a condition precedent, a taxpayer generally could not carryback FTCs to a previous year unless the taxpayer had excess limitation for that previous taxable year in the same FTC basket. Because the foreign branch income basket did not exist in taxable years prior to enactment of the TCJA, no taxpayer can have an excess limitation in the foreign branch income basket for such prior taxable years. Therefore, under this interpretation, taxpayers could never carry back excess foreign branch income taxes to their pre-TCJA taxable years.

A second interpretation is to view the amount limitation in the second clause as merely a computational rule—rather than a condition precedent—that only applies after applying the operative rule in the first clause. The operative rule provides that any excess foreign taxes "shall be deemed taxes paid" in the first preceding taxable year. A taxpayer would then apply the applicable law of the preceding taxable year (including the FTC basket provisions) to determine the amount of foreign taxes to carry back, which could be none if there was no excess limitation in the relevant basket in the prior year. This interpretation would require a taxpayer to reanalyze the foreign taxes in the foreign branch income basket to determine whether those taxes would have been in the general basket or the passive basket in the pre-TCJA year. However, because the branch basket already excludes passive income, all of the foreign taxes in the branch basket presumably would carry back to the general basket.

In similar circumstances, Congress and Treasury have consistently applied the law of the carried-to year to determine the amount of the carryback. As described above, the prior FTC transitional rules consistently required taxpayers to apply the law and FTC baskets of the carryback year to determine the amount of foreign taxes to carryback. This rule is also consistent with other carryback provisions of the Code, such as the NOL rules, which look to the applicable law in the carryback year.[24]

B. Policy Considerations

Congress enacted Code Sec. 904(c) to benefit taxpayers by lessening the burden of Code Sec. 904(a) applying strictly on a year-by-year basis.[25] The first interpretation above would deny taxpayers the ability to carry back certain FTCs. Taxpayers who wish to carryback their branch basket taxes can argue that this denial frustrates the Congressional intent of the statute. Taxpayers can also point to the fact that Congress expressly denied carrybacks and carryforwards for foreign taxes in the new GILTI basket, but was completely silent with respect to carrybacks for the new branch basket. Thus, there was no express Congressional intent to override the carryback provision for branch basket taxes.

The regulations under Code Sec. 904 also recognize that guidance cannot always keep up with statutory amendments. Rather than deny the benefits of Code. Sec. 904(c) to taxpayers, the regulations tell taxpayers to apply the principles of Reg. Sec. 904-2(b) through (g), but modified so as to take into account the effect of statutory amendments, like the amendments to Code Sec. 904(d) made in 1986.[26] Likewise, the recent amendments to Code Sec. 904(d) arguably should not be interpreted to limit a taxpayer's ability to carry back FTCs pursuant to Code Sec. 904(c).

Allowing a carryback of foreign taxes from the branch basket to the pre-TCJA general basket also does not appear to frustrate the purpose of creating the branch basket. As mentioned above, Congress created the branch basket to prohibit the cross-crediting of low-taxed subpart F income with high-taxed branch basket income. While some cross-crediting with low-taxed subpart F income could certainly occur, most taxpayers would likely carry back these foreign taxes to offset a portion of the Code Sec. 965 transition tax. While Congress effectuated the transition tax through the subpart F provisions, Code Sec. 965 did not differentiate between high-taxed and low-taxed income. Thus, Code Sec. 965 already allowed taxpayers to cross-credit their foreign taxes.

V. Conclusion

Without transitional guidance, it is not entirely clear whether taxpayers can carry back foreign taxes in the branch basket to the general basket in their first pre-TCJA taxable year. The plain language of Code Sec. 904(c) provides compelling evidence that Congress intended for taxpayers to be able to carry back excess FTCs one taxable year. Although Congress expressly prohibited the carrying forward and back of GILTI basket FTCs, no such proscription was placed on the branch basket. We do not see a convincing policy reason why these carrybacks should be prohibited. Moreover, prohibiting the carryback would be inconsistent with the approach Treasury has taken in the past under section 904 and would frustrate taxpayer expectations without notice. Therefore, taxpayers ought to be able to carry back branch basket FTCs. Consistent with prior transitional guidance, it would be appropriate for Treasury to issue regulations to explicitly permit carrybacks and provide taxpayers with certainty, and we urge Treasury to do so. Treasury may also want to consider implementing similar transitional rules for FTC carryforwards. However, unlike foreign branch income basket taxes that are carried back (which would clearly carry back to the pre-TCJA general basket), requiring taxpayers to re-basket foreign taxes when carrying them forward could create administrability concerns. Thus, we suggest that Treasury provide flexibility in any transitional rules for carryforwards.[27]

Endnotes

1 Tax Cuts and Jobs Act of 2017, P.L. 115-97, 131 Stat. 2054 (Dec. 22, 2017). The formal name of the act commonly referred to as the Tax Cuts and Jobs Act is "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018."

2 *Id*., §14302(c).

3 *Id*., §§14302(a), 14201(b)(2)(A). *See* §§904(d)(1)(A), (B).

4 §§904(d)(2)(J)(i)-(ii). The statute looks to Code Sec. 989(a) for the definition of a QBU. The amount of business profits attributable to a QBU will be determined under rules established by Treasury. §904(d)(2)(J)(ii).

5 S. Comm. on the Budget, Reconciliation Recommendations Pursuant to H. Con. Res. 71, S. Prt. 115-20, at 393 (Comm. Print 2017).

6 P.L. 115-97, §14201(b)(2)(C) (adding the following to the end of Code Sec. 904(c): "This subsection shall not apply to taxes paid or accrued with respect to amounts described in subsection (d)(1)(A).").

[7] The American Jobs Creation Act of 2004 reduced the number of Code Sec. 904 baskets from nine to only two, "general" and "passive" income baskets, effective as of January 1, 2007. ***See*** T.D. 9521, 76 FR 19268 (Apr. 7, 2011).

[8] For example, if a U.S. taxpayer has paid or accrued USD200 of foreign branch basket taxes but is only able to claim USD100 as a credit because the foreign branch basket limitation for the taxable year is USD100, such U.S. taxpayer is said to be in an "excess credit" position (***i.e***, the taxpayer's available credits exceed its limitation).

[9] §904(c).

[10] §904(d)(1).

[11] Internal Revenue Act of 1954 (P.L. 83-591).

[12] Act Sec. of 42 of the Internal Revenue Act of 1954 (P.L. 85-866).

[13] Tax Reform Act of 1976, P.L. 94-455, 90. Stat. 1520 (Oct. 4, 1976).

[14] *Id.*

[15] Congress made additional changes to the FTC limitation rules in 1960, 1962, and 1976, but we do not discuss those changes herein.

[16] Tax Reform Act of 1986, P.L. 99-514, 100 Stat. 2085 (Oct. 22, 1986). The nine baskets were passive income, high withholding tax interest, financial services income, shipping income, noncontrolled Code Sec. 902 corporation dividends, dividends from a DISC, FSC foreign trade income, distributions from a FSC, and other residual income.

[17] *Id*. at §1205(b).

[18] American Jobs Creation Act of 2004, P.L. 108-357, 118 Stat. 1418 (Oct. 22, 2004).

[19] T.D. 9368, IRB 2008-6 (Dec. 20, 2007).

[20] Reg. Sec. 1.904-2(i)(2)(ii)

[21] *See* §904(d)(7) ("The Secretary shall prescribe such regulations as may be necessary or appropriate for the purposes of this subsection…").

[22] The relevant sentence in Code Sec. 904(c) provides:

> Any amount by which all taxes paid or accrued to foreign countries or possessions of the United States for any taxable year for which the taxpayer chooses to have the benefits of this subpart exceed the limitation under subsection (a) shall be deemed taxes paid or accrued to foreign countries or possessions of the United States in the first preceding taxable year and in any of the first 10 succeeding taxable years, in that order and to the extent not deemed taxes paid or accrued in a prior taxable year, in the amount by which the limitation under subsection (a) for such preceding or succeeding taxable year exceeds the sum of the taxes paid or accrued to foreign countries or possessions of the United States for such preceding or succeeding taxable year and the amount of

the taxes for any taxable year earlier than the current taxable year which shall be deemed to have been paid or accrued in such preceding or subsequent taxable year (whether or not the taxpayer chooses to have the benefits of this subpart with respect to such earlier taxable year).

[23] Other commentators have suggested that the rules may require taxpayers to presuppose that there was a foreign branch income basket in the pre-TCJA year and then apply Code Sec. 904(c), but we do not believe that interpretation is appropriate.

[24] *See* §172(e) ("In determining the amount of any net operating loss carryback or carryover to any taxable year, the necessary computations involving any other taxable year shall be made under the law applicable to such other taxable year."); Reg. Sec. 1.172-1(e)

[25] *See Fluor Corp.,* CA-FC, 97-2 USTC Para. 50, 615, 126 F3d 1397 ("[O]ne of Congress's purposes in allowing foreign tax credit carryovers was to mitigate distortions that can result from differences in the rules for accrual of income under U.S. and foreign tax systems. See H.R. Rep. No. 85-775, at 27–28 (1957); Staff of the Joint Committee on Taxation, Summary of the Technical Amendments Bill of 1958 (Part Two) 5 (1958).").

[26] Reg Sec. 1.904-2(a)

[27] For example, for the transition from nine to two baskets, Treasury provided a safe harbor whereby taxpayers could elect to carryforward all pre-2007 passive income to the post-2006 passive basket and all other unused foreign taxes to the post-2006 general basket. See Reg. Sec. 1.904-2(i)(1)(ii)

Topical News Briefing: The OECD - Who Needs Governments!

by the Global Tax Weekly Editorial Team

The OECD has no legal powers. It is an association of the world's wealthiest nations and describes itself as a forum for the promotion of policies that "will improve the economic and social well-being of people around the world." And yet, it has been the driving force for global legislative and regulatory change across a diverse set of issues, for many years now, not least taxation.

Indeed, in the five years since the OECD published its Action Plan on base erosion and profit shifting, we have witnessed some profound changes not only in the way in which multinational companies are taxed, but also in the attitudes of governments and tax authorities towards tax avoidance. However, the OECD is by no means new to international tax game. It has led multilateral efforts to combat aggressive tax avoidance and evasion in all its forms since it kicked off its campaign against harmful tax regimes in 1998. And even more fundamental changes are in the pipeline as the OECD attempts to steer country-level reforms intended to adapt tax systems to the digital economy.

News stories included in this week's issue of *Global Tax Weekly* serve as a reminder of the Paris-based organization's enduring and pervading influence in the area of tax. In the week beginning October 15, 2018 alone, the OECD released three key tax-related documents. These included: three practice notes intended to support resource-rich developing countries to protect their tax bases from erosion and profit shifting (finalized with the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development); the findings of an analysis of the over 100 residence and citizenship by investment schemes available worldwide, which aimed to identify those that may enable taxpayers to avoid the reporting of their data to their home tax agency under the Common Reporting Standard; and seven new peer review reports on whether Austria, Aruba, Bahrain, Brazil, Saint Kitts and Nevis, Singapore, and the United Kingdom are complying with the OECD's international standard on transparency and exchange of information on request. The OECD also recently released a new Taxation Working Paper that looks at the design of simplified registration and collection mechanisms for taxpayers that are not located in the jurisdiction of taxation.

Notably, the OECD is taking a greater interest in international efforts to reduce carbon emissions, as we saw last month when it chastised the world's governments for failing to price carbon emissions appropriately. It would not be entirely unexpected, therefore, if the OECD assumes a coordinating role in the area of carbon taxation, as it has done in the area of corporate tax with BEPS.

Those expecting the OECD to take a back seat on tax issues following the completion of the BEPS project are therefore likely to be mistaken. The OECD has been driving the international tax agenda for 20 years, and as the wide range of tax issues it has tackled in the last few weeks alone shows, it will likely continue to do so for many more to come.

Ireland Implements New Exit Tax Regime

Ireland's 2018 Finance Bill legislates for a new exit tax regime compliant with the EU's Anti-Tax Avoidance Directive.

The exit tax charge was introduced via financial resolution on Budget night, October 9, 2018, and applies to certain events occurring on or after October 10. Finance Bill 2018 formally legislates for its introduction.

Under the new rules, Ireland applies a charge to tax on unrealized capital gains where companies migrate or transfer assets offshore such that the assets leave the scope of Irish taxation. The tax operates by deeming a disposal of the assets to take place at the time of exit and applying the exit tax charge on any unrealized gain.

The charge applies at the standard corporate tax rate of 12.5 percent. However, an anti-avoidance provision will ensure that a rate of 33 percent (the standard capital gains tax rate) applies if the event forms part of a transaction to dispose of the asset and the purpose of the transaction is to ensure that the gain is charged at the lower rate.

The tax will apply on the occurrence of any of the following events:

- Where a company transfers assets from its permanent establishment in Ireland to its head office or permanent establishment in another territory;
- Where a company transfers assets to the business carried on by its permanent establishment in Ireland to another territory; or
- Where an Irish-resident company transfers its residence to another country.

The charge will not apply if the assets of an Irish-resident company continue to be used in Ireland by a permanent establishment of the company after the company migrated.

The new tax replaces a previous, more narrowly focused charge introduced in 1997 as a proportionate anti-avoidance measure to counter a number of identified tax avoidance transactions that moved chargeable outsets outside the charge to Irish tax prior to the disposal of these assets.

The EU's ATAD contains five legally binding anti-abuse measures that all EU member states are required to apply as of January 1, 2019. An exit tax regime is one of these measures.

Ireland Introduces CFC Rules

The Irish Government has introduced legislation to implement a new Controlled Foreign Company regime in line with the EU's Anti-Tax Avoidance Directive.

The new CFC rules are designed to prevent the diversion of profits to offshore entities in low- or no-tax jurisdictions. The Irish Finance Department said that CFC rules have traditionally been a feature of territorial tax regimes and that as Ireland has a worldwide tax regime, CFC rules have not previously been a feature of its tax system.

The EU's ATAD contains five legally binding anti-abuse measures that all EU member states are required to apply as of January 1, 2019. A CFC rule is one of these measures.

Under Ireland's Finance Bill 2018, the undistributed income of CFCs, arising from non-genuine arrangements put in place to avoid tax, will be attributed to the controlling parent company or connected company in Ireland. The new rules will require an analysis as to the extent to which the CFC would hold the assets or bear the risks that it does were it not for the controlling company undertaking the significant people functions (SPFs) in relation to those assets and risks.

The legislation is intended to ensure that undistributed income that has been artificially diverted from Ireland will fall to be taxed in Ireland. In order to prevent double taxation, a credit will be available against the CFC charge for foreign tax paid on the same income.

In line with the ATAD, a number of exemptions will apply. There will be exemptions for CFCs with low profits or a low profit margin and in cases where the CFC pays a comparatively higher amount of tax in its territory than it would have paid in Ireland. A one-year grace period will apply in the case of newly-acquired CFCs, subject to certain conditions. The CFC rules will not apply where the arrangements under which SPFs are performed have been entered into on an arm's length basis or are subject to the transfer pricing rules.

The legislation will take effect for accounting periods of controlling companies beginning on or after January 1, 2019.

Ireland To Amend Business Tax Incentives

The Irish Government has announced plans to improve the effectiveness of the Employment and Investment Incentive (EII) and the Start Up Refunds for Entrepreneurs (SURE) program.

EII is a tax relief issued by trading companies to attract equity-based risk finance from individuals. A company that wishes to raise finance under EII must issue ordinary shares to the investor and use the money raised to carry on a qualifying trade. The investor can then claim income tax relief on the amount invested, provided they keep the shares for at least four years.

SURE is a tax refund scheme for employees, unemployed people, or people who have recently been made redundant and are starting their own business.

The Government intends to amend the application procedure for both EII and SURE to address issues that result in delays. It will move to a largely self-certification model and applicants will be able to ask Revenue to confirm that they meet the requirements for General Block Exemption Regulation compliance.

In addition, the Government will provide for a specific investor eligibility regime for investment in very small enterprises. It will also make certain technical and operational enhancements to the scheme and extend the EII and SURE sunset clause to the end of 2021.

Ireland To Improve Employee Share Scheme Tax Break

The Irish Government has introduced legislation to improve its employee share scheme tax incentive.

The Key Employee Engagement Programme (KEEP) was introduced in January and is designed to help SMEs in Ireland compete with larger firms to attract and retain employees.

In his Budget speech, Finance Minister Paschal Donohoe said he was "aware that take-up [of the scheme] has been less than expected." He confirmed that he would increase the ceiling on the maximum annual market value of share options that may be granted, replace the current three-year limit with a lifetime limit, and increase the overall value of options that may be awarded per employee.

Under KEEP, any gains arising from the exercise of qualifying share options granted between January 1, 2018, and December 31, 2023, by employees and directors will not be subject to income tax, Universal Social Charge, or Pay Related Social Insurance. The gain will instead be subject to capital gains tax when the shares are disposed. The shares must be held for a minimum of one year before exercise and must be exercised within 10 years of the grant.

Under the current rules, the total market value of all shares in respect of which share options have been granted must not exceed the lesser of: EUR100,000 (USD114,465) in one tax year, EUR250,000 in any three consecutive tax years, or 50 percent of the annual emoluments of the employee or director in the year in which the share option is granted.

The Government's new Finance Bill will double the ratio of share options to salary, from 50 percent to 100 percent. It will also increase the total value of options the company can grant to the particular employee from EUR250,000 to EUR300,000, applicable in any period.

In line with EU state aid rules, the Irish Government must notify the European

Commission of the proposed changes. The reforms will therefore be subject to a commencement order.

The Finance Bill also makes a number of technical and administrative changes to the Employment and Investment Incentive (EII) and the Start-up Refunds for Entrepreneurs (SURE) scheme. Applications for each program will now be based largely on a self-assessment procedure and the legislation under which they operate will be made more transparent and accessible to companies and investors.

Canada Needs To Enhance Corporate Tax Appeal: Lawmakers

A committee of Canadian senators has argued that the Government must overhaul the tax system and make it more business friendly if the country is to remain competitive.

The Senate Committee on Banking, Trade, and Commerce has published "Canada: Still Open for Business?," a report which examines new and emerging issues for Canadian importers and exporters with respect to the competitiveness of Canadian businesses.

Among the competitiveness issues identified by the committee is the impact of the reductions made last year to the US corporate tax rate.

Thanks to the changes, the US corporate tax rate has fallen from around 39.1 percent to 26 percent (taking into account subnational rates). By comparison, the Canadian rate is 26.7 percent. According to the committee, these changes have effectively eliminated Canada's main corporate tax advantage over the US. In addition, the US Administration's reforms also provided for full and immediate expensing for most types of equipment until 2022, whereas Canadian legislation does not make such allowances.

The report explained that witnesses to the committee's investigation "stated that the changes in the United States have caused business investment to decrease in Canada and existing capital to relocate, relative to the United States, since businesses are choosing to take advantage of the new, more competitive rates and deductions there."

Witnesses also expressed concerns about the two-tier nature of Canada's tax system, stating that because the small business rate "only applies to businesses below a certain income threshold, it creates a disincentive for businesses to grow and earn more."

The committee recommended that the federal Government should establish a Royal Commission on Taxation to examine Canada's tax system with the goal of improving the efficiency, simplicity, and international competitiveness of the system.

Given that a Royal Commission could take years to complete, the committee also urged the Government to act immediately to implement measures that would encourage companies to continue to invest in Canada. Possible measures include reducing the corporate tax rate and temporarily allowing the full and immediate deduction of capital expenditures.

The report stated: "The time for tax reform is now. Canada needs to create a tax environment that encourages businesses and people to stay, innovate, and contribute to Canada. A tax system that is simple, consistent, and has incentives for growth and investment is required."

The committee also made the following recommendations:

- The federal Government should improve Canada's regulatory regime;
- The federal Government should assist companies in commercializing their intellectual property by expanding the Scientific Research and Experimental Development investment tax credit program, and through better protections in international trade agreements; and
- The federal Government should focus on expediting trade in emerging, fast-growing economies, and continue to negotiate and implement free trade agreements.

The committee's chair, senator Doug Black, stated that: "Canada must show the world that it is willing to encourage innovation by allowing industry to be more competitive. Businesses can choose the jurisdiction that best suits their needs. We have to make sure that Canada can compete."

The committee's deputy chair, senator Carolyn Stewart Olsen, warned: "If the federal Government fails to implement these recommendations, Canada risks being left behind and our economic prosperity will decline – not just in one region but from coast to coast to coast."

Phil Taylor at the Canadian Chamber of Commerce said the committee's "recommendation that government conduct a much-needed review of Canada's cumbersome and complex tax system will be well-received by the business community."

"Getting the tax mix right is integral to promoting long-term economic growth, to ensuring Canada is internationally competitive, and that we reward entrepreneurship and encourage investment in the technologies, skills, and capacity companies need to grow."

British Columbia To Hike Tax On Foreign Property Investors

The British Columbian Government has introduced legislation to implement a speculation and vacancy tax, which would be the first of its kind in Canada.

The annual tax will be payable by owners of residential property in designated regions of the province. All residential property owners in these areas will be required to complete an annual declaration. Where there are multiple owners, a declaration must be completed for each owner.

The rate of tax will depend on the owner's tax residency and whether they are a Canadian citizen, permanent resident, or a member of a satellite family (one that receives considerable foreign income that is subject to low or no domestic tax). It is anticipated that more than 99 percent of British Columbians will be out of scope.

For 2018, the tax will be levied at 0.5 percent of the property's assessed value for all properties subject to the tax. For 2019 and subsequent years, the tax will be levied at: two percent, for foreign owners and satellite families, and 0.5 percent, for British Columbians and other Canadian citizens or permanent residents.

According to the Government, the aim of this rate structure is to ensure that those with limited social and economic ties to the province pay the largest share of the tax.

The tax will be levied on owners who own the property on December 31 of each tax year.

Finance Minister Carole James said: "Right now, British Columbians are faced with some of the highest housing prices in the world and there is widespread support for the Government's plan to moderate the housing market. We're tackling this housing crisis head-on and the speculation and vacancy tax is an essential piece in our plan."

All revenue raised from the tax will be used to fund affordable housing initiatives targeted at those who live in the province.

Canada Announces Latest Response To US Metal Tariffs

As part of its ongoing response to US metal tariffs, the Canadian Government has announced new reliefs for affected companies and a surtax on certain steel imports.

In March, the US announced that it would implement a 25 percent tariff on steel imports and a 10 percent tariff on aluminum imports, citing national security concerns. On May 31, the US said that it had been unable to reach an agreement with Canada on alternative ways to address the alleged security threat and that the tariffs would be imposed on Canadian imports.

To date, Canada has imposed reciprocal countermeasures on CAD16.6bn (USD12.8bn) worth of US imports, covering steel, aluminum, and a range of other products.

The Canadian Government has now announced the imposition of new provisional safeguard measures. Beginning October 25, imports of seven steel products will be subject to a surtax of 25 percent, in cases where the level of imports from Canada's trading partners exceeds historic norms. The following products will be affected: heavy plate, concrete reinforcing bar, energy tubular products, hot-rolled sheet, pre-painted steel, stainless steel wire, and wire rod.

The Government has requested that the Canadian International Trade Tribunal (CITT) conduct an inquiry to determine whether final safeguards are warranted. The provisional safeguards will be in place for 200 days pending the CITT's findings.

Under WTO rules, safeguard measures may be applied if there is evidence that a product is being imported in such increased quantities, and under such conditions, as to cause or threaten to cause serious injury to domestic producers.

The Government has also announced targeted relief from surtaxes collected on steel, aluminum, and certain other goods imported from the US since July 1. Companies that have applied for and been granted relief can now import these goods without paying surtaxes. A portion of this relief will be temporary, available until such time that Canadian producers are able to adequately meet domestic demand.

New Zealand To Repeal Low-Value Consignment Relief

New Zealand is to mirror a recent decision from Australia to repeal low-value consignment relief, requiring that foreign suppliers of goods worth less than NZD1,000 newly collect GST on those supplies from October 1, 2019.

The change will mean that many offshore suppliers will newly need to register for GST in New Zealand and collect and remit New Zealand GST on all goods supplied to consumers in New Zealand. Legislation will be tabled this year, the Government announced on October 18.

Unveiling the change at the Chartered Accountants Australia–New Zealand tax conference on October 18, New Zealand's Minister of Revenue Stuart Nash said: "There are about 26,000 small businesses in New Zealand employing more than 62,000 people in the retail sector. Many are in competition with foreign firms who sell exactly the same product into our market without collecting GST. We intend to make offshore suppliers collect GST on low value goods at the moment of sale, and in turn, buyers of these goods will no longer pay Customs tariffs or border security and biosecurity fees. This will simplify compliance and administration costs at the border."

"GST has been collected on services and digital products from offshore, such as streamed movies and music, since 2016. This extends that to goods. With the steady growth in online shopping from offshore suppliers, a significant amount of tax revenue is being lost. Mostly though, it's a matter of fairness so the sooner we get this in place the better. This measure aims to help level the playing field and improve the integrity of our tax system. Our new rules have been endorsed by the Tax Working Group and will be broadly similar to those introduced by Australia in July. The EU has also committed to following this approach," Nash concluded.

Hungary Authorized To Raise VAT Registration Threshold

On October 8, 2018, the EU Council published a decision in the Official Journal of the EU to authorize Hungary to derogate from the European Union VAT Directive by increasing its VAT registration threshold to EUR48,000 (USD55,400).

Currently, under Article 287(12) of the VAT Directive, Hungary is entitled to exempt from VAT those entities whose annual turnover is no higher than the equivalent in national currency of EUR35,000 at the conversion rate on the day of its accession. The decision authorizes Hungary to apply the higher threshold from January 1, 2019. Companies with turnover below the threshold would continue to be allowed to voluntarily register for VAT.

"Given that the increased threshold would result in reduced VAT obligations and thus a reduction in the administrative burden and compliance costs for small enterprises, Hungary should be authorized to apply the special measure for a limited period," the decision states. "The special scheme for small enterprises is optional, so taxable persons would still be able to opt for the normal VAT arrangements."

The derogation applies until December 31, 2021. However, the derogation may cease to apply from an earlier date if the rules governing the special scheme for small enterprises, which are subject to review, are changed.

Indian GST Refund Delays 'Due To Taxpayer Error Not Tardiness'

The Indian Government has described as inaccurate and exaggerated claims in the media about the Government's failure to pay goods and services tax refunds.

Responding to claims "published in the print media by trade bodies," the Government said: "It is a fact that a large number of exporters have been granted refunds so far while a few claims are still pending owing to deficiencies found in the claims."

"In this regard, it is clarified that about 92.68 percent (or about INR388.25bn, around USD5.3bn) of the total International GST refund claims (INR418.9bn) transmitted to Customs from GSTN as [at October 12] have already been disposed. The remaining claims [...] are held up on account of various deficiencies which have been communicated to exporters for remedial action."

Further, the Government said around INR20bn in input tax credits are yet to be disbursed and a further INR49.5bn is being held due to deficiencies about which taxpayers have been notified.

"Refund claims without any deficiency are being cleared expeditiously," the Government argued.

"Efforts are being made continuously to clear all the dues on account of pending refund claims," it added. "Co-operation of the exporter community is solicited to ensure that they exercise due diligence while filing GSTR 1 and GSTR 3B returns as well as Shipping Bills."

"Extensive outreach programs have been conducted along with issuance of guidance circulars, advisories, FAQs, advertisements, etc., and also an alternative procedure involving manual interface has been provided where the errors could not be corrected online," it continued. "The efforts are beginning to show positive results. The exporting community is assured that all their eligible refund claims will be sanctioned without any delay."

HMRC Clarifies VAT Compliance Rules For Firms Trading In Gold

The UK tax agency, HM Revenue and Customs, has released new guidance for firms that acquire, import, or invest in gold, in VAT Notice 701/21, which replaces guidance from 2011.

The new notice adds guidance on how to correctly record the amount of output tax due under the special accounting scheme for gold.

Those taxpayers who make a supply of gold under the special accounting scheme for gold must issue a VAT invoice to the buyer. The amount of output tax due under the special accounting scheme for gold must be clearly stated on the seller's invoice but should not be included in the amount shown as total VAT charged, the guidance says.

The guidance sets out what information must be included on the seller's invoice or self-billed VAT invoices.

Decree Extends Thailand's Seven Percent VAT

The Thai Government has published a decree in the Official Gazette extending the reduced seven percent rate of value-added tax for an additional year.

The seven percent VAT rate was due to expire on September 30, 2018, but has been extended to September 30, 2019, by Decree No. 30/2018 published on October 10, 2018, following Government approval of the measure in July.

The VAT rate will return to the 10 percent rate prescribed by law from October 1, 2019, unless extended again by the Government.

The Government has been extending the temporary seven percent reduced rate of VAT for several years to help boost the economy.

OECD Releases Mining Sector BEPS Guidance For Developing States

The OECD and the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development have finalized three practice notes intended to support resource-rich developing countries to protect their tax bases from erosion and profit shifting.

The first practice note is on limiting the impact of excessive interest deductions on mining revenue, which includes specific recommendations for the mining sector, building on the OECD's guidance on Action 4 of its BEPS Action Plan. It is intended to support government policymakers to strengthen their country's defenses against excessive interest deductions in the mining sector.

The second practice note concerns tax incentives for mining companies. Supplementing wider work undertaken by the Platform for Collaboration on Tax on tax incentives, the practice note focuses on the use of tax incentives in mining specifically, examining the tax base erosion risks they can pose.

The final practice note concerns monitoring the value of mineral exports. The paper puts forward policy options for developing countries to better price mineral exports, considering the type of mineral, the risk of undervaluation, existing government capacities, and developing countries' available budgets.

OECD Announces Action Against Citizenship For Investment Schemes

The OECD has released the findings of an analysis of the over 100 residence and citizenship by investment schemes available worldwide, which aimed to identify those that may enable taxpayers to avoid the reporting of their data to their home tax agency under the Common Reporting Standard.

The CRS is the new international tax transparency standard developed by the OECD. Countries signed up to the CRS exchange information relevant for the enforcement of taxes on an annual basis with other countries' tax authorities.

The OECD said: "Residence and citizenship by investment (CBI/RBI) schemes can create the potential for misuse as tools to hide assets held abroad from reporting under the OECD/G20 CRS. In particular, Identity Cards, residence permits, and other documentation obtained through CBI/RBI schemes can potentially be abused to misrepresent an individual's jurisdiction(s) of tax residence and to endanger the proper operation of the CRS due diligence procedures."

To counter circumvention of the CRS, the OECD has been working to identify those programs that may be harmful to international tax transparency efforts, identifying those schemes that "potentially pose a high-risk to the integrity of CRS."

Potentially high-risk CBI/RBI schemes are those that give access to a low personal tax rate on income from foreign financial assets and do not require an individual to spend a significant amount of time in the jurisdiction offering the scheme. Such schemes are currently operated by Antigua and Barbuda, The Bahamas, Bahrain, Barbados, Colombia, Cyprus, Dominica, Grenada, Malaysia, Malta, Mauritius, Monaco, Montserrat, Panama, Qatar, Saint Kitts and Nevis, Saint Lucia, Seychelles, Turks and Caicos Islands, United Arab Emirates, and Vanuatu, the OECD said.

Together with the results of the analysis, the OECD has also published practical guidance in the form of FAQs to enable financial institutions to identify and prevent cases of CRS avoidance through the use of such schemes. In particular, where there are doubts regarding the tax residence(s) of a CBI/RBI user, the OECD has recommended further questions that a financial institution may raise with the accountholder.

Moreover, a number of jurisdictions have committed to spontaneously exchanging information regarding users of CBI/RBI schemes with all original jurisdiction(s) of tax residence. This will reduce the attractiveness of CBI/RBI schemes as a vehicle for CRS avoidance, the OECD said.

The OECD concluded that, going forward, it will work with CRS-committed jurisdictions, as well as financial institutions, to ensure that the guidance and other OECD measures remain effective in ensuring that foreign income is reported to the actual jurisdiction of residence.

OECD Publishes More Tax Transparency Country Ratings

On October 15, 2018, the OECD published seven new peer review reports on whether Austria, Aruba, Bahrain, Brazil, Saint Kitts and Nevis, Singapore, and the United Kingdom are complying with the OECD's international standard on transparency and exchange of information on request (EOIR).

The reports assess jurisdictions against the updated standard developed by the OECD, which incorporates beneficial ownership information of all relevant legal entities and arrangements, in line with the definition used by the Financial Action Task Force recommendations, on preventing money laundering and the financing of terrorism.

Bahrain and Singapore received an overall rating of "Compliant," while Austria, Aruba, Brazil, Saint Kitts and Nevis, and the United Kingdom were rated "Largely Compliant."

The OECD revealed that the jurisdictions have demonstrated their progress on many deficiencies identified in the first round of reviews including improving access to information, developing broader exchange of information agreement networks; and monitoring the handling of increasing incoming exchange of information requests as well as taking measures to implement the strengthened standard on the availability of beneficial ownership information.

Oman has newly joined the Global Forum on Transparency and Exchange of Information for Tax Purposes, which undertakes the peer reviews. This takes its membership to 154 members who have committed to better cooperate in the fight against cross-border tax evasion.

German Finance Minister Seeking Minimum Corporate Tax Rate

Germany's Finance Minister has called for the introduction of a global minimum rate of corporation tax.

In an interview with *Welt am Sonntag*, Olaf Scholz argued that: "We need a worldwide minimum tax level that no state may go below."

According to Scholz, the internet economy is "exacerbating a problem that we recognize from globalization and that we are trying to address: the placing of profits in low-tax locations."

He stressed the need for "coordinated mechanisms" to "prevent the displacement of revenues to tax havens."

The European Commission has proposed the introduction of a temporary three percent excise tax on turnover from certain online activities. It is also seeking the introduction of an EU-wide common consolidated corporate tax rate, to be implemented in two phases.

Income Tax Reforms Announced In Guernsey's 2018 Budget

Guernsey has announced that it intends to broaden the scope of the intermediate company tax rate, in its Budget for 2019, which also includes changes to the personal income tax regime.

With effect from next year, the 10 percent rate of corporate tax will apply also to:

- Income from the regulated activity of operating an investment exchange; and
- Income from compliance and other related activities provided to regulated financial services businesses (such as advising on corporate governance, risk management and compliance with the regulatory framework).

Further, Guernsey has announced that it is considering the inclusion in the 20 percent corporate tax band of those businesses that grow cannabis plants for industrial hemp, food supplements, or medicinal products should this become a licensed activity.

The Budget also proposes a new higher-rate Tax on Real Property (TRP) band, involving an increase to the rates for accountancy services providers and Non-Regulated Financial Services Businesses to the same level applicable to regulated financial services businesses; and a 2.5 percent real-terms increase in commercial TRP rates.

Further, as announced by Jersey in its new Budget, Guernsey will introduce new substance requirements for domestic firms. These proposals will require companies that are tax resident in Guernsey and engaged in key activities identified by the EU Code of Conduct Group (Business Taxation) to demonstrate as part of their annual tax return for accounting periods commencing after December 31, 2018, that they meet minimum substance requirements.

As part of an earlier consultation undertaken in August on the substance proposals, the Policy and Resources Committee also consulted taxpayers on changing the definition of corporate residence from being determined by, broadly, shareholder control, to management and control in Guernsey (which generally considers where the directors meet and exert control). The Government intends to bring forward proposals next year to recommend a change to the definition of corporate residence, once detailed consideration and analysis of the feedback received has been undertaken.

In addition, Guernsey has announced changes intended to prevent dual residence of companies. A company may be dual tax resident, for example it may be tax resident in both the jurisdiction where it is incorporated and also the jurisdiction where it is managed and controlled.

The consequence of an investment company being considered dual resident by HM Revenue and Customs in the UK is that it will no longer be eligible to claim group tax loss relief.

While the UK-Guernsey Double Tax Arrangement has a "tie breaker" clause which means that a Guernsey incorporated company managed and controlled in the UK is only subject to tax in the UK, some anti-avoidance provisions within the income tax law in Guernsey (for example loans to participators) may still apply to that company. This has left some tax advisors concerned that HMRC may consider that the company is still dual resident, despite the "tie breaker."

The Guernsey Government explained that: "Ensuring clarity within domestic tax legislation will ensure that Guernsey attracts investment structures (and minimize the need for restructuring when high net worth individuals move to Guernsey), as at present tax advisors say that Jersey is viewed as a more attractive location."

"Consideration will need to be given, however, to adapting current anti-avoidance provisions (such as loans to participators), to ensure protection of domestic tax revenues. There is a need to ensure that such a change does not present an opportunity for Guernsey residents to extract funds from corporate structures without liability to Guernsey tax. The Revenue Service will discuss any amendments required with tax professionals, including issues of practical implementation to 'safeguard' this measure, for example requiring a certificate of tax residence in the other jurisdiction or automatically exchanging information on companies that notify they are resident elsewhere."

"The Policy & Resources Committee therefore recommends that the Income Tax Law is amended to make it explicit that with effect from January 1, 2019, a company which is treated as non-resident under the terms of a double taxation arrangement with a country or territory where the highest rate at which any company may be charged to tax is 10 percent or higher will not be considered tax resident in Guernsey for domestic tax purposes. It also recommends any consequential amendments to the anti-avoidance provisions of the Income Tax Law are made."

The Budget includes an increase to the personal income tax allowance by GBP500 to GBP11,000 per person. Further, Guernsey has outlined proposals to make the tax system more progressive, in particular through the third phase of the withdrawal of income tax allowances for higher earners. Guernsey has also proposed an increase in the Income Tax caps; the introduction of a banded system of TRP for larger properties; and a higher-rate document duty band for the element of a property conveyance above GBP2m.

The changes to the Income Tax cap regime amend the provisions introduced in 2008 to cap the income tax liability of wealthy taxpayers.

With effect from 2009, there were two methods of capping liability:

- A cap applicable to non-Guernsey source income (introduced at GBP100,000 and increased to GBP110,000 from 2012); and
- A cap relating to worldwide income (introduced at GBP200,000 and increased to GBP220,000 from 2012).

The Budget proposes to increase these caps from January 1, 2019, to GBP130,000 for non-Guernsey source income and GBP260,000 for worldwide income. This means that an individual with a combination of foreign and Guernsey source annual income totalling more than GBP1.3m can restrict their tax liability to GBP260,000 per year plus income tax at 20 percent on Guernsey property income.

Changes are proposed to the tax relief for new residents. As part of the 2018 Budget, Guernsey's Parliament agreed the introduction of a lower tax cap of GBP50,000 for new residents of Guernsey who have paid a minimum of GBP50,000 in document duty on the purchase of a property on Part A of the open market register.

An individual is able to claim this cap, for the year they take up permanent residence and then three consecutive years, where their open market property purchase has taken place either within six months prior to, or six months after, their first arrival in Guernsey. In order to qualify for this lower tax cap, an individual cannot have been resident in Guernsey at any time in the previous three years.

Following feedback that open market transactions can take some time to complete, the Budget recommends that the condition requiring that the open market property purchase has to take place within six months prior to, or six months after, an individual's first arrival in Guernsey should be extended to twelve months.

Australian Parliament Passes SME Tax Changes

The Australian Parliament has passed legislation to bring forward the start date of cuts to the small business tax rate.

As a result of the legislation, the small business rate will be cut from 27.5 percent to 26 percent from 2020-21 and to 25 percent from 2021-22. Under the Government's previous plans, the rate would have been cut to 25 percent from 2026-27. The turnover threshold for access to the rate is AUD50m (USD35.6bn).

The Government will also increase the tax discount for unincorporated businesses to 16 percent over the same period.

There are approximately 3.3 million SMEs in Australia, employing around seven million people.

Small Business Minister Michaelia Cash said: "I am delighted that we are putting in place the right economic framework and the right policies to ensure that our small and family businesses across Australia can prosper and grow."

US Lawmakers Ask EU To Drop Digital Services Tax Plans

Members of the US Senate Committee on Finance have written to the EU to express their concerns over a proposed new digital services tax, which they believe would discriminate against US companies.

The committee's Chairman, Orrin Hatch (R-UT), and Ranking Member, Ron Wyden (D-OR), have written to the presidents of the European Council and the European Commission.

In the letter, the senators expressed their "significant and growing concern" at the proposals, which they argued have been "designed to discriminate against US companies and undermine the international tax treaty system." They added that forcing additional burdens on US companies would erect "another deeply concerning barrier to transatlantic trade."

The European Commission has proposed the introduction of a temporary three percent excise tax on turnover from certain online activities. It has recommended this as an interim measure while a long-term solution is found that would ensure that profits are registered and taxed where businesses have significant interaction with users through digital channels. According to the EU's Tax Commissioner, Pierre Moscovici, a deal on the proposal could be reached by EU member states by Christmas.

In their letter, Senators Hatch and Wyden urged the EU "to abandon this proposal" and called upon EU member states to delay taking any unilateral action on taxing the digital economy.

The senators identified multiple problems with the proposal. They warned that it would violate "the long-held principle that taxes on multinationals should be profit-based, not revenue-based." They also stated that the EU "already has a revenue tax based on the location of customer," in the shape of VAT, meaning that the digital services tax would lead to the double taxation of multinational companies.

The letter further alleged that the envisioned turnover threshold for the new tax is discriminatory and would put companies at a competitive disadvantage. The European Commission has recommended that the tax would apply to companies with total annual worldwide revenues of at least EUR750m (USD860.2m) and EU revenues of EUR50m. Such "discrimination", the senators claimed, raises concerns about the proposal's compliance with the EU's commitments under the World Trade Organisation's General Agreement on Trade in Services.

Finally, the senators pointed out that although the tax is billed by the EU as an interim measure, no end date has been announced and it could theoretically be in force indefinitely. Should the proposal be approved as an interim measure, "taxpayers and taxing authorities would be required to develop new, complex, and costly tax collection and compliance systems, which would be discarded once international consensus is reached."

The senators said the EU should refocus its efforts on reaching an international consensus within the OECD on new digital taxation models. "This will allow for the development of a policy that will guarantee fairness, avoid discrimination, and prevent double taxation," they concluded.

Global CPA Body Calls For International Digital Tax Solution

The American Institute of CPAs and the Chartered Institute of Management Accountants have jointly issued a policy paper calling for a multilateral approach to solving the tax challenges posed by the digital economy.

The paper, published by their joint body, the Association of International Certified Professional Accountants, is intended to "educate, enlighten and stimulate the discussion" about the taxation of the digitalized economy.

"International tax issues and tax policies are most effective and efficient when tax systems operate within an internationally agreed-upon platform and approach," the paper states.

The Association notes in the paper that: "The taxation of digital transactions in a cross-border context presents several challenges to the concepts of the right to tax and the allocation of profits between countries. International bodies have devoted considerable effort to define these challenges and develop an international consensus on the best approach to address them. Meanwhile, many individual countries over the past few years have unilaterally proposed their own solutions."

It is argued in the paper that all parties to these discussions should develop policies and platforms "that are reasonable for business compliance and tax administration."

"Any solution should provide mechanisms to resolve controversies, eliminate the double taxation of value or income, and adhere to existing global standards and tax treaties to the extent possible," the Association said.

While the paper does not take a position on any specific tax proposal or existing law, it does reference various proposals now being developed by international organizations, as well as those that have been implemented, or have been proposed, by individual countries. These include: the two March 2018 European

Commission draft directives that address taxation of the digital economy in Europe, including the proposal for a temporary three percent tax on gross receipts from digital activity with the European Union; the OECD's attempts to achieve a global consensus on digital tax reforms; and the work of the United Nation's committee on taxation towards developing recommendations in this area.

The Association's policy paper is being distributed globally to policymakers and multinational organizations.

ALGERIA - SERBIA

Initialed

On October 15, 2018, Algeria and Serbia initialed a DTA.

CROATIA - JAPAN

Signature

On October 19, 2018, Croatia and Japan signed a DTA.

CZECH REPUBLIC - TURKMENISTAN

Effective

The DTA between the Czech Republic and Turkmenistan is effective from January 1, 2019.

FINLAND - HONG KONG

Ratified

On October 19, 2018, Finland ratified its DTA with Hong Kong.

JAPAN - ESTONIA

Into Force

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

JAPAN - SPAIN

Signature

On October 16, 2018, Japan and Spain signed a DTA.

LIECHTENSTEIN - LITHUANIA

Initialed

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

MALTA - MONACO

Signature

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

SAN MARINO - SERBIA

Into Force

On October 8, 2018, the DTA between San Marino and Serbia entered into force.

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

THE AMERICAS

Family Office Summit: Integrating the Full Balance Sheet

11/1/2018 - 11/1/2018

ClearView Financial Media

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

Key speakers: TBC

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

30th Latin American Tax Law Conference

11/4/2018 - 11/9/2018

IBFD

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

Key speakers: TBC

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

TP Minds West Coast

11/13/2018 - 11/15/2018

Informa

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

Key speakers TBC

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

111th Annual Conference on Taxation

11/15/2018 - 11/17/2018

National Tax Association

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

Chair: Rosanne Altshuler (National Tax Association) https://www.ntanet.org/event/2017/12/111th-annual-conference-on-taxation/

TP Minds Brazil

12/5/2018 - 12/6/2018

Informa

Venue: Address: TBC, Brazil

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

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

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

2/4/2019 - 2/5/2019

STEP

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

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

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

ASIA PACIFIC

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

11/7/2018 - 11/8/2018

IBFD

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

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

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

9th IBFD International Tax Conference

11/8/2018 - 11/8/2018

IBFD

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

Key speakers: Paolo Valerio Barbantini (Italian Revenue Agency), Shiqi Ma (IBFD), Premkumar Baldewsing (IBFD), Lei Cai (JD Group), among numerous others https://www.ibfd.org/IBFD-Tax-Portal/Events/9th-IBFD-International-Tax-Conference

STEP Asia Conference 2018, Hong Kong

11/20/2018 - 11/21/2018

STEP

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

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

https://www.step.org/asia2018

The 4th International Conference on Private Capital and Intergenerational Wealth

11/22/2018 - 11/22/2018

STEP

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

Key speakers: TBC

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

International Taxation Conference 2018

12/6/2018 - 12/8/2018

IBFD

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

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

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

STEP Australia 2019

5/15/2019 - 5/17/2019

STEP

Venue: The Stamford Plaza, Brisbane, Australia

Key speakers: TBC

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

CENTRAL AND EASTERN EUROPE

Ukrainian Business Forum Kiev 2018

11/19/2018 - 11/19/2018

CIS Wealth

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

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

https://ubf.international/

MIDDLE EAST AND AFRICA

Tax Planning in Africa and the Middle East

10/28/2018 - 10/30/2018

IBFD

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

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

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

TP Minds Africa

10/31/2018 - 11/2/2018

Informa

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

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

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

STEP Arabia Branch Conference

11/11/2018 - 11/11/2018

STEP

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

Key speakers: TBC

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

Introduction to GCC VAT

3/3/2019 - 3/5/2019

IBFD

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

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

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

WESTERN EUROPE

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

10/30/2018 - 10/30/2018

Informa

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

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

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

Transfer Pricing and Substance Masterclass

10/31/2018 - 11/2/2018

IBFD

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

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

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

International Business Structuring Conference

11/1/2018 - 11/1/2018

IBSA

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

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

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

IFRS Update Courses 2018

11/5/2018 - 11/8/2018

Informa

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

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

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

Operational Taxes for Banks Europe

11/7/2018 - 11/7/2018

Informa

Venue: Address TBC, Zurich, Switzerland

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

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

Beyond Borders: International Tax Into 2020

11/7/2018 - 11/10/2018

Taxlinked.net

Venue: Amathus Beach Hotel, Limassol, Cyprus

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

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

The 7th Annual OffshoreAlert Conference Europe

11/12/2018 - 11/13/2018

OffshoreAlert

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

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

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

US/UK Tax Planning 2018, London

11/13/2018 - 11/13/2018

Informa

Venue: Sofitel London, 6 Waterloo Pl, St. James's, London, SW1Y 4AN, UK

Key speakers: Iain Younger (Frank Hirth), Jeremy Franks (Knox Private Office), Leon Dutkiewicz (D & H Global Tax Group), Michael Giraud (Accuro)

https://finance.knect365.com/usuk-tax-planning/

Global VAT

11/13/2018 - 11/16/2018

IBFD

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

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

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

Global VAT - Specific Countries

11/15/2018 - 11/16/2018

IBFD

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

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

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

AICPA & CIMA Finance Transformation London

11/19/2018 - 11/20/2018

Informa

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

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

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

Principles of International Taxation

11/19/2018 - 11/23/2018

IBFD

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

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

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

Coordinated European Planning & Taxation: Post Brexit

11/20/2018 - 11/20/2018

Informa

Venue: Address TBC, London, UK

Key speakers: Paula Charpentier (Ernst & Young Société d'Avocats), Ashley Crossley (Baker & McKenzie), Patrick Delas (Russell Cooke), James Perrott (Macfarlanes), among numerous others

https://finance.knect365.com/coordinated-european-planning-taxation/

Tax Transformation Summit

11/20/2018 - 11/21/2018

Informa

Venue: Hilton London Tower Bridge, 5 More London Place, Tooley St, London, SE1 2BY, UK

Key speakers: Sveinung Baumann-Larsen (EY), Joy Harper (Google), Kate Benest (EY), Sam Barrett (iflix), among numerous others

https://finance.knect365.com/taxtech/

Annual Conference on European VAT Law 2018

11/22/2018 - 11/23/2018

Academy of European Law

Venue: TBC, Trier, Germany

Key speakers: TBC

https://www.era.int/cgi-bin/cms?_SID =9e33bf77b0e4587e14991159621f bca45243657200594226138893&_ sprache=en&_bereich=artikel&_aktion=detail &idartikel=127489&idrubrik=1024

International Tax, Legal and Commercial Aspects of Mergers & Acquisitions

11/28/2018 - 11/30/2018

IBFD

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

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

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

Capital Taxes Update

12/5/2018 - 12/5/2018

STEP

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

Key speaker: Chris Whitehouse (5 Stone Buildings)

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

Advanced VAT Optimization

12/6/2018 - 12/7/2018

IBFD

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

Key speakers: TBC

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

Transfer Pricing and Intra-Group Financing

12/10/2018 - 12/11/2018

IBFD

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

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

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

Transfer Pricing Masterclass

2/14/2019 - 2/15/2019

IBFD

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

Key speakers: TBC

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

Current Issues in International Tax Planning

2/27/2019 - 3/1/2019

IBFD

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

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

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

International Tax Planning Association Meeting

3/20/2019 - 3/22/2019

ITPA

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

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

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

US Corporate Taxation

4/1/2019 - 4/3/2019

IBFD

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

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

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

IBFD Seminar: The Future of VAT

5/9/2019 - 5/10/2019

IBFD

Venue: Address: TBC

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

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

Managing European Tax Affairs

5/13/2019 - 5/14/2019

IBFD

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

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

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

Transfer Pricing: Pharmaceutical and Life Sciences Industry Masterclass

5/21/2019 - 5/22/2019

IBFD

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

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

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

Tax Accounting, Reporting and Control

6/5/2019 - 6/7/2019

IBFD

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

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

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

The BEPS Multilateral Convention and Its Impact on Tax Treaties

6/20/2019 - 6/21/2019

IBFD

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

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

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

Introduction to European Value Added Tax

6/25/2019 - 6/28/2019

IBFD

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

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

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

International Tax Aspects of Corporate Tax Planning

7/3/2019 - 7/5/2019

IBFD

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

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

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

Tax Risk Assessment

9/5/2019 - 9/6/2019

IBFD

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

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

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

ASIA PACIFIC

India

A listing of recent key international tax cases.

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

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

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

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

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

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

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

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

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

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

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

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

MIDDLE EAST AND AFRICA

Dubai

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

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

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

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

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

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

The consultation closed on October 17, 2018.

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

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

WESTERN EUROPE

France

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

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

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

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

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

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

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

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

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

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

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

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

WESTERN EUROPE

Ireland

The EU has announced the withdrawal of its court case against Ireland following the state's recovery of EUR14.3bn (USD16.4bn) in alleged illegal state aid and interest from Apple.

In September, the Irish Government confirmed that Apple had deposited approximately EUR14.3bn into an escrow fund set up by the Government. The figure comprises EUR13.1bn in alleged back taxes owed, plus EUR1.2bn in interest.

In August 2016, the European Commission decided that two tax rulings provided to Apple by the Irish Government had enabled Apple to pay substantially less tax on profits recorded in Ireland than other companies subject to the same national taxation laws.

The deadline for Ireland to recover the alleged illegal state aid was January 3, 2017. Following Ireland's failure to meet this deadline, on October 4, 2017, the Commission referred Ireland to the European Court of Justice.

The Commission has now said that, "taking into account that the payment into the escrow fund of the illegal state aid removed the distortion of competition caused by that aid," it has decided to withdraw the Court action.

The Irish Government is appealing the Commission's ruling on the legality of the Apple tax ruling before the Court of Justice and the money will be held in the escrow fund until the Court reaches its decision. In September, the Government said that its collection of the money demonstrated that it always intended to comply with its legal obligations and that it took time to establish the infrastructure and legal framework around the fund.

http://europa.eu/rapid/press-release_MEX-18-6148_en.htm

European Court of Justice: *Cases T-778/16 and T-892/16*

Dateline October 25, 2018

The **US tax reform legislation might not be perfect**, as anyone grappling with the transition tax and the alphabet soup of acronyms and abbreviations, such as BEAT, GILTI, and FDII, would attest. But if the repatriation of the huge pile of stock and cash accumulated offshore by US corporations was a major goal of tax reform, then it **appears to have worked**. At least, that's the conclusion to be drawn from the United Nation's latest report on global foreign direct investment flows.

For the administration of President Donald Trump and the Republican lawmakers who pushed the Tax Cuts and Jobs Act through, these statistics must have seemed like a godsend. James Zhan, Director of the Investment and Enterprise Division at the United Nations Conference on Trade and Development, observed that the agency had said back in early January that there was "about USD2 trillion of stock in the form of cash or in the form of reinvested earnings of retained earnings outside the US," which may be **repatriated in some form**, following wholesale tax reform. "And indeed, it's happening," he said. "We have seen that outward FDI from the US was from USD147bn last year to a negative USD247bn this year."

Nevertheless, as Newton's Third Law dictates, **every action has an equal and opposite reaction**. And as capital now appears to be pouring into America, it is pouring out of some of the world's other major economies. Indeed, Zhan went as far as to describe the **global FDI environment** as "gloomy." So you can take your pick of the antonyms available to describe the investment environment in the US. Bright? Optimistic? Upbeat? Sunny?

On the other hand, clouds appear to have descended on western Europe in particular, the region that has felt the impact of this tax-driven shift in the global investment landscape most negatively. Indeed, the UN's report must have been worrying reading for the **Irish Government**, given the finding that inward investment declined by USD81bn. Maybe it should have slashed taxes in the 2019 Budget, announced earlier this month, after all. Although, when facing uncertainty from almost every conceivable angle, as poor old Ireland is at present, hasty decisions are probably not the best policy.

The finding that **Switzerland saw FDI inflows decline** by an equally worrying USD77bn has probably given the Swiss Government much food for thought too. It'd better get a move on with those economy-saving corporate tax reforms then.

Tax Plan 17 (TP17) is its second stab at these **essential corporate tax reforms**. Voters rejected the first attempt, Corporate Tax Reform III because they preferred the Government to do nothing than to accept those proposals. TP17, which must also be put to a referendum, could well suffer the same fate. The Swiss Government, it seems, can't do right for doing wrong. There's no pleasing some people!

Some feared that the US tax reforms would accelerate a **perceived race to the bottom** on corporate tax. But while it is true that governments around the world are still seeking to reduce corporate tax and widen tax bases, the reductions are being made more at a stroll than a sprint. Although, the US corporate tax cut probably has prompted a few to break into a jog.

Certainly, the ten-point plan reportedly drawn up by **German** Economy Minister Peter Altmaier to alleviate the tax burden for businesses, in one of the US's main economic competitors, isn't going to set the White House quaking with fear any time soon. It'll take more than trade tax deductions, a solidarity tax cut and reduced interest on tax underpayments to do that, one suspects.

Unsurprisingly, representatives of German businesses were said to be unimpressed by Altmaier's proposals. As was, reportedly, Finance Minister Olaf Scholz, but for entirely different reasons. He's **not in favor of cutting tax** that much anyway. Indeed, the German Government generally has an aversion to the idea of loosening the fiscal reins, despite record tax revenues and budget surpluses. Not so much an equal and opposite reaction to tax cuts as an allergic reaction to them.

The Jester