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GLOBAL TAX WEEKLY
a closer look

ISSUE 31 | JUNE 13, 2013

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

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

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The UK's New Statutory Residence Test

by David Klass and Janice Houghton,
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Overview

This year's UK Finance Act (expected to be passed into law in July 2013) introduces a much-anticipated statutory tax residence test for individuals. The new rules will have effect from April 6, 2013.

At the same time, the notoriously difficult concept of "ordinary residence" is being abolished.

Background

The new rules aim to provide more certainty about whether an individual is UK tax resident in a particular year by means of a three-part test.

The previous UK rules governing the tax residence of individuals were based on a long line of case law and UK tax authority (HMRC) guidance, and there were a significant number of grey areas.

The weight to be attached to the numerous potentially relevant factors was unclear, and this gave rise to uncertainty for individuals with complicated circumstances; for instance the 2011 Gaines-Cooper case (*R (Gaines-Cooper) v HMRC [2011] UKSC 47*) showed that whilst an individual can rely on non-statutory guidance where his facts fit the guidance scenarios exactly, significant caution had to be exercised where there was any ambiguity in the guidance or any material differences of fact.

In its June 2011 consultation document, the UK Government stated its intention that the new statutory residence rules should increase the attractiveness of the UK for the internationally mobile individual, by providing a clear view of their tax treatment, but that the rules should continue to ensure that those with close connections to the UK pay their "fair share" of tax.

Overall, the new rules have broadly been received positively (despite some criticism of continuing uncertainty surrounding certain concepts, as to which see further below), and it is expected that they will bring greater certainty to the question of an individual's tax residence status.

Ordinary residence

Following criticism of proposals merely to reform the concept of "ordinary residence", the Government has also now decided to abolish this outright as a concept for tax purposes.

The test of "ordinary residence," like the previous residence rules based on case law and non-statutory HM Revenue & Customs guidance, has been notoriously difficult to apply. The recent Upper Tribunal case of *Dr Andreas Helmut Tuczka v Revenue and Customs Commissioners* ([2011] UKUT 113 (TCC)) highlighted the difficulty of applying the rules, as the circumstances of the taxpayer's personal and professional life in the UK meant that the amount of time that he had actually spent in the UK was of little relevance in determining whether or not he was ordinarily resident (which he was held to be).

The New Test

The new test is comprised of a basic rule under which an individual will be UK resident for a tax year if he or she meets either the "automatic residence test" or the "sufficient ties" test. In addition to this basic rule there are also several "automatic overseas tests;" if any of these are met, then the individual will not be resident in the UK.

The following is an overview of these tests.

Automatic Overseas Tests

As meeting any of the automatic overseas tests automatically renders an individual non-UK resident, it is worth considering these tests first. The tests are:

- Where a person was resident in the UK in one or more of the prior three tax years, being present in the UK for less than 16 days in the relevant tax year;
- Where a person was not UK resident during the prior three tax years, being present in the UK for less than 46 days; and
- If an individual works full-time overseas without a "significant break", working no more than 30 days in the UK, spending less than 91 days in the UK (days longer than three hours worked in the UK are disregarded and the overseas hours worked are compared to the total hours worked over the total reference period; working on average over 35 hours overseas is "working full-time overseas").

Automatic Residence Test

An individual will be UK resident if any of the following automatic UK tests are met:

(1) Being present in the UK for at least 183 days;

(2) Having a home in the UK for a minimum period of 91 days, a minimum of 30 of which fall within the tax year (which the individual stays in for at least 30 days – these do not need to be the same 30 days); and

(3) If working full-time in the UK ("full-time" has the same meaning as discussed above in the context of full-time overseas work) over a period of a year with no significant breaks (ones of over 30 days), where 75 percent or more of the working days in the tax year are UK ones.

Sufficient Ties Test

If neither the automatic overseas nor the automatic UK tests are satisfied, an individual will be resident in the UK in a given tax year if he or she has "sufficient ties" to the UK.

The "sufficient tie" factors are:

(1) whether the individual has any UK resident family (spouse, partner or minor child);
(2) whether there is accessible accommodation in the UK available for at least 91 continuous days which the individual uses for at least one night (this is extended to 16 nights for stays with close relatives);
(3) whether there is a "work tie" to the UK (minimum 40 days' work of over three hours a day in the UK in a year, including self-employment);
(4) whether the individual spends more than 90 days in the UK in either or both of the two tax years immediately preceding the one under consideration; and
(5) if the individual was UK resident in one of the three previous tax years, whether he or she spends more time in the UK than any other country (based on presence at midnight).

The number of these factors which need to apply to establish UK residence depends on the number of days present in the UK in the relevant tax year as shown in the tables below.

For individuals leaving the UK (meaning those who were UK resident in one or more of the three prior tax years) the number of factors is as follows:

DAYS SPENT IN UK	MINIMUM NUMBER OF TIES FOR UK RESIDENCE
16 – 45	4
46 – 90	3
91 – 120	2
Over 120	1

For individuals arriving in the UK (meaning those who were not UK resident in any of the three prior tax years) the number of factors is as follows:

DAYS SPENT IN UK	MINIMUM NUMBER OF TIES FOR UK RESIDENCE
46 – 90	4
91 – 120	3
Over 120	2

Online residence indicator

A pilot "Tax Residence Indicator" has been made available on the HM Revenue & Customs website, for individuals to use in order to work out their UK tax residence status for tax years from 2013-14 onwards by answering a series of questions (the tool then produces a detailed results breakdown for the user based on the information entered).

This is a potentially helpful tool for those wishing to obtain an indication of their UK tax residence status, and an updated version is expected to be released later in 2013.

Split Year Treatment

The "split year" rules are relevant when an individual becomes or ceases to be UK resident part way through a tax year. If certain criteria are met, HMRC allow such individuals to benefit from "split year" treatment, which allows them to split their tax year into two separate parts (a UK-resident part and a non-UK resident part).

Previously, split year treatment depended on an individual meeting the criteria in Extra Statutory Concession A11 (which included not being "ordinarily resident" in the UK); there are provisions in the Finance Bill to ensure that, following introduction of the statutory residence test and abolition of the concept of "ordinary residence," split year treatment will still be available based on certain specified scenarios.

Briefly, these involve situations where you leave the UK part way through a tax year (for example to work full time overseas, or go abroad to live with a partner, or you move abroad and cease to have a UK home) or if you come to the UK part way through a tax year (for example by beginning to have your only home in the UK, starting to work full time in the UK, ceasing to work full time overseas, coming to live in the UK with a partner, or beginning to have your only home in the UK).

Overseas Workday Relief

With effect from April 6, 2013, thanks to the abolition of the concept of ordinary residence by Finance Bill 2013, the rules regarding overseas workday relief have also become more straightforward.

"Overseas workday relief" is helpful for individuals who are non-UK domiciled and work for a UK employer but spend some of their time working outside the UK, as it allows them to claim the remittance basis for remuneration paid to them outside the UK for duties they performed outside the UK during a tax year or part tax year in which they were UK resident, by apportioning earnings according to their UK and non-UK duties. (The remittance basis allows non-UK domiciled individuals to be taxed on their foreign income and foreign gains only when such income and gains are "remitted" to the UK – broadly speaking when they are brought, or a benefit in connection with them is enjoyed, in the UK.)

Under the new rules, overseas workday relief will be available for non-UK domiciles who meet a 3-year non-residence requirement.

In summary this means that an individual must have been non-UK resident for a continuous period of three tax years; overseas workday relief will then generally be available in each of the following three tax years.

Transitional rules

For individuals who were claiming overseas workday relief prior to April 6, 2013 and would have continued to be entitled to the relief on the basis of being not ordinarily resident, the old rules (and therefore the concept of ordinary residence) continue to be relevant for as long as they would have been in the absence of the changes described above.

Conclusion

The new statutory residence test is broadly to be welcomed, putting as it does a concept which is of central significance in the field of personal taxation onto a statutory footing.

However HMRC guidance will remain important – take for example the current draft Guidance's lengthy explanation of the concept of "home", on which the legislation does not itself elaborate – but it is nevertheless to be hoped that the role of such guidance will be significantly less fundamental than was previously the case.

Leasing Of Company Cars – What Impact From IASB & FASB?

by Alastair Kendrick, MHA MacIntyre Hudson (a member firm of Morison International)

Alastair Kendrick is a tax specialist with considerable experience on company cars

On May 16, 2013, the International Accounting Standards Board (IASB) and Financial Accounting Standards Board (FASB) published a paper calling for comment on a revised proposal outlining changes to the accounting of leases. Feedback to these proposals is requested to be provided in advance of September 13, 2013.

These changes are being introduced with a view to enhancing the quality and comparability of financial reporting by creating greater transparency in businesses that lease assets. The latest paper follows a number of proposed changes to the accounting standard on leasing which arose out of complaints made in 2006. The proposals will have an impact on leases which have duration in excess of 12 months and will require the balance sheet of the lessee to recognise the existence of all leases. The implementation date for these proposals is still to be announced but it is likely that it will be staged, with large international concerns affected in the first instance followed by smaller concerns at a later date. It should be noted that previous proposals required those companies "caught" by the rules to retrospectively reflect lease payments of the particular agreement on balance sheets from the outset of the contract, not just going forward.

The proposals raise a number of issues that may impact on those companies involved in leasing cars:

- The main issue for many corporates is that by showing the value of the leases on balance sheet, it will change the financial position of the company and may impact on the company's gearing for funding. It is interesting that to-date more focus has not been on this significant point. In reality it could have serious implications for those with a large fleet of cars and is likely to lead some employers totally re-considering their financial position.
- At present, many international concerns have been comfortable in providing company cars which are leased and not shown on balance sheet. The reason this is fairly attractive is because the arrangement is not transparent and does not need to be reported. Therefore, in countries where cars are not provided to their employees, they cannot complain of possible double standards. However, I do fear that this proposed change of approach

will make some international companies look at whether they align their car policy across all countries. We are already seeing this happen, particularly with US owned groups.

For some it may be a case of saying that if a business's leases are going to be reportable on its balance sheet, they may decide to look at other funding options. To date they may not have considered such options as they preferred the comfort of the cars being off balance sheet. It is likely that we will begin to see a growth in the number of companies seeking alternative options such as outright purchase of vehicles.

- Those companies affected by the rules will have to account on balance sheet for the value of the lease. Therefore if the lease cost incorporates maintenance (and other non-finance costs), those costs will need to be uncoupled. The result would see the lease costs reported on balance sheet and non finance costs shown in the profit and loss account. This will create additional administration which if undertaken by the lease provider may be charged for.

The proposed changes do not come at a good time for those involved in leasing. The statistics show that there is a general decline in the company car market in many countries and it is possible that this change in balance sheet treatment will move others to review their fleet policy.

It is unlikely that the outcome of this further period of consultation will lead to any material change in the proposed accounting legislation. This is because there is significant pressure being exerted on the accounting bodies to change their standards and reflect leases on balance sheet. I anticipate that further discussions will now be around when we will see these changes in accounting standard implemented.

Ireland: A Corporate Tax Haven?

by Michael G Bell, Editor-In-Chief,
Global Tax Weekly

Introduction

One of the highest profile dossiers traveling the corridors of international tax at present is of course the "BEPS" conundrum. How can international companies, acting entirely within the law, manage to reduce their corporate tax bills to levels that are regarded as "unfair", to use one of the more polite epithets that are thrown at the likes of Apple and Google?

A report earlier this year from the US Congressional Research Service which revealed the extent of corporate profit-shifting seems to have done little but fan the flames of the tax avoidance debate and raise the volume of the usual corporate-bashing rhetoric. The report, entitled "An Analysis of Where American Companies Report Profits: Indications of Profit Shifting," came to the not-so-surprising conclusion that US multinational companies (MNCs) are shifting substantial amounts of their profits to low-tax and offshore jurisdictions in order to reduce their exposure to tax in the US, and the findings have predictably filled the media with yet more negative headlines about badly-behaved and unethical corporations dodging their taxes.

The study in question compared the contribution of US MNCs in tax and economic terms in five low-tax territories, including Bermuda, Ireland, Luxembourg, the Netherlands, and Switzerland, and five high-tax territories, including Australia, Canada, Germany, Mexico, and the United Kingdom, during 1999-2008. It found that during that nine-year period, profits reported in the low-tax territories had increased by roughly 60 percent without a marked increase in employment or investment in the related business operations.

The report also revealed that in 2008, American companies reported earning 43 percent of overseas profits in Bermuda, Ireland, Luxembourg, the Netherlands, and Switzerland while these operations accounted for only 4 percent of their foreign workforce and 7 percent of their foreign investment. By contrast, the traditional economies of Australia, Canada, Germany, Mexico and the United Kingdom accounted for 14 percent of American MNCs' overseas profits, but 40 percent of foreign hired labor and 34 percent of foreign investment.

This trend is not something unique to the US. In the UK, reports that certain MNCs paid relatively little tax while enjoying booming sales there shed light on the profit-shifting issue. The fact that they can do this quite legitimately only seemed to intensify public anger, rather than placate it. It is worth noting for example, that low-tax Guernsey remains the top domicile of incorporation globally for non-UK entities listed on the London Stock Exchange, with Ireland, the Isle of Man, the Cayman Islands, Bermuda and the British Virgin Islands also featuring on this list ahead of countries like the US, Germany, France and China.

Initiatives To Address The Problem

Typically, lawmakers and governments react to reports of corporate misdeeds by vowing to "punish" multinationals with an array of sophisticated anti–avoidance legislation, and by generally making an example of them. This is also the case in the US, where just days after the CRS made its report public, Senator Carl Levin, the Michigan Democrat and the de facto leader of the anti-offshore group in Congress, published a bill designed to achieve just this. Among other measures, the bill would give the Treasury Department authority to take specified steps against foreign jurisdictions or financial institutions "that impede US tax enforcement," including prohibiting US financial institutions from doing business with a designated foreign jurisdiction or foreign bank. It would also establish rebuttable presumptions to treat non–publicly traded offshore entities as controlled by the US taxpayer who formed them, sent them assets, received assets from them or benefited from them, unless the taxpayer proves otherwise; and treat foreign corporations that are publicly traded, or have gross assets of USD50m or more, and whose management and control occur primarily in the US, as US domestic corporations for income tax purposes. Furthermore, the bill would eliminate tax incentives for moving US jobs and transferring intellectual property offshore, determine foreign tax credits on a pooled basis to prevent US corporations from manipulating and taking excess foreign tax credits to reduce their US taxes, and close the offshore swap payments loophole by treating swap payments that originate in the US as taxable US source income.

Last year, Sen. Michael B. Enzi (R – Wyoming), a member of both the Senate Finance and Budget Committees, introduced the United States Job Creation and International Tax Reform bill of 2012, which aimed at reforming and modernizing the rules for taxing the global operations of American companies, while also providing a tax break for those companies repatriating profits from overseas. The proposed legislation would have allowed US-based company earnings sitting offshore to be brought back to America at a reduced tax rate, provided an exemption from US tax for foreign earnings already subject to taxes in a foreign country, and reduced the US tax burden on certain income derived from intellectual property.

"The current tax structure acts as a great wall, keeping money outside of US borders," Enzi said. "The new tax structure creates a breach, the good kind, that allows money to flow back in. This increase in capital not only will mean more jobs and a more stable US economy, it will mean more tax revenue for our indebted federal government."

In February 2012, the Treasury issued a report presenting President Barack Obama's revenue–neutral proposals for corporate tax reform, cutting the headline tax rate to 28 percent from the current 35 percent, but also closing loopholes used by corporations to reduce their tax burdens. However, in the area of international taxation, the administration's proposals were more stick than carrot, including a new minimum tax on foreign earnings to encourage domestic investment. "Our tax system," it said, "should not give companies an incentive to locate production overseas or engage in accounting games to shift profits abroad, eroding the US tax base." This is a key area where the two parties differ, as Dave Camp (R – Michigan) the House of Representatives Ways and Means Committee Chairman, observed in his response to the plans. "I am pleased to see the Administration's proposal adopts many of the same principles of reform that House Republicans have championed, such as lowering rates by broadening the tax base and closing loopholes. However, there are some policy differences that I look forward to discussing with the Administration and my House and Senate counterparts. Chief among those is the Administration's apparent decision to expand a system that double taxes American employers when they try to compete with foreign corporations."

Despite all these initiatives, noble or ignoble, nothing has actually changed due to the cross-party paralysis of the Congress, and in reality, the facts don't really match up to the general level of hype on the subject. Last month, an analysis published by the Tax Foundation (TF) showed that, according to Internal Revenue Service (IRS) data, United States multinational corporations paid an average effective rate of 25 percent in foreign income taxes in 2009. If you put aside the extremely high US rate (federal and average state rates combined) of almost 40 percent, which absolutely nobody, even in the most anti–business reaches of government, thinks that corporations ought to be paying, this 25 percent is just about spot on the OECD's reported average worldwide corporation tax rate, and is higher than the rate in force in many of the key US investment destinations (the UK, for instance, is about to reach 20 percent).

The TF pointed out that, while "taxes paid by US multinational firms on foreign income have been key to the ongoing debate in Congress over fundamental tax reform, … many believe that US companies pay little or nothing in taxes on their foreign earnings. Even President Obama has suggested the need for a 'minimum tax' on corporate foreign earnings to prevent tax avoidance."

"The US has a complicated 'worldwide' system of taxation that requires businesses to pay the 35 percent federal corporate tax rate on their income – the highest in the world – regardless of whether it was earned domestically or abroad," said Tax Foundation Economist Kyle Pomerleau. "When it comes to foreign profits, companies pay tax on their income not once, but twice (less a credit for the taxes they pay to other countries)."

While American firms can delay paying the additional US tax on their foreign profits as long as the earnings are reinvested in the ongoing activities of their foreign subsidiaries (and the additional US tax is only due when the profits are eventually repatriated), the TF explained that companies are still required to report to the IRS on how much they earn in each country they operate in and how much they pay those countries in taxes, as part of their annual tax returns.

The TF noted that, "while it is undoubtedly true that US multinational firms use tax planning techniques to minimize the taxes they pay on their foreign earnings," American companies paid more than USD104bn abroad on foreign taxable income of USD416bn billion; an average effective exchange rate of 25 percent, according to the most recent IRS data for 2009.

Furthermore, while the foreign taxable earnings of US companies have grown over the years between 1992 and 2009, so have their foreign taxes. Over those seventeen years, the TF calculated that taxable income grew in real terms by 214 percent and foreign taxes paid grew by 202 percent.

The TF found that the largest concentration of foreign earnings for US multinationals was in the European Union, at USD164.5bn, on which they paid nearly USD38bn in income taxes at an average effective tax rate of 24 percent. The second largest concentration of taxable earnings was in Asia at USD60.8bn, where US firms paid more than USD18bn at an average effective tax rate of 31 percent.

With regard to particular countries, while the TF also emphasized that the majority of countries at the top of the foreign earnings list for US companies have normal corporate tax systems, there were two so-called tax havens, Bermuda (with USD25.3bn in income) and the Cayman Islands (USD9.1bn) within that list. Even there, US multinationals paid average effective tax rate of 17.8 percent and 20.9 percent, respectively.

However, the TF did calculate that Ireland, due to its low statutory corporate tax rate, did give US companies one of the lowest average effective tax rates at 11 percent on earnings of USD14.6bn in 2009.

"People who criticize US companies for 'avoiding' taxes on their foreign earnings need to be more careful with their language and acknowledge that our worldwide tax system requires US firms to pay taxes twice on their foreign profits, before they can reinvest those profits back home," noted Pomerleau. "Any discussion about reforming the corporate tax code must keep these facts in mind."

Ireland Under Fire

Ireland has come in for a certain amount of direct or indirect critical comment lately from those who consider that the taxation of multinationals has unfair results for the citizens of high-taxing countries via "base erosion and profit-shifting." If there is really a problem, and if there is something substantive that can be done about it – two questionable premises – then Ireland is one of the places where that something would have an impact.

The USA is not by any means the only country whose businesses use Ireland as a base for their operations in the European Union, but it is the source of the biggest external investment pool in Ireland, and makes a good place to start in examining the issue.

There are 700 US-owned firms in Ireland (we are always talking about Republic of Ireland, of course, not including Northern Ireland, which forms part of the United Kingdom), representing inward investment of about USD190bn, which is more than half of all FDI into Ireland, although, surprisingly, it represents only 8 percent of all US investment into the EU. These firms employ 115,000 people and their inputs (local purchases) totaled USD-14bn. They paid more than USD3bn to the Irish exchequer in taxes in 2011. Incidentally, and before anyone proposes ways to constrain US companies locating in Ireland, it is worth noting that according to the US Chamber of Commerce in Ireland, Irish-owned companies employ 120,000 people in the USA: this is not a one-way street.

Says the Chamber: "Since 2005, Ireland emerged as a magnet for US internet/digital media investment, with industry leaders Yahoo, eBay, PayPal, Google, Amazon, Facebook and LinkedIn making it a significant hub for their European operations. Ireland's evolution as a significant knowledge economy is evidenced in the sophistication and complexity of the investments into Ireland during 2010. US companies continued to invest in Ireland in 2010, representing approximately three quarters of all IDA announcements. US companies announced investments of approximately EUR350m in research, development and innovation projects. Major expansion projects have been announced by US firms such as eBay and Hewlett Packard, United HealthCare and MSD, Hertz and Citi to name just a few. Meanwhile new investment was secured representing all of the key sectors, such as services in D&B, new media in EA Games, and Warner Chilcott in life sciences."

The reasons that Ireland is so attractive to US companies, apart from its membership of the EU, obviously include its low 12.5 percent corporate tax rate, the presence of a highly educated, English-speaking workforce, cooperative labor, and a pro-business government. Although life sciences and financial services are both well represented among US investors, these sectors are dwarfed by the IT/digital media sector, with such names as PayPal, Google, eBay, Apple, Dell, IBM, Hewlett-Packard and SAP having operations in the emerald isle.

As the employment figures bear witness, many US companies in Ireland do actually have "bricks-and-mortar" establishments with buildings, equipment and staff – such companies are presumably good corporate citizens, and can hardly be anything else, by virtue of payroll and property taxes, among others. But many foreign-invested companies in Ireland have other geometries, being holding companies, corporate treasuries, or, particularly, Intellectual Property hubs, and it's with these types of operation that tax-minimizing opportunities are particularly marked. We should also note that Irish companies may be owned by US investors via holding companies in other EU (or for that matter non-EU) states: inside the EU the Netherlands and Luxembourg particularly spring to mind, while outside the EU, the British Virgin Islands, Guernsey and the Cayman Islands are examples of widely-used holding company locations. The "double Dutch-Irish sandwich" is a favorite media metaphor for corporate tax minimization.

Ireland Clings To Its Tax Rate

When Ireland hit the skids four years ago, attempting to salvage its bombed-out banking sector – imagine what would have happened if it been after Cyprus (AC) rather than before Cyprus (BC) – the European Union rushed to its aid. Although there was a determined attempt, presumably originating in Germany and France, to nail Ireland to the wall and insist on an increased corporate tax rate, the country held its nerve and won that particular poker game. Of course it didn't help the Troika (just emerging as Europe's real executive management) that the EU had approved the 12.5 percent rate just a few years previously when Ireland was forced to abandon its raft of tax-privileged 10 percent regimes.

In fact the bail-out has so far been a success. Or at least, it hasn't failed.

Last February Ireland completed its latest bailout review, with the Troika concluding that the economic recovery is continuing and praising the Government for its commitment to meeting the targets set.

Staff teams from the European Commission, the European Central Bank (ECB), and International Monetary Fund (IMF) visited Dublin from January 29-February 7 for the ninth review of the Government's economic program.

According to the troika, the strong track record of program implementation has been maintained, with substantial improvements seen in market access. Growth is expected to gain momentum, and is forecast at just over 1 percent in 2013 and at above 2 percent in 2014. The troika recognized that the Government is estimated to have comfortably met its 2012 fiscal targets, and that it remains committed to a deficit ceiling of 7.5 percent of GDP in 2013. Exports continue to drive the recovery, but the troika warns that this is highly dependent on the pace of recovery in trading partners. Further, continuing high levels of unemployment and weak balance sheets remain matters for concern. The three organizations said they saw reducing "stubbornly high" levels of unemployment as an urgent policy priority.

Also praised, however, was the good progress made in repairing the financial sector, but the mission teams did warn that "decisive actions remain essential to ensure banks' capacity to lend and support the recovery." The troika wants to see the banks "make demonstrable progress in enhancing asset quality" and there needs to be improvement in the management of mortgage and small- and medium sized enterprise loans in arrears. It is also argued that a "timely resolution" of the banks' non-performing loans will "pave the way for improving the situation in the banking sector, restoring credit supply, reducing uncertainty, and, ultimately, enabling a durable revival in domestic demand."

In spite of improving market conditions for Irish bonds, confidence remains vulnerable, and the mission teams concluded that there is a real need "for continued strong policy efforts by the Irish authorities in order to lay solid foundations for successful program exit at end 2013 and a durable return to market financing."

Commenting on the mission, Olli Rehn, Vice President of the European Commission said: "Ireland has made good progress to consolidate its public finances and recover much of the competitiveness that was lost in the boom years. After a deep recession, the Irish economy has been growing since 2011 and we expect its expansion to gradually become more robust later this year and in 2014. Significant progress has also been made in repairing the financial sector, though more needs to be done to enable banks to revive productive lending to the economy. Another key priority is to tackle unemployment, not least by strengthening employment services and accelerating the implementation of key investment projects, including those co-financed by the European Investment Bank.

"Market conditions for Irish bonds have been steadily improving and confidence growing. Ireland is on track to exit from the EU-IMF program as planned. The Commission stands by Ireland and its people and supports them in this objective. In this context, the major steps taken by the Irish authorities regarding the Promissory Notes should further boost confidence and help to facilitate a successful outcome."

Welcoming the mission's conclusion, Ireland's Finance and Public Expenditure Ministers, Michael Noonan and Brendan Howlin, said: "We are pleased to confirm that Ireland has successfully completed the 9th Review Mission and we continue to meet all of our targets. The completion of the Q4 2012 program conditions brings to over 190 the number of commitments that have been fulfilled on time and we have now drawn down some 84 percent of the available funding. Throughout the course of the review we have demonstrated significant progress on delivering on our commitments but we do not underestimate the significant challenges that remain. Our focus is now firmly on our exit strategy from the program, our re-entry into the financial markets and the debt sustainability of the program."

Not everybody agrees that Ireland's tax structure is effective, however. In April, activist think-tank Social Justice Ireland claimed that Ireland's tax take is "simply too low to pay for the infrastructure and services necessary to ensure human dignity for all."

Social Justice Ireland's Socio-Economic Review 2013 contends that just taxation is required for real economic recovery to take place. Outlining the organization's key policy priorities on taxation, the report calls on the Government to move toward increasing the total tax take – all taxes, plus charges and social insurance payments taken together – to 34.9 percent of gross domestic policy. It also wants to see steps taken to broaden the tax base and to ensure the development of a fairer taxation system.

The report contends that the narrowness of the tax base has resulted in around 25 percent of tax revenues disappearing, quoting figures that show a drop in tax revenues from EUR59bn (USD75.7bn) in 2007 to EUR44bn in 2010. It also reflects on the effects of the current economic crisis on Ireland's future taxation needs, in particular pointing to a rapid increase in the national debt caused by the high levels of borrowing needed to replace lost revenues and fund investment in struggling commercial banks. These burdens, the report says, come on top of those which already exist in relation to the funding of local Government and infrastructure, dealing with the health and pension needs of an ageing population, and the payment of European Union (EU) contributions.

Bearing these factors in mind, Social Justice Ireland has proposed a package of reforms it believes will help the Government tackle the situation. Among the most headline grabbing are the recommendations that the Government continues to increase the minimum effective tax rates imposed on those with incomes in excess of EUR125,000, and that it helps negotiate an EU-wide agreement on minimum corporation tax rates. In the latter case, the report argues that a rate of 17.5 percent would "seem fair in this situation." Also on the corporate tax front, Social Justice Ireland suggests that policies be adopted to ensure that companies based in Ireland pay a minimum effective corporate tax rate of 10 percent. Controversially, the report urges that a financial transactions tax (FTT) should be adopted in line with other EU states. Ireland is not one of the eleven EU member states proceeding with an FTT, although it is charged with the levy's implementation as part of its current EU Presidency role.

At the other end of the income scale, the report says that tax credits and the universal social charge should be adjusted so that the minimum wage returns to being outside the tax net. The distribution of all changes in indirect taxes should be such that they discriminate positively in favor of those with lower incomes, and all Budget tax packages should be "poverty-proofed" to make sure that they do not further widen the gap between those with low incomes and the better off.

Ireland's 2013 Budget

The Government is not likely to pay much attention to the Social Justice think tank's recommendations. Finance Minister Michael Noonan's 2013 Budget, delivered last December concentrated largely on implementing the tax consolidation committed to by the Government as part of Ireland's bailout package. No alterations were made to the 12.5 percent rate of corporation tax, while a number of tax incentives for small and medium sized enterprises were announced. The biggest change was the final introduction of the controversial property tax, effective from July 1 this year. Noonan said at the time that Ireland was "well on the road to recovery."

Among the flagship measures included in Finance Bill 2013 is the Small and Medium Sized Enterprise (SME) Ten Point Plan, now being labeled "SME Ten Point Plan Plus Two." This tax reform package introduces changes to the three-year corporation tax relief for start-up companies, and increases the cash receipts basis threshold for value-added tax (VAT). It also amends the close company surcharge to improve cash flow for SMEs and extends the foreign earnings deduction for work-related travel to certain additional countries.

The "Plus Two" element now amends the "key employee" provision of the R&D tax credit regime. It reduces – from 75 percent to 50 percent – the proportion of time that such an employee must spend solely on R&D activities, in order to qualify for the credit. In addition, the Employment Investment Incentive (EII) Scheme is being reformed, to permit the operating or managing of hotels, guest houses, self-catering accommodation or comparable establishments to qualify for the incentives.

Needless to say, the precious 12.5 percent corporate tax rate was left untouched; other tax-related measures implemented in the legislation are as follows:

- Standard rates of Universal Social Charge (USC) will now apply to those aged 70 and over and to medical card holders with income in excess of EUR60,000 per year.
- Maternity benefit payments will be treated as taxable income with effect from July 1, 2013.
- The tax reliefs for donations to charities and approved bodies will be simplified.
- The deposit interest retention tax rate will rise from 30 percent to 33 percent, with the rate for certain longer–term savings products rising to 36 percent.
- The exit tax applying to life assurance policies and investment funds have risen, effective January 1, from 33 percent to 36 percent.
- The film tax relief will end in 2016, when new incentives will enter into force.
- Capital gains tax relief will be available where the proceeds of a sale of farm land are reinvested for restructuring purposes.
- Duty rates on tobacco and alcohol will rise.
- The vehicle registration tax rates and bands will be re-structured, and an auto-diesel excise duty relief will enter into force for licensed and tax compliant hauliers.

A number of new measures have been introduced. They are:

- Foreign Service Relief is to be abolished, to prevent a situation whereby employees in multinational corporations, who had no "presence" within the Irish income tax system, could be transferred to Ireland for short periods to finish careers and be given significant, almost tax-free, "golden handshakes".
- Payments, including loans, to any employee out of a trust that is provided or funded by an employer will, in future, be considered income within the charge to income tax and the USC.
- The Mandatory Disclosure regime will be refined, so as to ensure that the same "burden of proof" applies in determining whether a transaction is a

tax avoidance transaction, regardless of whether a protective notification has been received or not.

Not much joy there for fiscal hawks; although Ireland is playing with a straight bat on a level playing field (to mix a couple of sporting metaphors): in May, the country was among twelve territories that have newly signed, or committed to sign, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, at a ceremony at the Organization for Economic Cooperation and Development (OECD).

Austria, Belize, Estonia, Latvia, Luxembourg, Nigeria, Saudi Arabia, Singapore and the Slovak Republic inked the agreement. Burkina Faso, Chile and El Salvador signed a letter of intention to sign the Convention; and Belize, Ghana, Greece, Ireland, Malta, and the Netherlands, including its Caribbean islands (Bonaire, Sint Eustatius and Saba), and Aruba, Curacao and Sint Maarten completed their domestic ratification procedures.

"This is a historic moment for the Convention and another winning round in the fight against tax cheats," said OECD Secretary-General Angel Gurria during the signing ceremony. "In the past two years more than 60 countries have signed the Convention or stated their intention to do so, marking an important milestone on the road to closer cooperation and more transparency, towards making the international system fair to all taxpayers."

Singapore's Deputy Prime Minister and Minister for Finance, Tharman Shanmugaratnam said: "Signing the Convention reflects Singapore's commitment to tax cooperation based on international standards, but the standards can only work if all financial centers come on board. Singapore will work with our international partners to achieve that, so that Switzerland, Luxembourg, Singapore, Hong Kong and offshore jurisdictions like the British Overseas Territories move together."

The G20 has consistently supported the Convention. At their last meeting G20 Finance Ministers and Central Bank Governors stated: "In view of the next G20 Summit, we also strongly encourage all jurisdictions to sign or express interest in signing the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and call on the OECD to report on progress."

The OECD highlighted that the Convention complements other initiatives, to foster the adoption of a standardized model for multilateral information exchange, as well as efforts in the European Union to improve automatic information exchange. The Convention itself provides for spontaneous exchange of information, simultaneous tax examinations and assistance in tax collection.

Ireland's Tax Collections

In January, following the 2013 Budget, Finance Minister Michael Noonan welcomed strong growth in revenue during 2012, but warned that the government must not lose sight of the fact that it continues to spend more than it collects in taxes.

The government's Exchequer return for 2012 recorded a 7.7 percent increase in tax revenue at end–December. At EUR36.65bn (USD48.12bn), revenues were up EUR2.62bn on 2011 and EUR271m (0.7 percent) ahead of target. Two of the four main sources of revenue – value-added tax (VAT) and corporation tax – recorded above-target figures, while income tax and excise duties fell short of projections.

VAT recorded "a very positive performance" in particular, with a EUR176m (1.8 percent) surplus and 4.4 percent growth in receipts compared with 2011. This is attributed largely to the increase in the standard VAT rate, from 21 percent to 23 percent, introduced in Budget 2012.

A combination of higher than expected payments, specifically from two large taxpayers, along with lower than expected repayments, saw corporation tax significantly above profile in December. For the year as a whole, corporation tax recorded a EUR196m (4.9 percent) surplus against target. On an adjusted basis, receipts were up 5.1 percent compared with 2011.

For the year as a whole, both income tax and excise duties fell short of their respective targets. Income tax was EUR124m (0.8 percent) lower than profiled, while excise duty fell EUR108m (2.2 percent) below expectations. The Finance Department has however stressed that better than expected December receipts meant that these shortfalls were not as significant as had been expected when Noonan published his Budget last month. Indeed, the Department describes December's receipts as surprising, coming in EUR440m ahead of target. The Budget had in fact anticipated a EUR210m shortfall for 2012.

The overall revenue performance was welcomed by Noonan, who said that the figures highlight "the continued improvement we are making in the public finances."

The particular strength of December's figures was "a positive development", and gives Noonan "further confidence that the Budget tax revenue target for 2013 is both robust and achievable." Noonan is however adamant that the EUR15bn deficit recorded in 2012 is too large. "Notwithstanding the significant progress we are making, we cannot lose sight of the fact that we continue to spend more than we collect in revenue," he said, stressing that the government is committed to reducing further in the coming years. He points to measures introduced in Budget 2013 as "the latest step in that regard."

By May, the controversial new Local Property Tax had already generated EUR21m (USD27.6bn) in revenue, but the established "big four" tax heads had not all performed as expected, the latest Exchequer figures showed..

According to the end-April Exchequer returns, tax revenues were up EUR145m (1.3 percent) year-on-year. Tax revenues for the month of April totaled EUR2.13bn, an increase of EUR51m (2.4 percent) on the same month in 2012.

The self-assessed LPT will enter into force from July 1. It will be charged at 0.18 percent of the market value of properties worth up to EUR1m (USD1.3m), and at 0.25 percent on any excess value over EUR1m. Householders must decide on the value of their property, file a return, choose a payment option and send it to Revenue.

Personal income tax was up EUR62m (1.3 percent) on the same period last year, but currently stands EUR58m (1.1 percent) below profile. The Finance Department attributed this to lower than expected Deposit Interest Retention Tax (DIRT) receipts, itself the likely result of a reduction in retail interest rates. Corporation tax also failed to perform strongly on a year-on-year basis, falling EUR88m (17.2 percent) short of the figure recorded in April, 2012. It was however EUR121m (39.9 percent) above target, and, adjusting for a number of one-off payments that occurred in the first four months of 2012 and 2013, the underlying year-on-year growth was EUR23m.

Excise duties were EUR44m (3 percent) behind target, but marginally up on the year. Value-added tax (VAT), the final "big four" tax, remained flat year-on-year, and in April recorded a shortfall against target of EUR34. It was EUR105m (2.9 percent) down on profile for the first four months of 2013.

Capital gains tax, capital acquisitions tax and customs duties were all slightly below profile.

Multinationals In Ireland

Google and Apple are two high-profile US/Irish resident companies that have been adduced as exemplars of corporations behaving badly from a tax perspective, although both have stoutly defended their conduct.

In the case of Google, the UK's Parliamentary Public Accounts Committee, headed by Labour MP Margaret Hodge, has acted as devil's advocate, claiming that the company has a substantial sales staff in the UK, with turnover of USD6bn, yet pays hardly any tax there. Google executives, and its UK auditors, Ernst & Young, explain that UK clients transact their business with the company's Irish subsidiary, while the UK staff merely has a sales support role, so that the company has no permanent establishment in the UK, and its turnover originating in the UK would therefore not be taxed in the UK under the Irish/UK double tax treaty. It also transpired that the Irish company's IP revenues actually flow through to a Bermudan holding company which holds the title to the IP in question.

Although Google's UK tax practices had already been queried by the Committee in 2012, more serious criticism arose in 2013 when Reuters published an analysis of job adverts and staff social media profiles which could give the impression that members of Google's sales team are based in the UK rather than in Ireland.

Reuters studied around 150 staff profiles on Linkedin and interviewed clients and former staff. One client suggested that "all the people are based in London," although invoices had a Dublin address.

Reuters' findings prompted Hodge to announce that the committee will be seeking answers "as soon as possible." She also indicated that Ernst & Young, "have questions to answer."

Google's European head, Matt Brittin, had told the committee in November that although customers were "encouraged" to buy advertising by staff in the UK, those who chose to do so were put through to an "expert team" in Dublin.

The company's Director for External Relations, Peter Barron, reiterated that Brittin's account had been "truthful," and he condemned the Reuters article as "wilfully misleading." He also explained that references to "sales skills" in job adverts referred to the kind of candidate they were seeking to attract. He added that Google had already made contact with Hodge and the company would be "happy to appear again to set the record straight."

Hodge recently criticized comments made by Google executive chairman Eric Schmidt about the amount of corporation tax the company pays in the UK, and suggested he should be removed from his role as a member of the UK Government's Business Advisory Group.

In a renewed hearing before the House of Commons Committee, John Dixon, UK head of tax for Ernst & Young said that the key test for an Irish resident company trading in the UK was whether it had a "permanent establishment" in the UK through which it was trading. In the context of a UK service company providing services to an Irish company, Dixon said the key test on the permanent establishment issue was whether the service company had the authority to conclude contracts on behalf of the Irish company, and whether it habitually exercised that authority.

Google executive Matt Brittin told the committee that 99 per cent of his company's customers in the UK conducted business directly through Google's online live auction process, with the computer platform actually setting the price. The customers that dealt directly with Google's support staff in the UK were Google's major clients there, Brittin said, and they accounted for 60-70 per cent of total UK revenue.

Business conducted directly through the website did not create a UK tax charge even if the customers were based there. Trade conducted over a website based outside of the UK, the owner of which was in a country that had a tax treaty with the UK, would not be taxed in the UK.

Miles Dean, the founding partner of Milestone International Tax Partners, expressed skepticism about the strength of the evidence. He accused the committee of going "well beyond its remit" by announcing a new investigation, and of making insinuations that undermine both HMRC and "the rule of law." However, he added: "If Google Ireland are found to have created a permanent establishment in the UK this will amount to perhaps one of the biggest schoolboy tax errors committed by a multi–national in recent years. Avoiding a PE is the cornerstone of many international tax structures and can be achieved provided the framework within which the business is to operate is properly set and adhered to."

Apple has been equally successful in limiting its international tax bills. According to its Form 10K filing with the United States Securities and Exchange Commission last November, Apple Inc. paid a corporation tax rate of less than 2 percent on its foreign earnings in its financial year ending September 29, 2012.

During the year to end-September, however, Apple's effective tax rate was 25.2 percent; comparable with the 24.2 percent and 24.4 percent it paid in 2011 and 2010, respectively. As it explains, its "effective rates for these periods differ from the statutory federal income tax rate of 35 percent due primarily to certain undistributed foreign earnings for which no US taxes are provided because such earnings are intended to be indefinitely reinvested outside the US."

Its foreign provisions for income taxes, based on foreign pre-tax earnings of USD36.8bn, USD24.0bn and USD13.0bn in 2012, 2011 and 2010, respectively, were USD713m, USD602m and USD161m. While its foreign earnings had therefore been increasing rapidly, it had maintained effective tax rates on non-US earnings at 1.94 percent, 2.5 percent and 1.24 percent in 2012, 2011 and 2010, respectively.

As pointed out in the company's Form 10K, Apple's consolidated financial statements do "provide for any related tax liability on amounts that may be repatriated, aside from undistributed earnings of certain of the company's foreign subsidiaries that are intended to be indefinitely reinvested in operations outside the US."

As of September 29, 2012, it added: "US income taxes have not been provided on a cumulative total of USD40.4bn of such earnings. The amount of unrecognized deferred tax liability related to these temporary differences is estimated to be approximately USD13.8bn."

However, the cash that Apple has not repatriated, and not actually paid any US tax on, has sharply increased. As at end-September 2012 and end-September 2011, it confirms, USD82.6bn and USD54.3bn, respectively, of the company's cash, cash equivalents and marketable securities were held by foreign subsidiaries.

After the United States Senate Permanent Subcommittee on Investigations referred to Ireland as a "tax haven" during a May hearing, the Irish ambassador in Washington, Michael Collins, wrote to the Committee pointing out that Ireland's tax system is "set out in statute" and imposes a strict 12.5 percent tax on trading income and 25 percent tax on non–trading income. As such, "there is no possibility of individual tax rates being negotiated for companies.

In addition, he noted that the tax rates attributed to Ireland in a memorandum prepared for the Subcommittee "appeared to be based on the companies' entire profits, as if those companies were tax-resident in Ireland. This is despite the fact that the memorandum clearly states that the companies concerned are not tax-resident in Ireland. The tax rates attributed to Ireland are wrong and misleading."

Collins added that, building on this analysis, the memorandum had referred to Ireland as a "tax haven". However, he confirmed that Ireland was "fully supportive of international efforts to address aggressive tax planning and was an active participant in the OECD project addressing Base Erosion and Profit Shifting." It was also "committed to playing a leading role within the European Union during (Ireland's) Presidency, in securing progress on a number of key files in the area of tax evasion and tax fraud."

He concluded that Ireland is also committed to working with the US through the operation of their existing bilateral double taxation agreement, and has become one of the first countries to sign an inter-governmental agreement with the US Treasury to implement the Foreign Account Tax Compliance Act.

In their reply to the Ambassador, Carl Levin (D – Michigan), the Subcommittee's Chairman, and John McCain (R – Arizona), the Subcommittee's Ranking Member, insisted that "records obtained by the Subcommittee clearly reflect that, for years, Apple paid Irish tax authorities a nominal rate, far below Ireland's statutory rate of 12.5 percent, on trading income."

"Testimony by key Apple executives," they continued, "corroborates that Apple had a special arrangement with the Irish government that, since 2003, resulted in an effective tax rate of 2 percent or less. Most reasonable people would agree that negotiating special tax arrangements that allow companies to pay little or no income tax meets a common-sense definition of a tax haven."

Apple denies any skullduggery, but like Google, it uses offshore holding companies to optimize its tax structure, and much of the revenue that accrues to it in Ireland would appear to pass through subsidiaries that are non-resident, thus avoiding local taxation. The Senate response seems to duck away from this fact, perhaps not wanting to acknowledge and hence somehow legitimize MNC's use of such mechanisms.

Conclusion

As everybody agrees, there is nothing illegal in the techniques that companies such as Google and Apple use to minimize tax bills, and as public corporations they have a duty to their shareholders to do just that. So the "BEPS" initiative faces the need to change international legal structures if it is to achieve anything, and the case of Ireland shows just how difficult this will be. It's inconceivable that the edifice of double tax treaties will be dismantled or significantly altered; Ireland is sovereign, for all its EU membership, and simply wouldn't entertain such a thing. It's equally impossible to imagine that constraints can be successfully imposed on the right of a company to place its intellectual property where it chooses, although transfer pricing can be – and is – used on the margin to control excessive licensing practices. That seems to leave "formulary" or "unitary" taxation as about the only way in which the situation can be changed. Formulary taxation doesn't help much with jurisdictions such as Bermuda, which don't have corporate taxation (bring it on, they might say), but it would work in the EU. Except that Ireland, for instance, wouldn't allow it, and there is no EU mechanism by which it can be imposed against the wishes of member states. The EU has seen its CCCTB (Common Consolidated Corporate Tax Base) as a way of prising open the tax structure in the direction of formulary taxation; but the Irish have seen through that, and the dossier is effectively dead for the moment.

So, the Margaret Hodges and Carl Levins of this world can thunder all they want; it's hard to see how anything is going to change. The OECD has probably come to understand this by now, and seems to have reconciled itself to a belief that change, insofar as it is possible, will come about through a general tightening up of transfer-pricing policies, and is concentrating on a series of improvements to its guidance.

Ireland, for its part, can probably continue on its path with nothing much to fear from the multilaterals or the EU. There is every reason to believe that the flow of FDI will persist, and if anything, grow, over the next decade as Asian tigers follow through on their built-in advantage over European competitors – and in looking for a place to invest, why would Ireland not be at or near the top of the list?

Topical News Briefing: Europe's Anti-Democratic Troika

by the Global Tax Weekly Editorial Staff

In case anyone is uncertain, the Troika, the self-appointed arbiter of the destinies of Eurozone economies that have fallen on hard times, consists of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF).

Everyone worries about the European "democratic deficit," which has been only partially remedied by the teenaged European Parliament (EP), and there is nothing at all democratic about the members of the Troika. EU Commissioners are appointed, one per country, by national governments, thus there are 27 of them, and if there were 40 member states there would be 40 Commissioners. As a body, they are subject to a sort of confirmation hearing in the EP. No-one knows how the rulers of the ECB are appointed; it happens in a series of secret meetings in obscure Swiss mountain villages, in all probability. The IMF is scarcely better, and neither the ECB nor the IMF are accountable to anyone except themselves.

Yet this modern Three Horsemen Of The Apocalypse, which first galloped out of the sunset when the Greek crisis hit in early 2010, and holds the fate of whole European populations in its hands, has a very patchy record. In a report out this week (see our news stories below), the IMF has owned up to serious miscalculations over Greece, and with the partial exception of Ireland, the Troika has been hopelessly over-optimistic in its forecasts for the wrecked economies it has tried to "save," being Greece, Portugal and Cyprus. Without those rosy miscalculations, it would have been impossible to justify the bail-outs and the lending that they entailed. Germany, for one, would never have agreed to rescue Greece if the true numbers had been available at the time.

What would have happened, if the truth had been told? A Grexit, surely, followed by the demise of the eurozone; then the Cypriot banks wouldn't have committed hari-kiri with a sword called "Greek bonds," and the other endangered Eurozone economies, Italy, Spain, and France, in order of vulnerability, would have been able to devalue their currencies and by now would be on their way to recovery. Shoulda, woulda, coulda, you may say, yet the existential consequences of the Troika's "economy with the truth" – surely they must have known better in their hearts – is that tens or even hundreds of millions of young Europeans are condemned to blighted, jobless lives on the edges of society. There is a real danger of major social unrest, with unpredictable consequences, and if that happens, it will be the Troika's fault.

It's not too late, even now. Greece, or rather, the Greeks, may give up the unequal fight. And the hopelessness of Italy's situation, in which an uncompetitive, debt-ridden country is ruled by a paralyzed government which has neither the will nor the power to change things, even if it knew how to, points to a necessary end to the status quo. Not an inevitable end, though. Unfortunately, the likely upshot is that the mighty Troika will ride on regardless into the inferno. It was Jean-Claude Juncker, Prime Minister of Luxembourg and ex-President of the EU Council, who said: "We all know what to do; we just don't know how to get re-elected after we've done it." What does that tell us about the state of European politics? How can we stop the rush towards the cliff-edge? Not by voting, it's sure, because there is no vote in which you as a European citizen could participate which can make even the tiniest difference to the outcome!

FRANCE – Foreign Trusts: French Filing Obligations

by Bruno Gouthière, Partner, CMS Bureau Francis Lefebvre, France

In general, for French tax purposes, a "trust" is defined as a legal relationship created under the laws of a state other than France by a person known as a settlor, when assets or rights have been placed under the control of a trustee for the benefit of one or more beneficiaries or for a specified purpose.[1] Trustees of trusts falling into this definition and having some connection with France have now to abide by certain reporting requirements allowing the French tax authorities to verify that income tax, wealth tax and inheritance duties have been properly paid when due.[2] The reporting requirements apply where either (i) the settlor (or the deemed settlor, *i.e.*, the beneficiary after the death of the settlor or of a preceding deemed settlor) is a French tax resident, (ii) at least one beneficiary is a French tax resident, or (iii) one of the trust's assets or rights is located in France.[3]

In such a case, the trustees must first disclose the existence of the trust and any amendment thereto; the disclosure applies not only to new trusts, but also to all trusts in place on July 31, 2011. The declaration must provide relevant information on the parties involved and the main terms and conditions of the trust (in particular, information on whether it is revocable or irrevocable, discretionary or not, and on the rules governing the attribution of the assets or rights and related undistributed income). This declaration has to be filed just once except in case of further amendments to the trust (or termination of the trust) or if new assets are put into the trust in which case a new declaration has to be made. Where the French assets or rights in trust are only financial assets and where the settlor and all beneficiaries are non-French resident, the trustees have to file the declaration of existence, but do not have to file a new declaration for the new French financial assets that may result from reinvestments of the trust proceeds. In such a case, no declaration will have to be made regarding reinvestments except if the settlor or one beneficiary becomes later on a French resident. The declaration has to be filed with the French Tax Authority within the month following the creation of the trust or any amendment thereto (the deadline was December 31, 2012, for trusts in place on July 31, 2011, or created between this date and September 15, 2012).

In addition, trustees have to file a yearly declaration disclosing the fair market value of the trust's assets on

January 1 of each year; where one of the beneficiaries at least is a French resident, this declaration must provide a detailed estimate of the assets or rights put in trust and related undistributed income, including assets or rights located outside of France, together with their fair market value as of January 1 of each year. However, if the settlor is not a French resident and if no beneficiary is French resident, only French assets have to be declared with the exception of financial assets, *i.e.*, all investments that produce income taxable as income from securities except (i) shares representing at least 10 percent of the capital of a French company, (ii) shares in a French or foreign legal entity the assets of which are mainly composed directly or indirectly of French real properties (unless the real properties are used for the own activity of the company), and (iii) shares in a French or foreign legal entity directly or indirectly held for more than 50 percent by nonresidents where the entity owns French real property (unless the real property is used for the own activity of the entity). The due date for filing is generally June 15, but it is extended to August 31 where the settlor is a non-French resident (as an exception, the deadline was September 30, 2012, in respect of 2012).

Although the scope of the above reporting requirements seems very large, it should be noted that the regulations have excluded certain trusts with a view to concentrate on trusts established for the management of the own assets of wealthy individuals and not for business purposes. Are accordingly excluded trusts settled in order to manage employees' rights under stock incentive plans and trusts settled by a company (or a group of companies) for its own benefit, provided that the settlor is not an individual (and, if the settlor is a company, provided that no individual has put assets or rights into the trust). Also excluded, provided that the trust is governed by the law of a state having signed with France a tax information exchange agreement, are trusts managing pension rights acquired by beneficiaries during their professional activity under a pension plan set up by a company (or group of companies) and trusts acting as "unit trusts," *i.e.*, trusts that meet the definition given by the EU Directive 2009/65/CE of July 13, 2009, and non-EU trusts having the same characteristics.

The information given by the trustees is intended to allow, among others, the FTA to check that the settlor has effectively included the assets in his wealth tax return, as the case may be, and that any transfer of a taxable asset through a trust has been properly taxed in France. Clearly, the trustees should pay attention to the above requirements as failure to comply may trigger high penalties, up to five percent of the total value of the assets, rights and undistributed income held in trust, whether located in France or outside or France. The settlor is jointly liable with the trustees.

Endnotes

1 Article 792-0 bis of the French tax code.

2 Law n° 2011-900 of July 29, 2011; Decree n° 2012-1050 of September 14, 2012; Regulations BOI-DJC-TRUST, BOI-ENR-DMTG-30, BOI-PAT-ISF-30-20-30 issued on October 16, 2012.

3 Article 1649 AB of the French tax code; articles 344 G sexies, 344 G septies and 344 G octies of Appendix III to this code.

Topical News Briefing: The Swiss Defense

by the Global Tax Weekly Editorial Team

Swiss neutrality has meant that the Alpine nation has not been involved in a military conflict since the early 19th century, and its economy has generally flourished as a by-product of this long-held policy. However, in the 21st century, it finds itself cornered in a very different sort of fight, with enemies seemingly lined up at the gate.

We talk here of the crusade by the OECD, the European Union and several of these groupings' most prominent members against banking secrecy. While laws such as the European Savings Directive, the FATCA and the so-called "Rubik" withholding tax agreements with Austria and the United Kingdom (the one with Germany looks unlikely to be ratified) have chipped away at the edges of banking secrecy in Switzerland, these nations cannot be said to have overturned it completely, and the country remains the largest private banking center in world.

However, the likes of the USA, Germany and France have resorted to a different tactic, and that is to attack Switzerland's banks directly, accusing them of aiding their citizens to evade taxes in their home countries.

This started in the USA in 2008 when the authorities there indicted Switzerland's largest bank, UBS, and eventually forced it to hand over the names of 4,450 American clients to be investigated for tax evasion. This policy even forced Switzerland's oldest bank, Wegelin, to close its doors earlier this year after it was charged with conspiring with US taxpayers and others to hide more than USD1.2bn in Swiss bank accounts from the IRS.

Swiss banks have for some time had an uneasy relationship with the authorities in Germany, especially since a large scale tax evasion scandal involving captains of Germany industry broke in 2010, and a regular stream of stolen client data has flowed over the border ever since.

Now the French authorities are getting in on the act, with UBS placed under investigation by a judge last week after it was accused by prosecutors of helping French clients conceal money in overseas accounts.

The enemies are also within, it seems, as evidenced by this week's astonishing decision (see below) by the municipal council of Egerkingen in the Swiss canton of Solothurn, to publish the names of individuals alleged to have evaded taxes over the course of the last few years, an act it argued was in the public interest.

So, if even local authorities in Switzerland (admittedly so far only one of them) now believe that the public interest takes precedence over the hitherto sacrosanct (in Switzerland at least) laws of privacy, where does this leave the Swiss banking center?

In a recent speech, Nicolas Pictet, President of the Swiss Private Bankers Association, suggested that while Swiss banking was not in full-blown crisis, it certainly faces challenges. He called for Switzerland to become proactive with respect to the issue of banking secrecy, rather than reactive. The trouble is, Bern is already being fairly proactive, having recently come to an agreement with the US over FATCA and pioneering the Rubik agreements.

So while Switzerland has not yet capitulated in the face of these foreign attacks on its banking industry, it has conceded some ground, and will likely have to give more away to shoo the wolves from its door.

Argentina: Recent Tax Developments

by Jean Anton, Rosso Alba, Francia y Asociados, Buenos Aires, Argentina

The Argentine Revenue Service (ARS) recently introduced a new income tax advance collection mechanism, applicable to the purchase of goods and services performed abroad by Argentinian residents, by means of credit and/or debit cards. Online purchases, international transportation tickets and travel packages are also included in the scope of the provision. Additionally, a regularization program for tax, customs and Social Security debts was launched last March, aimed at increasing tax collection and reducing default and late payment ratios.

Meanwhile, the National Tax Court issued an outstanding decision on the deductibility of expenses incurred in the execution of a cost-plus based contract. Relevant Supreme Court rulings on the deductibility of bad debts, undocumented disbursements, and the conditions for the application of income tax "grossing up" were also made public during the period.

Advance Collection Mechanism For Income Tax

On March 18, 2013, ARS Resolution 3450 was published in the Official Gazette, immediately coming into force. Devised in order to replace Resolution 3378, which enforced a 15 percent rate, Resolution 3450 establishes a 20 percent advance collection mechanism on foreign currency operations performed abroad by Argentinian residents by means of credit, debit and/or purchase cards managed by local companies. International e-commerce is also subject to advance tax collection. The scope of the Resolution was broadened so as to cover the purchase of international transportation tickets as well as foreign services included in travel packages sold by travel agencies, whether wholesalers or retailers. In the case of the latter, both cash and card payments are included.

Resolution 3450 regards travel agencies, credit cards and transportation companies as collection agents. Sums paid in advance can be credited against Income Tax and Personal Assets Tax while balances are allowed to be offset against other fiscal debts. Individuals who are not subject to such taxes are allowed to file an administrative claim for the refund of the deducted amounts.

Tax, Customs And Social Security Debts Regularization Program

Resolution 3451, published in the Official Gazette on March 25, 2013, creates a special mechanism for payment of most outstanding tax, customs and social security debts (including interest and fines) in existence prior to February 28, 2013.

Extended payment facilities are to be granted even in respect of debts which are currently under negotiation, either before the ARS or the Courts, as well as to those which are already part of previous settlement plans. On the other hand, certain fiscal obligations are expressly excluded from the benefits of the mechanism by Sections 3 and 4 of the Resolution, including the much debated custom charges resulting from law 26,351.

It is relevant to state that, unlike previous ones, the current Resolution does not contemplate any reduction or remission of interest or penalties, but merely offers the taxpayer supplementary terms and instalments (up to 120) for the payment of their debts, at a monthly interest rate of 1.35 percent. The window during which applications can be made for the mechanism expires on July 31, 2013.

Special attention is drawn to the fact that Section 27 of Resolution 3451 abrogates ARS Resolution 2774/2010, which instituted a permanent plan offering facilities for payment of tax and social security debts.

Relevant Court Decisions

On October 23, 2012, the National Tax Court issued a decisive ruling, admitting the deductibility of expenses incurred abroad by an Argentine resident company in the context of an agreement for the provision of services with its foreign parent company. In *Cisco Systems Argentina S.A.* [1] the ARS had questioned the deduction of certain expenses incurred by Cisco Argentina in order to fulfill its contractual obligations with Cisco Systems Inc. Based on the existence of a written contract documenting the services invoiced by the local company, the Tax Court took into account that the price of the services was based on the expenses incurred plus a five percent margin, being thus a "cost-plus" scheme. Although the decision does not specifically elaborate as to the relationship between the expenses incurred and the transfer pricing method used, it clearly confirms that income arising from a cost-plus based contract constitutes a deductible expense for an Argentine taxpayer.

The Supreme Court has had a prolific first quarter, dealing with several tax issues, mostly by ratifying standards set in previous rulings. As regards undocumented disbursements, the Court heard the case *Bolland y Cia c/ DGI* (TF 21.122-I) , in which it followed the criterion set in the precedent *Red Hotelera Iberoamericana c/ DGI* (2003): a disbursement is to be considered as undocumented not only when there are not any documents referring to it, but also when the documents are insufficient to prove its nature and identify its true beneficiary. In this particular case, the taxpayer was able to demonstrate to the Court who were the actual payees of the sums disbursed, *i.e.*, in respect of whom the ARS had been able to file tax claims, as well as the cause of the disbursement. Thus, the elements required for the provisions of Section 37 of the Income Tax Law to be enforced were not met in the case.

On the deductibility of bad debts, the Court in *Sullair Argentina S.A. c/DGI*, attributed special importance to the practice and customs of each particular industry, introducing a proper distinction between "bad" and "non-recoverable" debts. In the former case, the poor quality is only presumptive, derived from the expiration of the due term without proper payment. Sullair was able to demonstrate the existence of multiple collection and recovery efforts, in line with the practice of its industry, which, however, remained unsuccessful. Adducing the standard put forward in *Telefonica de Argentina SA c/DGI*, the Court ruled that taxpayers cannot be obliged to exhaust all available means of collection before being able to deduct "bad" debts from income tax, as such a requirement would imply the imposition of impossible financial costs on the taxpayer and would subvert the principle of taxation on net income.

Finally, further clarifications on the practice of "grossing up" were provided by the Supreme Court, in *Ciccone Calcografi ca S.A. c/DGI* (TF 19.236-I). Only the existence of either an express clause in the agreement on which the payment is based or unequivocal behavior to an equivalent effect by a relevant party entitles the ARS to interpret that responsibility for the payment of income tax has been assumed by the local payer, an indispensable requisite for the application of "grossing up" (according to Section 145 of the Income Tax Law regulatory decree). As a conclusion, a mere lack of withholding by the local taxpayer cannot be alleged in order to apply "grossing up," unless the effective assumption of liability required by the decree is verified.

Endnotes

1 National Tax Court, chamber A; 10/23/2012, "Cisco Systems Argentina S.A. s/recurso de apelación-Impuesto a las Ganancias"

Topical News Briefing: Shutting The Stable Door

by the Global Tax Weekly Editorial Team

The Greek situation no longer dominates the world news agenda as it did a year or two ago, but this doesn't mean that its problems have miraculously been magicked away.

Although the International Monetary Fund (IMF) said recently that Greece has made "exceptional" progress towards its necessary fiscal adjustment, it should not be forgotten that the country has now received over EUR200bn in bailout loans – roughly equivalent to the size of the entire Greek economy.

The idea behind a loan of course is that it will eventually have to be paid back to the lender. But recent indicators suggest that Greece will, to put it mildly, struggle to pay this huge amount back. True Greece's sovereign debt has come down, but it was still just under 170 percent of gross domestic product in the first quarter of this year. Athens has also said that substantial inroads have been made into shrinking the budget deficit this year, and that it is on target to return to surplus by 2016. But this has to be an optimistic assumption with Greece now in its fifth consecutive year of recession (the economy is predicted to shrink by another 4.5 percent in 2013) and confidence in extremely short supply.

What's more, the Government is struggling to pay its own way, let alone find the money to pay back its creditors, and at the heart of the problem is its ongoing lack of success in collecting taxes which are legally owed. Tackling tax evasion was identified by the Troika as a major contributor to Greece's plight right at the start of the crisis three years ago. In the meantime, various Government ministers have talked a tough game on tax evasion, and anti-evasion initiatives have featured prominently in each austerity budget that has come along since. But to no avail it seems. Last month the IMF said that "very little progress" had been made in this area, and last week the EU said that the Greek tax system was not fit for purpose.

Estimates of the amount of tax that goes uncollected each year in Greece vary, but it is widely acknowledged to be somewhere between EUR30bn and EUR70bn. It is said that the tax owed by Greece's 1,500 largest tax debtors would fill the budget deficit for 2013, and of that EUR13bn, just under EUR20m has been collected over the last two years. But it is hardly realistic for a Government which has tolerated a culture of tax evasion, corruption and cronyism at the highest levels for so long to suddenly acquire the means to reverse the situation in a couple of years.

This is a toxic issue in Greece, and it is questionable how serious the Government really is about getting to grips with the problem. For example, it was reported recently that one wealthy retiree has received a back tax bill for EUR6bn, while the so-called "Largarde list" of names of well-placed individuals with undeclared foreign bank accounts was suppressed by the Government – largely because many of its members' names were on it.

As is the case all across crisis-hit Europe right now, it is the ordinary taxpayers who are being compelled to pay for the mistakes committed by their leaders over the past few years. But in the case of Greece, it is going to take several years longer to turn around the tax-paying culture.

UK Tax Code Of Conduct For Banks Gets Makeover

by Stuart Gray, Senior Editor, Global Tax Weekly

The United Kingdom tax authority HM Revenue and Customs (HMRC), has issued a consultation document on strengthening the Code of Practice for Taxation of Banks, focusing on the process around determining non-compliance, the processes and criteria around deciding to name a bank as non-compliant, and the nature of an annual report to be published by HMRC. This article looks at the current Code and the changes proposed by the Government in the new consultation document.

Introduction

The Code, which was introduced by the previous Labour Government in 2009 (see below) sets out that banks should have strong governance around tax, that they should follow "the spirit of the law" in addition to the letter, and that there should be a "mutually open and transparent" relationship with HMRC.

In a statement to the House of Commons on March 16, 2009, then Chancellor of the Exchequer Alistair Darling announced that compliance with the Code would be voluntary, but that banks would be strongly encouraged by the government to sign up.

"We expect banks to fully comply with their tax obligations," remarked Darling. "So I can tell the House that I have asked HM Revenue and Customs

to publish shortly a draft code of practice on taxation for the banking sector – so that banks will comply not just with the letter but the spirit of the law," he announced.

The government's announcement followed revelations in the media that UK banks – including those which received billions of pounds in public money at the height of the financial crisis – participated in large scale tax avoidance schemes using a series of complex transactions and financial instruments.

"While banks play a vital role in the UK and are important contributors of tax, it is clear that many continue to be involved in tax avoidance that goes well beyond reasonable tax planning," said Financial Secretary to the Treasury Stephen Timms in launching the first public consultation on the proposed Code. "This code is part of our work to minimize tax avoidance and ensure that large businesses such as banks have a clear understanding of the behaviors the tax authorities expect from them."

"As part of the consultation we will be talking directly with banks to develop a shared understanding of the principles that underpin the code and, in particular, what it will mean in practice for banks," Timms continued. "This is vital to ensuring that the code plays a part in changing the behavior of banks and in turn minimizing the loss to taxpayers through tax avoidance."

The consultation published by the Government in June 2009 set out "the behaviors the government expects from banks in the management of their tax affairs" and in their relationship with HM Revenue and Customs, including governance, tax planning and the relationship between banks and HMRC.

Feedback was sought on a range of issues, including introducing and complying with the code, how uncertainties arising in interpreting the code could be dealt with and what support banks can expect from HMRC in return. The government and HMRC also spoke directly with banks operating in the UK to develop a "shared understanding" of the principles and implications of the code.

The Labour Government was voted out in the May 2010 general election, but the Conservative-led coalition which followed took up its anti-avoidance baton with much gusto, and when it emerged later that year that only four banks operating in the UK had signed up to the code it applied pressure on the rest to follow suit. The Treasury asked HM Revenue and Customs (HMRC) to ensure that all the major banks signed up by the end of November 2010 and the Government announced on November 30 that the top 15 banks operating in the UK had adopted the Code. These 15 banks included: Bank of America/Merrill; Barclays; Citigroup (Citibank); Credit Suisse; Deutsche Bank; Goldman Sachs; HSBC; JP Morgan Chase; Lloyds Banking Group; Morgan Stanley; Nationwide Building Society; Royal Bank of Scotland; Santander; Standard Chartered; and UBS.

"A year ago, the previous government announced that it would require banks to sign up to the Code of Practice on Taxation," said Osborne at the time. "At the start of October this year only four out of the top fifteen had done so. I said that this was unacceptable and I gave them a deadline of end of November 2010 to sign up," "That deadline arrived today and I am pleased to say that all fifteen banks have signed up. Alongside the bank levy, this shows that the Coalition Government is taking action to ensure banks pay their fair share – unlike the previous government, which talked tough, but failed to deliver."

Currently 262 banks, (dealt with by HMRC's Large Business Service (LBS) and the Large & Complex section within HMRC Local Compliance), have adopted the Code.

The Code

The Code of Practice on Taxation for Banks[1] signed by the 15 banks in 2010 contains four sections as follows:

Overview

The Government expects that banking groups, their subsidiaries, and their branches operating in the UK, will comply with the spirit, as well as the letter, of tax law, discerning and following the intentions of Parliament.

This means that banks should:

- adopt adequate governance to control the types of transactions they enter into;
- not undertake tax planning that aims to achieve a tax result that is contrary to the intentions of Parliament;
- comply fully with all their tax obligations; and
- maintain a transparent relationship with HM Revenue & Customs.

Governance

The bank should have a documented strategy and governance process for taxation matters encompassed within a formal policy. Accountability for this policy should rest with the UK board of directors or, for foreign banks, a senior accountable person in the UK.

This policy should include a commitment to comply with tax obligations and to maintain an open, professional, and transparent relationship with HMRC.

Appropriate processes should be maintained, by use of product approval committees or other means, to ensure the tax policy is taken into account in business decision-making. The bank's tax department should play a critical role and its opinion should not be ignored by business units. There may be a documented appeals process to senior management for occasions when the tax department and business unit disagree.

Tax Planning

The bank should not engage in tax planning other than that which supports genuine commercial activity.

Transactions should not be structured in a way that will have tax results for the bank that are inconsistent with the underlying economic consequences unless there exists specific legislation designed to give that result. In that case, the bank should reasonably believe that the transaction is structured in a way that gives a tax result for the bank which is not contrary to the intentions of Parliament

There should be no promotion of arrangements to other parties unless the bank reasonably believes that the tax result of those arrangements for the other parties is not contrary to the intentions of Parliament.

Remuneration packages for bank employees, including senior executives, should be structured so that the bank reasonably believes that the proper amounts of tax and national insurance contributions are paid on the rewards of employment.

Relationship Between The Bank And HMRC

The features of this relationship should include:

- disclosing fully the significant uncertainties in relation to tax matters;
- focusing on significant issues;

- seeking to resolve issues before returns are filed whenever practicable;
- engaging in a co-operative, supportive and professional manner in all interactions; and
- working collaboratively to achieve early resolution and hence certainty.

Where the bank is in doubt whether the tax result of a proposed transaction is contrary to the intentions of Parliament, to help the bank form its reasonable belief under section 3, it may discuss its plans in advance with HMRC.

The Governance Protocol

On March 26, 2012, HM Revenue & Customs published its governance process which sets out the communication and escalation procedures in any case where HMRC has concerns about a bank's compliance with its commitments under the Code.

The HMRC Governance Protocol on compliance with the Code of Practice on Taxation for Banks is split into three chapters and is reproduced below:

Chapter 1

Introduction

HMRC may at any time take one of three views about a bank's compliance with the Code of Practice:

- it has not expressed concerns over a bank's compliance with the Code;
- it has expressed concerns over compliance which are being discussed; or
- its concerns over compliance have not been adequately addressed and it considers that the bank has not complied with the Code.

If HMRC has concerns about compliance with the Code then the CRM (Customer Relationship Manager) or equivalent will raise them with the bank at the earliest opportunity, once this action has been approved at deputy director level.

If discussion between the CRM and the bank does not resolve the concerns, HMRC (normally at or above deputy director level) will escalate them to the bank's Board for further discussion at this level.

HMRC will only take the view that the bank has not complied with the Code if its concerns still remain unresolved. If this is the case, it will:

- tell the bank that it considers that the bank is not complying with its undertakings under the Code; and
- explain what it considers the bank should do in order to comply.

Where HMRC has told a bank that it considers it to not have complied with its Code undertakings HMRC would expect the bank to acknowledge this in any public pronouncements it makes on its operation of the Code.

Some smaller banks have been asked to adopt section 1 of the Code only. This allows them a more flexible approach to documenting and governing their strategy towards tax. However the principles underpinning that strategy should be the same as for larger banks that adopt the Code in its entirety. The considerations set out below therefore will be applied to all banks.

Chapter 2

Governance

HMRC may express concerns over whether a bank has met its undertakings under Code paragraphs 2 to 2.2: where the concerns are over

- the bank's strategy for and governance of risk management for taxation matters;
- whether the strategy is understood and operated within the bank; or
- the bank's strategy towards the openness, transparency and professionalism of its relationship with HMRC.

Reasons HMRC may be concerned over the bank's strategy or governance could include:

- a lack of policy for proper tax risk management containing a documented strategy and governance process for taxation matters except where the bank's approach to avoiding tax risk is sufficiently clear for it to be unnecessary for the bank to have such a formal written policy;
- failure to let the CRM or equivalent officer see any such policy on request;
- evidence that the strategy, and compliance with it, is not considered at an adequately senior level consistent with the scale of risks being managed;
- failure to give the CRM on request an understanding of the processes adopted over the period concerned to ensure that the policy is taken account of in business decisions;
- failure by the bank to review its actions over time to ensure it believes it is properly implementing its governance obligations under the code;
- evidence of systemic failures in implementation revealed by the bank's review or for other reasons;
- failure to provide any required certificate under schedule 46 FA 2009;
- evidence that the tax department is not involved in, does not fully understand, or has little power to influence transactions undertaken which may present tax risk;
- a recent pattern of mistakes in completing tax returns;
- significant arrears in filing returns or paying tax; or
- failure to disclose transactions which may present a significant tax risk.

Chapter 3

Tax Planning

HMRC may express concerns whether a bank has met its undertakings under paragraphs 3 to 3.3 of the Code where the concerns are that the bank has failed to:

- embody the tax planning strategy envisaged by the Code in its formal policy, where it has one; or
- adopt this tax planning approach in practice; and give guidance to the bank's operating staff accordingly
- review, prior to contracting, all potentially contentious transactions for compliance with this tax

planning strategy, involving an appropriate level of tax expertise and challenge, and documenting the review appropriately;

- enter into or promote reviewed transactions only if its management was satisfied that:
  - they supported genuine commercial activity;
  - they produced tax results for the bank that are consistent with the underlying economics of the arrangements; or if not
  - the tax results they produced were not contrary to the intentions of Parliament, taking into account both a purposive construction of legislation and whether Parliament could realistically have intended the result, given a track record of acting to close loopholes to prevent transactions that are "too good to be true."
- take reasonable views in coming to decisions under (iv), where the failure to do so amounts to failing systematically or wilfully to implement its undertakings about tax planning.

Evidence of possible systematic or wilful failure may include one or more of the following:

- a pattern of executed transactions which are followed by corrective or clarificatory changes to tax law that prevent the intended tax results;
- a deliberate or continuing failure by the bank's management to undertake a proper review of proposed transactions; to ensure that it is sufficiently well informed about the transactions and the legislative context for it to take reasonable decisions; or to challenge proposals that are inconsistent with the Code.
- an approach to the Code which ignores its overall intent of constraining destabilizing tax avoidance transactions that are likely to trigger a need for Parliament to consider legislative change.

Strengthening The Code

Although the Government says that the Code is "generally operating well" it believes that the Code currently lacks public transparency, and that there are no codified consequences for non-compliance. Further, concerns have been raised that some banks may be interpreting the code differently, despite the consistent application of the Code by HMRC across the banking sector.

The strengthened Code will remain voluntary, but the Government intends in its Autumn Statement to publish a full list of those banks that have adopted it. Further, from 2015 there will be an annual list of banks that have adopted the code, and of those that have chosen not to.

The consultation document published by the Government on May 31[2] includes a number of questions. It asks whether it remains tenable for smaller banks to be required to adopt only Section 1 of the Code, which is concerned with governance transparency, and whether the three months or so before the Autumn Statement is a sufficient amount of time for banks to become fully appraised of, and satisfied with, the strengthened Code.

Further questions concern whether the proposals provide the necessary safeguards around the naming of non-compliant banks, whether the proposals offer sufficient transparency for the public around how the rules will operate, whether examples of transactions given by the HMRC provide sufficient guidance, and whether the draft legislation gives sufficient coverage.

The Government believes that the commitments enshrined in the Code remain appropriate and that the wording used and the concepts and actions involved are now well understood by banks and practitioners. Therefore the consultation does not include any proposals on the content of the Code itself.

HMRC proposes that the procedures set out in the Governance Protocol should continue to be the basis for HMRC's handling of concerns about a bank's compliance with the Code. However it is proposed that the escalation routes and governance arrangements around conclusions of non-compliance will be set out much more explicitly.

HMRC also intends to build in the requirement for the Tax Assurance Commissioner to take the final decision on whether to name a bank as non-compliant in a report. HMRC's Tax Assurance Commissioner is responsible for:

- seeing that tax disputes are resolved efficiently and on a basis that determines the correct tax in accordance with the Litigation & Settlement Strategy and achieves outcomes that are even-handed across different customer groups;
- ensuring that there are appropriate governance arrangements in place to meet those objectives;
- ensuring that those arrangements are observed in practice in individual cases; and
- monitoring and evaluating the effectiveness of processes for resolving tax disputes and governance arrangements, and implementing improvements.

Three Commissioners will make the final decision on whether a bank is considered not to be complying with its Code commitments. This could include the Tax Assurance Commissioner. The Tax Assurance Commissioner however will have the ultimate decision on whether or not to publish the name of a bank as non-compliant in the annual report.

The Protocol envisages that a conclusion that a bank is non-compliant will not automatically lead to the bank being named as non-compliant. This is reflected in the draft legislation that enables, but does not require HMRC to name such a bank.

It is envisaged that in most cases a conclusion of non-compliance will lead to a bank being named. However, the consultation document explains that the public naming of a bank is not an end in itself, but rather a means of ensuring that the Code remains effective in preventing tax avoidance activity by banks. Therefore, there may be cases where, following HMRC's communication to a bank's board of its opinion that the bank is not complying with the Code, the bank takes actions that convince HMRC that the bank is committed to a cessation of tax avoidance behavior going forward and where therefore no further purpose would be served by publicly naming that bank.

Banks will have the normal rights of legal recourse in relation to any decision by HMRC to publish the bank's name, for instance through Judicial Review. But as the Code will remain voluntary there will be no statutory right of appeal against HMRC's view of a bank's compliance with the Code and decision to name such a bank.

The document also notes that requirements relating to tax planning under the Code will remain in place after the General Anti-Abuse Rule (GAAR) is introduced. These requirements have a wider scope than the GAAR, and a designation of non-compliance will be made in relation to a transaction where the HMRC, having taken account of representations from the bank and advice from the GAAR Advisory Panel, has issued a notice of counteraction. The consultation asks whether naming such transactions as "potentially abusive" is an appropriate descriptor for transactions within the ambit of the GAAR.

The closing date for comments on the proposals to strengthen the Code is August 16, 2013.

Endnotes

1 http://www.hmrc.gov.uk/thelibrary/bank-code-practice.htm

2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204321/130530_Code_consultation_Docprint_version.pdf

Potential Challenge To The European Union Emissions Trading Scheme By International Airlines

by Jeffrey Bates and Susan Cooke, McDermott Will & Emery

The International Civil Aviation Organization (ICAO), a United Nations specialized agency under UN Protocol No. 45, is an intergovernmental organization, chartered by the Chicago Convention in 1944, which governs civil international aviation. There are 191 Member States in the Chicago Convention and the ICAO. All European Union Member States are in the Convention and the ICAO, but the European Union is not itself a party to the Convention or the ICAO.

On January 1, 2012, the EU Emissions Trading Scheme (ETS) came into force for EU airlines and non-EU international airlines. Under the ETS, an airline must surrender an allowance for each ton of CO2 emitted on flights to, from or within the European Union. Before the ETS came into effect, US airlines and their trade association filed a suit in the High Court of England and Wales (EWHC), asking it to "quash the measures" of the ETS in the United Kingdom, as the ETS was unlawful under international treaties and customary international law. The EWHC referred a preliminary ruling to the Court of Justice of the European Union (CJEU) on international law questions concerning the ETS, including the effect of the Chicago Convention. On December 21, 2011 (Case C-366/10), the CJEU ruled that the ETS directive was valid on two grounds. But in its decision on the international law question, the CJEU said it "cannot examine the validity" of the ETS in the EWHC's reference to the Chicago Convention, because the European Union is not bound by the Convention.

Under Article 84 of the Chicago Convention, a dispute between ICAO Member States can be heard by the ICAO Council, but Council Member States involved in that dispute may not cast a vote in the Council. A Member State may appeal the Council's decision to the International Court of Justice (ICJ) or to an *ad hoc* arbitral tribunal. Further, UN Protocol No. 45 authorises the ICAO Assembly or its Council to request an advisory opinion from the ICJ on a matter that falls within the scope of their activities under the Chicago Convention.

At a meeting held in Moscow on February 21-22, 2012, 23 ICAO Member States, none of which were EU Member States, issued a declaration against the ETS to non-EU airlines (the Moscow Declaration). In the Moscow Declaration there is a basket of measures and actions (referenced as Attachment A) that the signatories could take in response to the ETS. It specifically mentions "a proceeding under Article 84 of the Chicago Convention." There is no mention in the Moscow Declaration of seeking an ICJ advisory opinion, although it might be referred to obliquely under "[any] other actions/measures" in Attachment A. The ICAO has not requested an advisory opinion from the ICJ but, in the past, there have been two similar Article 84 disputes involving international airlines, *i.e.*, the EU "hushkit" dispute and Pakistan's action against India.

Hushkit Dispute

In the hushkit dispute, the United States brought an Article 84 action against the EU Member States in 2000, on a 1999 EU regulation prohibiting the use of hushkits to reduce engine noise on aircraft in EU airports, because it was against the Chicago Convention and the ICAO. Omega Air and others had previously filed a suit in the EWHC and in the High Court of Ireland to prevent enactment of the prohibition. Those Courts referred preliminary rulings to the CJEU (Cases C-27/00 and C-122/00), including whether the EU regulation was incompatible with the Chicago Convention and the ICAO.

Before the CJEU issued its decision, the ICAO Council adopted noise standards for aircraft engines and the European Union replaced its more stringent hushkit prohibition in favour of measures tracking the ICAO provisions. After that compromise, the CJEU then approved the earlier hushkit regulation on the grounds that, under EU law, "no factor" had been disclosed with respect to the Chicago Convention that would affect the validity of that regulation.

Pakistan's Action Against India

The other Article 84 dispute was an action brought by Pakistan against India in 1971 under the Chicago Convention, where India suspended Pakistan's civil aircraft flights over Indian territory. This arose out of a "hijacking" incident on an Indian aircraft that flew across the border between India and Pakistan. India contended that this matter was covered by a prior agreement in which the parties had suspended or terminated the Chicago Convention.

The Council disregarded India's arguments and allowed Pakistan's application to go to the Council for resolution. India then appealed this determination to the ICJ. In its decision, the ICJ stated that "the Council would inevitably be obliged to interpret and apply the Treaties, and thus to deal with matters unquestionably within its jurisdiction." Consequently, the ICJ sent Pakistan's application back to the Council for its final decision.

Macedonia v Greece

In addition, a noteworthy ICJ opinion on such international treaties was rendered two weeks before the CJEU's ETS decision. In *Macedonia v Greece*, the ICJ stated that the CJEU interpreted the treaty establishing the European Economic Community and under prior agreements to that treaty, the CJEU "has concluded that this language refers to the 'rights' of third countries and 'obligations' of treaty parties, respectively." The ICJ cited CJEU decisions, including paragraph 34 of the CJEU's decision in *Commission v Sweden* (C-249/06), in which the CJEU said:

> *The purpose of that provision [in Article 307 EC] is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations [citations omitted].*

Further, in its *Sweden* decision, the CJEU stated that Sweden had investment treaties with third countries prior to its entry into the European Union and there was a risk of conflict with measures that might arise from application of those investment agreements.

If some Moscow Declaration Member States with airlines flying to and from EU airports were to seek a resolution under Article 84 of the Chicago Convention, the Council's decision could be unfavorable to the ETS, as the EU Member States on the Council could not vote on that dispute. If there was a preliminary appeal similar to India's appeal to the ICJ, or if there was a final appeal to the ICJ, then the ICJ could look at the treaties under Article 84. Thus, if a dispute were brought under Article 84, then the contesting ICAO Member States and the Council might well decide on a compromise similar to the one that resolved the hushkit dispute.

The Moscow Joint Declaration can be found at www.ruaviation.com/docs/1/2012/2/22/50/.

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Pictet Warns Of Major Swiss Financial Center Challenges

In his June General Assembly address, President of the Swiss Private Bankers Association (SPBA) Nicolas Pictet highlighted the key challenges currently facing the Swiss financial center.

While perhaps not the most urgent issue to be addressed, the biggest concern for the SPBA remains ensuring access for Swiss banks to foreign markets, notably to the European Union (EU), Switzerland's "natural market," Pictet explained, pointing out that around half of the clients of Swiss wealth management banks are EU residents.

Emphasizing that financial market regulation is in huge flux in Europe at the moment, Pictet warned that with every new European directive there is a real risk of a further discrimination against third states such as Switzerland. EU member states are at liberty to "invent" protectionist regulations, and are indeed protected against such provisions, Pictet argued, insisting that this poses a real danger and threat for Switzerland.

A further challenge facing the Confederation is the ongoing "crusade" against tax evasion and tax fraud, spearheaded by debt-ridden, belt-tightening countries in Western Europe, the SPBA President maintained.

Pictet cited some of the key tax files, which are either currently being debated or have been agreed and implemented by the Swiss Federal Council in the last few years. These include the so-called bilateral "Rubik" accords, concluded between Switzerland and the UK and Austria. These landmark treaties provide for the taxation of previously undeclared and future income of UK and Austrian clients of Swiss banks by means of a withholding tax, while at the same time preserving anonymity. A "Rubik" deal with Germany was blocked in the German Bundesrat, or upper house of parliament, however.

Other major tax dossiers include the Foreign Account Tax Compliance Act agreement negotiated with the US, which has yet to be approved by parliament, and the settlement deal sought with the US to end the longstanding dispute with Swiss banks. Furthermore, Switzerland has implemented Global Forum regulations on transparency and information exchange in tax matters, together with the OECD's latest standards, including the allowance of group requests, and has amended its criminal tax code and classified severe tax offences as a crime and therefore predicate to money laundering, in accordance with the revised Financial Action Task Force (FATF) recommendations.

Finally, Switzerland is to engage in discussions surrounding the move towards an automatic exchange of information as sought by the G20, and is to enter into a dialogue with the EU on the planned revision of the European Savings Tax Directive, Pictet noted.

As a result, numerous, uncoordinated initiatives have been launched, which have overburdened Switzerland, lead to immense costs, and meant that the country's legal, tax, and compliance services are currently at breaking point. Moreover, the changes have resulted in a loss of one of Switzerland's key strengths, namely legal certainty, Pictet warned, urging the Federal Council not to initiate any further measures

Alluding to the Swiss financial center's third and final challenge, namely the Federal Council's "white money strategy," aimed at ensuring future tax compliance and halting Western Europe's tax crusade, Pictet made clear that while the SPBA fundamentally supports the concept, it nevertheless has concerns that the proposals may disadvantage Switzerland as a location, compared to rival financial centers, including New York, London, and Luxembourg. Additionally, Pictet underscored that the strategy is not recognized or understood abroad and carries with it considerable practical problems.

Back in February, the Federal Council launched a consultation on plans for its "white money strategy," which involves negotiating "Rubik"-style withholding tax agreements with certain target countries, to regularize the tax situation of partner state residents with accounts held in the Confederation. The strategy also includes plans to extend mutual assistance in tax matters, and to introduce enhanced due diligence requirements, to prevent the acceptance of untaxed assets in Swiss banks in future.

Pictet also expressed his criticism of plans to impose enhanced due diligence requirements on banks in Switzerland. Pictet argued that the idea merely gives rise to suspicion in the system, contradicting the constitutional principle of trust and faith. Financial intermediaries should be able to assume that their clients are honest, and only intervene on the basis of objective indications of a lack of tax compliance, Pictet stressed.

Pictet also regretted the fact that the Federal Council plans to impose enhanced due diligence measures with retroactive effect. Banks were given to understand that the provisions would merely apply to new money, he clarified. Pictet insisted that Swiss citizens should not fall within the scope of the new law. Finally, Pictet made clear that it would simply be "irresponsible" for the Federal Council to implement such a fundamental reform of the country's legislative framework without having first assessed the impact or consequences of waving through such changes. Pictet therefore called on the Federal Council to carry out an impact study and international comparative analysis before pressing forward with its plans.

In his concluding remarks, Pictet emphasized that Brussels is not in a position to treat Switzerland like Luxembourg and Austria in tax matters, and like Malaysia with respect to market access. The SPBA President maintained that unilateral concessions by Switzerland must be ruled out and underlined the importance of finding an alternative to the "Rubik" accords, to resolve the past and to ensure that Switzerland is not excluded from key foreign markets.

Switzerland must become involved in the drafting of future legislation and not passively sit back and have measures imposed, the SBA President ended, underscoring that Switzerland must take up the reins once again and act innovatively and proactively, rather than merely waiting for others to decide the Confederation's fate.

Switzerland's Egerkingen Faces Action Over Tax Data Publication

During its latest meeting, the municipal council of Egerkingen in the Swiss canton of Solothurn made public the names of individuals alleged to have evaded taxes over the course of the last few years.

Defending its decision, the municipal council argued that in this case public interest took precedence over personal data protection. Furthermore, the council insisted that those concerned had had ample opportunity to avoid publication of their names. The council pointed out that individuals could either have declared their personal tax situation or concluded a consensual agreement with the municipal tax authorities.

The municipal council therefore concluded that data publication was the only possible means of combating tax avoidance and ensuring collection of the due tax liability. It is in the public and fiscal interests of the municipality that individual tax obligations are met, the council stressed.

Egerkingen municipal council announced plans to make public tax evaders' identities back in April. At the time it made clear that taxpayers still had time to regularize their tax situation. The council also highlighted the fact that it had received a formal objection from Judith Petermann Büttler, responsible for information and data protection in the Solothurn canton.

Petermann Büttler warned that there was no legal basis for making public the names of suspected tax evaders, emphasizing that the information is subject not only to official secrecy, but also to tax secrecy. She therefore urged the municipal council to comply with Switzerland's privacy laws and to abandon its plans.

The municipal council's decision has borne fruit, however. Since its April statement, a number of individuals have come forward to declare their fiscal situation, enabling the authorities to collect around CHF75,000 (USD80,129).

The municipal council is aware that it may face legal action over its highly controversial decision.

Switzerland, US Sign MOU Over FATCA Agreement

On June 7, in Washington, the United States and Switzerland signed a Memorandum of Understanding (MOU) on interpretations regarding the Foreign Account Tax Compliance Act (FATCA) intergovernmental agreement (IGA) they had signed on February 14 this year.

Within the negotiations on that FATCA agreement, both sides had agreed to set interpretations of a technical or administrative nature in a subsequent MOU, which has now been signed by Manuel Sager, the Swiss Ambassador to the United States, and Mark Mazur, the US Assistant Secretary for Tax Policy.

FATCA requires foreign financial institutions (FFIs) to register with US tax authorities and report information on accounts housing the assets of US taxpayers. Failure by an FFI to sign an agreement with the Internal Revenue Service (IRS) and disclose information would result in a requirement, from next year, to withhold 30 percent tax on US-source income.

The Swiss Government has pointed out, in particular, that the US-Swiss IGA ensures that accounts held by US persons with Swiss FFIs are only disclosed to the IRS either with the consent of the account holder or on the basis of the administrative assistance clause in the two countries' double taxation agreement.

The MOU summarizes the obligations of Swiss financial institutions and confirms the simplified self-certification process for "exempt Swiss beneficial owners" under the FATCA agreement.

It therefore contains the requirements placed on a Swiss financial institution to obtain such information regarding account holders as is necessary to determine whether the accounts held US accounts; comply with the verification and due diligence procedures as may be required by applicable US Treasury regulations; report on an annual basis the information needed; deduct and withhold from payments to recalcitrant account holders and non-participating financial institutions; and close accounts of recalcitrant account holders, subject to the terms and conditions of the IGA.

On the other hand, the MOU also confirms the arrangements for non-reporting Swiss FFIs identified as "deemed-compliant" in the IGA, largely due to their lack of business outside of Switzerland or the European Union, and exempt certain beneficial owners, such as Swiss retirement plans, investment advisers and certain collective investment vehicles.

In addition, it is stated that, if they simplify matters relative to the definitions in the IGA, Swiss FFIs can apply definitions in applicable US Treasury Regulations in lieu of corresponding definitions in the IGA, provided that such application would not frustrate the latter's purposes.

Troika Blocks Greek Proposals To Lower VAT On Food

A proposal put forward a second time by the Greek Government to the Troika of lenders to reinstate the 13 percent concessionary rate on food sold by restaurants was dismissed by European Commissioner for Taxation Algirdas Šemeta during meetings to review the nation's fiscal consolidation strategy on June 3-4, 2013.

The rate on restaurants was hiked from 13 percent to 23 percent on September 1, 2011, as part of a package of austerity measures agreed with international creditors, a year after the rate was raised from 9 percent. The hike was intended to raise approximately EUR750m (USD1.06bn) during 2012 but many restaurateurs boycotted the measure. Eateries in particular criticized the provision of an exemption for hospitality operators offering all-inclusive packages, which retained the 13 percent rate.

Šemeta, addressing a Greek parliamentary committee on June 4, 2013, contested that lowering the VAT rate on food would not solve the nation's economic woes as the Government investigates measures to foster economic recovery after six years of recession.

Greece Needs To Take Tougher Stance On Tax Avoidance

Greece "needs a zero-tolerance policy against tax fraud and evasion," European Tax Commissioner Algirdas Šemeta has urged.

Speaking before the Greek parliament, Šemeta stressed that the European Commission is committed to helping Greece overhaul its tax system and improve tax compliance. Although Šemeta pointed to initiatives such as the creation of a Secretary General for Public Revenue and the proposed new Tax Codes as steps in the right direction, he cautioned that "there is a long road still to be travelled before Greece has a tax system that can be considered fully fit for purpose."

In particular, Šemeta wants to see Greece "take a tougher stance against those who seek to escape paying what they owe." He fears that progress toward better debt collection and the improved auditing of wealthy taxpayers remains slow. Further, there must be a strong enough political will to implement the necessary measures for ensuring that the tax burden is fairly distributed; Greece needs to "move away from a system where the tax burden falls disproportionately on wage earners and pensioners, and is too lenient on the rich and self-employed."

Going forward, Greece should consider further strengthening its anti-money laundering regime, as a means of identifying those evading tax, and follow the actions proposed by the Commission against so-called tax havens. The Government ought also to look to the European Union (EU) and draw on the example set by the increasingly hard line attitude being adopted at an institutional level. "There is an opportunity for Greece to reinforce its fight against tax evasion at home – which does need reinforcing – by marrying it to actions being taken at EU and global level," Šemeta explained.

Concluding, Šemeta said: "the Commission recognises the ambitious change agenda that is being pursued in Greece. For my part, I will do everything at hand to support the further essential actions that need to be taken."

IMF Evaluation Criticizes Tax Approach In Greek Bailout

The IMF has published an evaluation of its handling of the first Greek bailout in 2010, in which it admits that it had been "overly reliant on tax increases," and that efforts to check tax evasion and to make the tax burden more equitable had achieved only "limited progress."

The 2010 crisis gave the IMF "exceptional access" to Greece through a Stand-By Arrangement (SBA) program which brought in VAT rate hikes, a new property tax, and higher income taxes, along with efforts to strengthen tax administration and to improve revenue collection. The report explains that tax increases were chosen because they are "quick to take effect" and would face less resistance than spending cuts. However, Greece's deficit was for most part due to increased expenditure in the 2000s, and the IMF now observes that "the large dose of revenue measures in the SBA-supported program can therefore be questioned, particularly since tax changes constituted almost half of the measures targeted for the first two years of the program."

The program also included structural benchmarks, focusing heavily on fiscal reforms in a number of areas. The report explains that an initial emphasis on changing laws and plans had been "relatively easy to achieve," but that the authorities had only a limited capacity to implement changes, in part due to bureaucratic resistance. Citing the OECD, the report notes factors such as the large size of Greece's informal economy, the complexity of the country's tax system, the large numbers of self-employed workers, and institutional weaknesses.

The program consequently increased its focus on operational details, including "organizational structures, audit practices, and dispute procedures that were leaving large tax debts uncollected." The failure to get higher earners to pay their tax meant there was no "demonstrable improvement in the equity of the tax burden," which risked public support for the program.

The report acknowledges "notable" failures in relation to the program, including a continuing lack of confidence in the market, the loss of 30 percent of the banking system's deposits, and public debt remaining at such a level that restructuring had to be implemented. It concludes that although the policies adopted were "broadly correct," a number of lessons could be learnt in relation to refining lending policies and frameworks, to taking better account of political economy, and to streamlining the Troika process.

Tax Reform, Transfer Pricing Top Concerns For US Tax Professionals

A survey presented by KPMG during its recent 2013 Tax Summit in Orlando, Florida, has indicated that the major global concerns of United States tax professionals are corporate tax reform and the rigorous pursuit of transfer pricing adjustments by foreign countries.

"It's clear from our survey that tax department leaders are focused on how to manage in the persistent and active regulatory environment in transfer pricing and are also devoting increasing attention to how changes in US tax legislation will affect their global operational decisions," said Jeffrey LeSage, vice chairman of KPMG's US Tax practice. "We believe that these and other key tax issues will present US companies with challenges and opportunities as the global business landscape continues to evolve."

The KPMG survey analyzed the responses of 242 senior tax professionals including tax directors, tax managers, vice presidents of tax, chief tax officers and tax analysts. The survey also polled companies on tax cloud initiatives, the tax impact of import and export activities, and legislation on taxation of internet sales.

According to the survey, 26 percent cited the pursuit of transfer pricing adjustments as their greatest global tax concern, while 24 percent pointed to the potential for US federal business tax reform. Other top concerns included the increasing number of countries aggressively pursuing "permanent establishment" as an approach to asserting a jurisdiction's taxing authority and the lack of a uniform approach by countries (15 percent), and challenges related to obtaining meaningful data that enables a company to project its annual effective tax rate with confidence (12 percent).

The survey also revealed that just 12 percent of tax departments are involved in early-stage discussions around cloud-related business transformation and almost one-third (30 percent) said when it comes to decisions on cloud-enabled business transformation their department is still being left out of the decision-making process.

"The feedback related to cloud business activities is particularly eye-catching," Laura Newinski, national managing partner-tax at KPMG, commented, "because we've seen that many companies that leave tax departments out of early cloud-related discussions also leave money on the table when it comes to the ultimate return-on-investment of their cloud projects."

In addition, despite the US Senate's recent passage of the bill, 40 percent of tax executives have not yet evaluated the potential impact of the Marketplace

Fairness Act of 2013, which would allow states to require online and other out-of-state merchants to collect and remit sales taxes on products and services they sell. Only 5 percent said they had evaluated the legislation and believe it will have a significant impact.

"Companies that may be affected by the potential changes to the taxation of online and remote sales need to pay close attention to the legislation and new tax compliance obligations that may be imposed on them," LeSage added. "If passed, the bill could be the most significant game changer in US state and local tax in years."

Finally, when asked what new regulatory, legislative or policy development has had the most impact on their company's global import and export activities, 21 percent of respondents cited aggressive enforcement of customs valuation laws associated with related party pricing and the "dutiability" of royalties.

"As all of these issues spotlight, the challenge for tax departments in the future will be to stay out in front of developments and make the case that their insights can add value to their company's overall business and bottom line in light of rapidly evolving needs," concluded LeSage.

French Report Recommends TP Overhaul

In its latest report, the French General Inspectorate of Finance (IGF) has put forward a raft of recommendations aimed at strengthening existing transfer pricing rules applicable to international groups in France, to better combat tax avoidance by multinational companies.

The IGF was tasked with comparing international practices used to prevent tax optimization and avoidance via intra-group financial and economic transfers. On the basis of its analysis of regulations currently in place in the US, the UK, Germany, and the Netherlands, the IGF advocated a series of measures to reinforce the French Tax Administration's own arsenal in the area of transfer pricing.

Underlining the need for existing legislation to be adapted, clarified, and improved, the IGF recommended, crucially, the introduction of the arm's length principle. This principle provides that if affiliated parties enter into a transaction, third party conditions regarding the transaction are to be used to ensure that transactions are based on principles customary in commerce.

Furthermore, the IGF suggested that the burden of proof be reversed in certain "risk situations," such as corporate restructuring, and proposed that sanctions and penalties be modified and toughened for groups failing to have the appropriate transfer pricing documentation in place.

Finally, the body recommended that tougher accounting transparency rules be imposed on taxpayers, and that the Tax Administration has better access to pertinent accounting information in future.

The report has been published on the Finance Ministry's website.

Transfer Pricing Assessment Shocks Danish Company

A Danish company has been hit with a DKK5.5bn (USD 980m) tax bill after tax authorities ruled that the transfer of rights and patents to two subsidiaries in Switzerland had been made at too low a price.

The case concerns Novo Nordisk, which is Denmark's largest listed company, and the total transfer pricing reassessment of an extra DKK 22bn (USD 3.9bn) is the largest in the country's history for a single company.

In 2006 and 2007 Novo Nordisk had transferred its biopharmaceutical division to Switzerland, and transferred patents relating to a growth hormone, Norditropin, and a hemophilia drug called NovoSeven.

According to Danish tax lawyers Vistisen, Danish tax authorities ruled that the transfers should have cost an extra DKK17.6bn in total, while charges for services such as administration, research and production made on behalf of the subsidiaries from 2005-09 should have cost an extra DKK4.2bn.

The company has now appealed to the Danish Administrative Tax Tribunal.

Indian Financial Sector Under Competitiveness Review

A Standing Council of Experts has been asked to make recommendations for improving the international competitiveness of the Indian financial sector.

The Council will be part of the Department of Economic Affairs, and its creation follows up on a pledge made by Finance Minister P. Chidambaram in his recent Budget. It will be headed by the Department's Secretary.

The Council will examine the comparative pecuniary and non-pecuniary costs of doing business via the Indian capital and financial markets and via other competitive destinations. Comparative levels of taxation will also be taken into account.

The Council will consider how the Indian markets operate, and make suggestions for improving their efficiency, "completeness," and transparency. Finally, it will aim at strengthening market governance, while ensuring that risks are contained and investor interests are protected.

The Government expects the Council to meet at least once every two months.

Panama To Consolidate Macrofinancial Governance

The Inter-American Development Bank (IDB) approved a loan for USD200m to support Panama's consolidation of its macrofinancial and fiscal framework to reduce risks and improve financial sector oversight and regulation.

The program will help to minimize the fiscal impact of macroeconomic and financial shocks. In achieving this objective, the program will provide an indicator for monitoring public debt to ensure that the country's debt-to-GDP ratio remains below 40 percent, a level established by Panama's Social and Fiscal Responsibility Law.

Also being considered is the development of a strategic plan for the newly created Financial Coordination Council, an organization that coordinates actions among the supervisory entities in Panama's financial system. The council establishes information exchange mechanisms, particularly as regards regulation and supervision of financial institutions.

This is the second IDB operation in support of Panama's macrofinancial and fiscal management program. The first one, a USD350m guarantee, was approved in 2012.

The new loan is for 20 years, with a variable interest rate based on LIBOR. The executing agency is the Ministry of Economy and Finance of Panama.

UK Consults On Banks Tax Code

HM Revenue and Customs has issued a consultation document on strengthening the Code of

Practice for Taxation of Banks, focusing on the process around determining non-compliance, the processes and criteria around deciding to name a bank as non-compliant, and the nature of an annual report to be published by HMRC.

The Code, which was introduced in 2009, sets out that banks should have strong governance around tax, that they should follow "the spirit of the law" in addition to the letter, and that there should be a "mutually open and transparent" relationship with HMRC.

However, HMRC believes that the Code currently lacks public transparency, and that there are no codified consequences for non-compliance. Further, concerns have been raised that some banks may be interpreting the code differently, despite the consistent application of the Code by HMRC across the banking sector.

The strengthened Code will remain voluntary, but the Government intends in its Autumn Statement to publish a full list of those banks that have adopted it. Further, from 2015 there will be an annual list of banks that have adopted the code, and of those that have chosen not to.

The consultation document includes a number of questions. It asks whether it remains tenable for smaller banks to be required to adopt only Section 1 of the Code, which is concerned with transparency, and whether the three months or so before the Autumn Statement is a sufficient amount of time for banks to become fully appraised of, and satisfied with, the strengthened Code.

Further questions concern whether the proposals provide the necessary safeguards around the naming of non-compliant banks, whether the proposals offer sufficient transparency for the public around how the rules will operate, whether examples of transactions given by the HMRC provide sufficient guidance, and whether the draft legislation gives sufficient coverage.

The document also notes that requirements relating to tax planning under the Code will remain in place after the General Anti-Avoidance Rule (GAAR) is introduced. These requirements have a wider scope than the GAAR, and a designation of non-compliance will be made in relation to a transaction where the HMRC, having taken account of representations from the bank and advice from the GAAR Advisory Panel, has issued a notice of counteraction. The consultation asks whether naming such transactions as "potentially abusive" is an appropriate descriptor for transactions within the ambit of the GAAR.

HMRC says that the Code "has been a significant factor" in changing attitudes about tax avoidance. However, there was controversy in May when a High Court judge noted that HMRC had taken a threat from a bank to withdraw from the Code into consideration when deciding to write off a tax debt.

Hong Kong Tax Exemption Should Boost Hedge Funds

In a media interview, Philip Tye, Chairman of the Hong Kong branch of the Alternative Investment Management Association, which represents the hedge fund industry, confirmed that the extended tax exemption proposed in his last Budget by Financial Secretary John Tsang should strengthen Hong Kong's position as an international asset management center.

In an article on the website of the South China Morning Post, Tye said that "the proposed reform plans would now make Hong Kong more attractive for fund companies to domicile their funds here. This will create job opportunities and benefit the hedge fund industry as a whole."

To attract more private equity funds to Hong Kong, Tsang's proposal is to extend the profits tax exemption for offshore funds to include transactions directly in private companies that are incorporated or registered outside Hong Kong (for example in Mainland China) and do not hold any Hong Kong properties nor carry out any business in Hong Kong. That would allow private equity funds to enjoy the same tax exemption as offshore funds.

In addition, while, at present, investment funds established in Hong Kong can only take the form of trusts, the Government is considering legislative amendments to introduce the open-ended investment company into Hong Kong. That should also encourage more traditional mutual funds and hedge funds to domicile in Hong Kong.

ECJ Slams Belgium's 'Discriminatory' Savings Tax Perk

The European Court of Justice (ECJ) has found that Belgium's regime of granting tax exemption to savings account interest payments made by resident banks, and not to those made by non-resident financial institutions, is "discriminatory."

Article 21 of Belgium's Income Tax Code provides that income from capital and from moveable property shall not include the first tranche of EUR1,880 (USD2,485) per year of income from savings deposits received by credit institutions established in Belgium.

The ECJ ruled that the system constitutes a restriction on the free movement of capital and services under articles 56 and 63 of the Treaty on the Functioning of the European Union (EU).

The Court rejected Belgium's claim that the regime is vital for ensuring the effectiveness of fiscal supervision, arguing that Belgium now participates in the information exchange system of Directive 2003/48, which specifically enables the risk of tax evasion to be considerably reduced.

Furthermore, the ECJ ruled that the Commission had correctly observed that the risk of tax evasion "also exists in the situation where a taxpayer has two or more savings accounts with a bank established in Belgium and therefore in a purely domestic context."

The Commission argued: "Since taxpayers enjoy anonymity in relation to interest from a Belgian savings account, it would be sufficient, in order to be able to take advantage of the exemption at issue several times, that the taxpayer entrust his savings to several different banks. It follows from this that the risk of evasion or abuse, relied upon by the Belgian Government, is inherent in the national system of exemption and does not depend on the existence of a cross-border element."

The European Commission launched an infringement procedure against Belgium back in 2010. The Commission insists that the Belgian legislation infringes EU legislation as it has the effect of discouraging Belgian residents from using, for the management of savings accounts, the services of banks established in other member states of the European Union or in states, which are parties to the European Economic Area Agreement.

The Commission maintains that interest payments by such banks can never be exempt on the sole grounds that the debtor bank is not established in Belgium, even though that bank is able to fulfill the other conditions laid down in the Belgian legislation in question.

Commenting, the Belgian Finance Ministry underlined that need for the Government to "analyse in detail" the ECJ's ruling, before adopting its position. The Ministry explained that the consequences of the decision appear simple, namely that the tax regime applicable to savings account interest will have to be identical in future, irrespective of whether or not the interest is paid out by Belgian banks or by European banks, and whether or not they have a branch in Belgium. This will allow savers complete freedom when choosing where to invest their savings, the Ministry ended.

However, another alternative does exist, namely to repeal the regime altogether. Indeed, last month Belgium's Finance Minister Koen Geens called for an end to a highly popular savings tax break.

At the time, Finance Minister Geens insisted that savings account investments in Belgium are currently too heavily subsidized by the state. The Minister therefore advocated that the withholding tax exemption applicable to such accounts be abolished and that a withholding tax of 15 percent be imposed on classic savings accounts.

It is estimated that EUR240bn is currently invested in savings accounts in Belgium.

EC Says It Will Not Target Gibraltar's Gaming Regime

The European Commission has said that it will not target Gibraltar's online gaming operators in its crackdown on tax evasion, nor will it conduct an analysis of the impact of the territory's gambling industry on the European job market.

The statement was made in response to a complaint from Belgian MEP Marc Tarabella that Gibraltar's gaming companies engage in anti-competitive behavior.

Algirdas Šemeta, European Commissioner for Taxation, Customs, Anti-Fraud, Audit and Statistics, declared that "Member States are entitled to establish the tax regimes they see fit, so long as these comply with EU law."

He added: "The Commission is not currently taking any actions in the area of direct taxation specifically targeting online gambling operators established in Gibraltar, nor is the Commission planning to undertake an impact analysis of gambling operations in Gibraltar."

The news comes in the same week that Gibraltar's Chief Minister met British Prime Minister David Cameron at Downing Street. Commenting on the meeting, Chief Minister Fabian Picardo said: "Gibraltar has been one of the leaders in the fight against money laundering, tax evasion and fraud. Indeed, as far back as February 2002 Gibraltar committed itself to transparency and effective exchange of information to the OECD. Moreover, Gibraltar as an EU jurisdiction, already complies with all EU rules to combat money laundering, tax evasion and fraud. We therefore have nothing to fear and all to gain from international initiatives to stamp out tax evasion and we would be very pleased indeed to finally see a level playfield of all other relevant jurisdictions."

He went on to say: "In the run up to the G8 meetings, I have already written to the Prime Minister setting out Gibraltar's commitment to continue leading on this international agenda, including our transposition of the EU Directive on exchange of information on tax matters. We are also actively working on the OECD multilateral treaty on mutual administrative assistance in tax matters which has equivalent effect on an international basis."

Earlier this year Fabian Picardo, speaking to the European Parliament's Internal Market and Consumer Protection Committee, said that Gibraltar was leading the way in regulating the fast-growing gaming industry.

Antigua and Barbuda Approaches Joe Biden Over Gambling Dispute

Prime Minister of Antigua and Barbuda, Baldwin Spencer, said he came away from a recent meeting between leaders of the Caribbean Community and the Dominican Republic and US Vice President Joe

Biden encouraged about the prospects for an end to the cross-border gaming dispute between Antigua and Barbuda and the US.

Spencer urged Mr. Biden to use his influence in the Obama Administration to speedily bring the long-running trade dispute to a fair settlement.

"I came away from the meeting feeling more encouraged than I have before," Spencer said. "I think we were able to use the opportunity of this meeting with US Vice President Joe Biden to bring our case more sharply into focus with the US administration and to gain momentum for a final settlement."

The prime minister said he now expects that the negotiations under way with the US Trade Representative would accelerate and that new and innovative proposals would be tabled in the search for a solution.

The dispute began in 2003 following measures introduced by the United States affecting the cross-border supply of gambling and betting services. The WTO concurred with Antigua and Barbuda's argument that United States' legislation prohibiting the provision of overseas online gambling services contravened the nation's commitments under the General Agreement on Tariffs and Trade (GATT). In January of this year the WTO controversially authorized Antigua and Barbuda to retaliate by suspending its obligations to the US in respect of the Trade-Related Aspects of Intellectual Property Rights agreement.

It is said that the direct actions of the US reduced the remote gaming industry in Antigua, which had been estimated to be worth over USD3.4bn and was the country's second largest employer, from one providing 4,000 jobs to a sector with less than 500 jobs currently. Fees paid by the gaming industry to the government had helped to fund such public services as education and healthcare.

VAT Compliance Hurdles Stifling Intra-European Trade

Small businesses in the UK and across the European Union are being excluded from operating on a cross-border basis because of the complexity of European VAT systems, says a study from the Association of Chartered Certified Accountants.

To mark 40 years of VAT in the UK, the ACCA has produced an in-depth report that identifies that the various VAT rates and rules in each EU member state effectively block many small businesses from trading in the European single market due to the complexities of accounting for VAT across the soon-to-be-29 member states.

Chas Roy-Chowdhury, ACCA head of taxation, said: "VAT was supposed to be simple. In the UK alone it has become a complicated tax, but when you add in the various rates and exclusions that apply in the EU it becomes a maze. The real losers in this are small businesses and consumers. Efforts to increase small- and medium-sized enterprises' exports from the UK will always be stifled by the burden of the various value-added tax rates and exemptions across the European Union. It is the most business-unfriendly tax there is, while consumers are forced to pay higher prices for the instances of double taxation."

"It is encouraging that the EU Commission is trying hard to get member states to focus serious attention on the problems that exist. The Commission is trying to make the necessary VAT information available over the internet in multiple languages so that SMEs can more readily assess whether it is viable for them to operate outside their own home market. However, more needs to be done to ensure value-added tax is not a bar to operating on a cross-border basis for smaller businesses."

The report points out that rates vastly vary from country-to-country with Hungary charging 27 percent VAT, while Luxembourg sets VAT at 15 percent. However, the report suggests the real problem lies in the plethora of reduced rates and exemptions. A harmonized system for reduced rates at a common, low level would not only help reduce the complexity for small businesses, but would also reduce the opportunity for tax fraud and litigation, the ACCA suggests.

Roy-Chowdhury added: "Fraudsters have taken advantage of the multi-layered nature of VAT. They have found ways of obtaining a VAT refund without paying VAT themselves; they then disappear before the tax authorities can catch up with them. This is the so-called "missing trader" fraud problem. One simple way to stop compliant traders from being duped into trading with such fraudsters is by keeping them informed of high-risk businesses. That is, actually giving them names and details of these fraudulent businesses so that if the innocent business encounters them, its managers will know not to trade. The UK tax authorities are very good at passing on this type of information but in many other member states even if the information is known by the tax authorities it is not generally passed on."

Rajoy Rebuffs Brussels' Call For VAT Reform

Under pressure from the European Commission to undertake value-added tax reform, Spanish Prime Minister, Mariano Rajoy, has rejected calls to hike the nation's headline value-added tax (VAT) rate higher than 21 percent, and deferred a review of goods and services subject to concessionary rates.

The European Commission had urged Rajoy to consider a higher value-added tax rate as part of fiscal consolidation efforts, being negotiated after Spain was allowed an additional two years to bring the nation's deficit below the Maastricht Criterion of three percent of Gross Domestic Product, under the EU's excessive deficit procedure.

After rejecting a headline rate hike a day earlier, Rajoy stated that his government had no intention of undertaking an immediate review of goods subject to the nation's concessionary VAT rates of four percent and ten percent, but said the Government would investigate the matter in the future, potentially as part of fiscal consolidation plans being drafted for 2014.

Falling VAT Widens French Budget Gap

The French Finance Ministry has published an update on the country's budgetary situation as at April 30, 2013, highlighting the fact that weak tax revenue levels have impacted on the general budget deficit.

The general budget deficit stood at EUR66.8bn (USD88.3bn) as at the end of April 2013, compared to EUR59.9bn at the end of April 2012. According to the Finance Ministry, the EUR6.9bn widening of the deficit is attributable not only to various exceptional outlays, including payments to the European Stability Mechanism (EUR3.3bn) and to the European Investment Bank (EUR1.6bn), but is also due to lower than anticipated fiscal revenues.

As at April 30, 2013, general budget revenues (net of reimbursements and rebates) amounted to around EUR90.8bn. This compares to EUR91bn the same time last year. Although net fiscal income has therefore remained stable compared to last year, the level is slightly below the figure forecast in the Government's Stability Program. A recorded rise in income tax revenues was offset by a shortfall of revenues from net value-added tax (VAT) and from the domestic tax on the consumption of petroleum products (TICPE).

Lower consumption tax revenues are attributable to weak economic activity experienced at the beginning of the year.

The Finance Ministry's statistics show that revenue derived from income tax was up 11 percent at the end of April, compared to the same period in 2012, while income from VAT, the main source of state revenue, had fallen by 2.3 percent, corporate tax revenue had fallen by 5.8 percent, and TICPE revenues had dropped by 6.1 percent.

Although the Government had planned to reduce the public deficit to 3 percent of gross domestic in 2013, it has been forced to revise upwards this target figure to 3.7 percent, based on limited growth of 0.1 percent.

Israeli VAT Hiked To 18 Percent

Israel's value-added tax rate was hiked to 18 percent from 17 percent on June 2, 2013, after approval from the nation's parliament, the Knesset on May 29, 2013.

This is the third time in Israel's history that the nation has levied an 18 percent rate, mirroring decisions taken in 1991 and 2002, to assist in fiscal consolidation efforts.

Financial institutions will continue to be subject to the 17 percent rate, and goods and services supplied in Eilat will remain exempt.

The increase was passed despite several coalition government politicians, including the Finance Minister, being absent for the vote. It was passed by a majority of 45 to 18.

The hike was proposed in the nation's 2013-14 Budget, hot on the heels of the earlier one percent increase to Israel's headline VAT rate from 16 percent to 17 percent on September 1, 2012.

BELGIUM - ANTIGUA AND BARBUDA

Forwarded

Belgium's Council of Ministers on May 31, 2013, approved a law to ratify the TIEA signed with Antigua and Barbuda on December 7, 2009.

BELGIUM - VARIOUS

Forwarded

Belgium's Council of Ministers on May 31, 2013 approved two laws ratifying the DTA and an accompanying Protocol signed with the Seychelles, and a Protocol to the nation's DTA with the Czech Republic.

CANADA - BAHRAIN

Signature

Canada and Bahrain signed a TIEA on June 4, 2013.

ECUADOR - COSTA RICA

Signature

Ecuador and Costa Rica have recently signed a TIEA, Ecuador's Ministry of Foreign Affairs confirmed on June 5, 2013.

IRELAND - SAN MARINO

Into Force

According to preliminary media reports, the TIEA signed between Ireland and San Marino entered into force on May 12, 2013.

ITALY - SAN MARINO

Forwarded

An Italian Parliamentary finance committee on June 4, 2013, endorsed the DTA signed with San Marino as part of the nation's domestic ratification procedures.

JAPAN - SAMOA

Signature

Japan and Samoa signed a TIEA on June 4, 2013.

MALTA - MACAU

Signature

Malta and Macau signed a TIEA on May 30, 2013.

NORWAY - AUSTRIA

Into Force

The second Protocol to Norway's DTA with Austria entered into force on June 1, 2013.

NORWAY - BOTSWANA

Ratified

According to preliminary media reports, Norway on June 4, 2013, ratified the TIEA the nation had signed with Botswana.

QATAR - MALAYSIA

Ratified

The Qatari authorities endorsed Decree No 26 of 2013 on June 3, 2013, ratifying the Protocol to the nation's DTA with Malaysia signed on February 16, 2011.

SERBIA - MOROCCO

Signature

Serbia and Morocco signed a DTA on June 6, 2013.

UKRAINE - CYPRUS

Legislation

Ukraine's parliament voted against a law to terminate the nation's DTA with Cyprus on June 5, 2013.

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

THE AMERICAS

INDEPENDENCE IN A CAPTIVE MARKET

Darla Moore School of Business

Venue: Darla Moore School of Business, Charleston, 151 Market Street, Charleston SC 29401, USA

Key speakers: Michael D. Tarling (Assistant Treasurer, Risk Management and Insurance The Boeing Company), Ian Wrigglesworth (Managing Director, Guy Carpenter & co), Nicolas Depardey (Director of Insurance and Risk Management, Michelin), Dave Adams (Maiden Re), Anthony Valente (Maiden Re), Raymond G. Farmer (Director of Insurance, State of South Carolina), Bill Hodson (Executive Vice President, USA Risk Group Intermediaries) Gary Bowers (Partner, Johnson Lambert LLP)

6/20/2013 - 6/20/2013

http://mooreschool.sc.edu/executiveeducation/workshopsconferences/independenceinacaptivemarketreinsuranceseminar.aspx

REVENUE RECOGNITION ACCOUNTING UPDATE

AAC

Venue: Chicago Marriott Oak Brook, 1401 W. 22nd St., Oak Brook, IL 60523, USA

Key speakers: Tom Adams (KPMG), Chad Arcinue (Ernst & Young), John Benedetti (PwC), Renee Bomchill (Deloitte & Touche), Luke Cadigan (US Securities and Exchange Commission), Andreas Chrysostomou (Duff & Phelps), Wissam Dandan (Deloitte & Touche), Steve DiPietro (Deloitte & Touche), Jonathan Feig (Ernst & Young), Hank Galligan (BDO), among various others

6/20/2013 - 6/21/2013

http://www.allconferences.com/c/revenue-recognition-accounting-update-oak-brook-2013-june-20

CAPTIVE INSURANCE LANDSCAPE

DealFlow

Venue: The Westin Jersey City Newport, 479 Washington Blvd, Jersey City, NJ 07310, USA

Key speakers: John Capasso (Alvarez & Marsal Insurance Advisory Services), Gregg Sgambati (The New Jersey Captive Association), Harry

Baumgartner (Bressler, Amery & Ross), Donald McCully (Roundstone Management)

6/24/2013 - 6/24/2013

http://www.dealflowevents.com/conferences/Captive_2013/

INTERNATIONAL TAX ASPECTS OF FOREIGN CURRENCY TRANSACTIONS

TolleyConferences

Venue: Bloomberg BNA, 1801 S. Bell St., Arlington, VA 22202

Key speakers: John Bates (Ivins Phillips & Barker), Ramon Camacho (McGladrey), Michael Corrnett (KPMG), Kevin Cunningham (KPMG) Adam S. Halpern (Fenwick & West), Lucy Murphy (PwC), Susan Ryba (Baker & McKenzie), William R. Skinner (Fenwick & West), Adam Tritabough (McGladrey)

6/24/2013 - 6/25/2013

http://www.bna.com/uploadedFiles/Content/Events_and_Training/Live_Conferences/Tax_and_Accounting/Conferences_-_Seminars/JuneDC.pdf

THE 3RD ANNUAL PRIVATE EQUITY OPERATIONS AND COMPLIANCE

Financial Research Associates

Venue: The Princeton Club, 15 West 43rd Street, New York, NY 10036

Chair: Karl J. Jordan (Domestic & International Tax Principal, Joseph Decosimo and Co)

6/24/2013 - 6/25/2013

http://www.frallc.com/conference.aspx?ccode=B874

8TH ANNUAL US TAXATION OF INTELLECTUAL PROPERTY

BNA Bloomberg

Venue: Bloomberg LP, 731 Lexington Ave, New York, NY 10022, USA

Co-chairs: Rob Bossart (Rob Bossart), Paulus Merks (DLA Piper LLP)

6/24/2013 - 6/25/2013

http://www.mayerbrown.com/en-US/Bloomberg-BNA-8th-Annual-US-Taxation-of-Intellectual-Property-06-24-2013/

BASICS OF INTERNATIONAL TAXATION 2013

Practising Law Institute

Venue: PLI New York Center, 810 Seventh Avenue at 53rd Street (21st floor), New York, New York 10019

Chair: Linda Carlisle (White & Case LLP)

7/23/2013 - 7/24/2013

http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2013/_/N-4kZ1z12p29?ID=158672

THE HEDGE FUND ACCOUNTING AND COMPLIANCE FORUM

Financial Research Associates

Venue: The Princeton Club, NYC, 15 West 43rd Street, New York, NY 10036, USA

Chair: Karl Jordan (Principal, Joseph Decosimo and Co)

7/25/2013 - 7/26/2013

http://www.frallc.com/conference.aspx?ccode=B876

VCIA'S 28TH ANNUAL CONFERENCE

Vermont Captive Insurance Association

Venue: The UVM Davis Center, Main Street, Burlington, Vermont, USA

Key speakers: Frank Nutter (President, Reinsurance Association of America), among others

8/13/2013 - 8/15/2013

http://www.vcia.com/annualconference/

ASIA PACIFIC

POTENTIAL USES OF OFFSHORE TRUSTS

STEP Malaysia

Venue: Sasana Kijang, 2 Jalan Dato' Onn, Kuala Lumpur, Malaysia

Chairpersons: Saiful Bahari Baharom (Chief Executive Officer, Labuan IBFC), Raymond Wong (Chairman, Society of Trust and Estate Practitioners Malaysia)

6/19/2013 - 6/19/2013

http://www.step.org/events.aspx?eventId=a0XC000000AzGNKMA3

NATIONAL TAX CONFERENCE 2013 MALAYSIA

Chartered Tax Institute of Malaysia

Venue: Kuala Lumpur Convention Centre, Kuala Lumpur, Selangor, Malaysia

Chair: SM Thanneermalai (President, Chartered Tax Institute of Malaysia)

6/24/2013 - 6/25/2013

http://www.ibfd.org/IBFD-Tax-Portal/Events/National-Tax-Conference-2013-Malaysia

THE 4TH OFFSHORE INVESTMENT CONFERENCE SHANGHAI 2013

Offshore Investment

Venue: Pudong Shangri-La, 33 Fu Cheng Road, Pudong, Shanghai 200120, China

Chair: Michael Olesnicky (Baker & McKenzie Hong Kong)

6/26/2013 - 6/27/2013

http://www.hg.org/legal-events.asp?action=page&pcomp=9088

FINANCIAL REPORTING AND COMPLIANCE

Achromic Point

Venue: The Oberoi, 37-39, Mahatma Gandhi Road, Bangalore 560001, India

Key speakers: TBA

6/27/2013 - 6/27/2013

http://www.achromicpoint.com/upcomingevent.php?id=118

INDONESIA: INVESTMENT AND TAXATION

IBFD

Venue: Novotel Singapore Clarke Quay, 177A River Valley Road, Singapore 179031

Key Speakers: Andreas Adoe (IBFD), Pieter de Ridder (Loyens & Loeff)

7/3/2013 - 7/4/2013

http://www.ibfd.org/Courses/Indonesia-Investment-and-Taxation

9TH INTERNATIONAL SPECIAL ECONOMIC ZONES

ASSOCHAM

Venue: Hotel Le Meridien, Windsor Place, New Delhi 110001, India

Key speakers: TBA

7/26/2013 - 7/26/2013

http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDgQFjAB&url=http%3A%2F%2Fwww.assocham.org%2Fdownloads%2F%3Ffilename%3DSEZ-2013-Brochure.pdf&ei=bZWQUay0MsnZPKyfgBA&usg=AFQjCNH5Y6ZCrGW4VmIcATZ0LNQ0BJmxyw&sig2=T9cczo_kqKIJ_Bs0zb7DFw&bvm=bv.46340616,d.ZWU

GETTING WITHHOLDING TAX & TREATIES ESSENTIALS RIGHT

CCH

Venue: Concorde Hotel, Kuala Lumpur, Wilayah Persekutuan, Malaysia

Chair: Kularaj K. Kulathungam (former Assistant Director of Inland Revenue Board, Philippines)

8/5/2013 - 8/5/2013

http://www.cch.com.my/my/ExecutiveEvents/ExecutiveEventDetails.aspx?PageTitle=FasTax-Series-Getting-Withholding-Tax---Treaties-Essentials-Right&ID=1673&EETopicID=3&Source=EETopic

INTERNATIONAL CONFERENCE ON EMERGING TRENDS IN FINANCE & ACCOUNTING 2013

SDM Institute for Management Development

Venue: SDM Institute for Management Development, 1 Chamundi Hill Road, Kurubarahalli, Mysore, Karnataka 570011, India

Key speakers: TBA

8/9/2013 - 8/10/2013

http://sdmimd.ac.in/financeconference2013/ConferenceThemes.html

INTERNATIONAL TAX ASPECTS OF MERGERS, ACQUISITIONS AND CORPORATE FINANCE

IBFD

Venue: Novotel Singapore Clarke Quay, 177A River Valley Road, Singapore

Key speakers: Michael Butler (Finlaysons), Ruxandra Vlasceanu (Research Associate, IBFD), Chris Woo (PwC Singapore)

8/19/2013 - 8/21/2013

http://www.ibfd.org/Courses/International-Tax-Aspects-Mergers-Acquisitions-and-Corporate-Finance-0

CENTRAL AND EASTERN EUROPE

INTERNATIONAL WEALTH FORUM 2013

Bosco Conference

Venue: Swissotel Tallinn, Tornimae Street 3, 10145 Tallinn, Estonia

Key speakers: TBA

9/9/2013 - 9/10/2013

http://bosco-conference.com/en/events/upcoming/tallinn-2013

WESTERN EUROPE

ICAEW TAX FACULTY CONFERENCE 2013

TolleyConferences

Venue: ICAEW, Moorgate Place, London EC2R 6EA, UK

Chair: Rebecca Benneyworth (Chairman Elect, ICAEW Tax Faculty)

6/14/2013 - 6/14/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/Icaew-Tax-Faculty-Conference-2013-London/?displayControl=overview

TRANSCONTINENTAL TRUSTS 2013

IIR & IBC Finance Events

Venue: Grand Hotel Kempinski Geneva, Quai du Mont-Blanc 19, 1201 Geneva, Switzerland

Chairman: Richard Hay (Partner, Stikeman Elliot)

6/19/2013 - 6/20/2013

http://www.iiribcfinance.com/event/Transcontinental-Trusts-Conference

OFFSHORE TAX AND TRUST FORUM ISLE OF MAN

TolleyConferences

Venue: Isle of Man, TBA

Key speakers: Giles Clarke (Author, Offshore Tax Planning), John Barnett (Partner, Burges Salmon), Gregory Jones (Tax Director, KPMG), George Sharpe (Tax Director, PwC), John Rimmer (Partner, Appleby), Guy Wiltcher (Partner, Greystone LLC)

6/20/2013 - 6/20/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/Offshore-Tax-And-Trust-Forum-Isle-Of-Man/?displayControl=overview

PRACTICAL APPLICATION OF TAX TREATIES

IBFD

Venue: IBFD head office, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands

Key speakers: Roberto Bernales (IBFD), Bruno da Silva (Loyens & Loeff), Jan de Goede (Senior Principal, Tax Knowledge Management, IBFD), Ridha Hamzaoui (IBFD), Bart Kosters (IBFD)

6/24/2013 - 6/27/2013

http://www.ibfd.org/Courses/Practical-Application-Tax-Treaties

TAX PLANNING FOR CORPORATE RESTRUCTURING

TolleyConferences

Venue: London, UK, TBA

Chairperson: Martin Moore QC (Barrister, Erskine Chambers)

6/26/2013 - 6/26/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/Tax-Planning-Corporate-Restructuring--Insolvency/

THE CYPRUS BAIL-OUT AND FOREIGN CLIENTS

Academy Finance

Venue: Hotel Beau Rivage, Quai du Mont-Blanc 13, 1201 Geneva, Switzerland

Key speaker: Charilaos Stavrakis (former Vice-President of the Eurogroup)

6/26/2013 - 6/26/2013

http://www.academyfinance.ch/v2/next_events/AF466.pdf

FUNDS TAXATION IRELAND 2013

Infoline

Venue: Dublin IFSC, Dublin, Ireland, TBA

Key speakers: Kate Levey (Financial Policy Division, Irish Department of Finance), Jim Byrne (Corporate Business and International Division, Revenue Commissioners)

6/26/2013 - 6/26/2013

http://www.infoline.org.uk/event/Fund-Tax-Ireland-Conference

IFRS FOUNDATION CONFERENCE: AMSTERDAM

IFRS

Venue: NH Grand Hotel Krasnapolsky, Dam 9, Amsterdam 1012 JS, The Netherlands

Chair: Hans Hoogervorst (Chairman, IASB)

6/27/2013 - 6/28/2013

http://www.iiribcfinance.com/download/send-file/iddownload/9029

INNOVATIVE FINANCIAL PRODUCTS

IBFD

Venue: IBFD head office, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands

Key Speakers: Severine Baranger (Loyens & Loeff), Floris Andriessen (KPMG), Peter Drijkoningen (BNP Paribas), Shee Boon Law (Manager, Tax Research Services, IBFD), Roger Smith (independent trader), Eelco van der Stok (Freshfields Bruckhaus Deringer), Bob van Kasteren (Freshfields Bruckhaus Deringer)

7/1/2013 - 7/1/2013

http://www.ibfd.org/Courses/Innovative-Financial-Products

WORLD FINANCE CONFERENCE

World Finance Conference

Venue: Amathus Beach Hotel Limassol, Amathus Ave, Limassol 3606, Cyprus

Key speaker: Richard Brealey (Emeritus professor of finance, London Business School)

7/1/2013 - 7/3/2013

http://www.lawyersincyprus.com/seminar/world-finance-conference

FINANCIAL SERVICES AND FATCA

TolleyConferences

Venue: London, UK, TBA

Chairperson: Malcolm Powell (Head of Tax, Investec Asset Management)

7/3/2013 - 7/3/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/FStax2013/

TAXATION OF HIGH NET WORTH INDIVIDUALS

IBFD

Venue: IBFD head office, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands

Chairperson: Bart Kosters (Senior Principal Research Associate, IBFD Tax Services Department)

7/8/2013 - 7/9/2013

http://www.ibfd.org/Courses/Taxation-High-Net-Worth-Individuals

CREATING A BEST IN CLASS TAX FUNCTION

IBC

Venue: The Hatton, 51-53 Hatton Garden London EC1N 8HN

Key speakers: Ruth Felsing (Global Head of VAT/GST-Taxation, American Express Services), Yiannis Poulopoulos (General Manager, Global Indirect Taxes, Rio Tinto), Darren Mellor-Clark (Partner Head of Indirect Tax Advisory, Pinsent Masons LLP), Michael Dong (Director of Tax, Sega of America), Philip Geddes (Head of Tax, Europe, Sun Life Financial of Canada), among others

7/9/2013 - 7/9/2013

http://www.iiribcfinance.com/event/Operational-Tax-Conference

HMRC AND HIGH NET WORTH INDIVIDUALS

IBC

Venue: The Hatton, 51-53 Hatton Garden, Clerkenwell, London EC1N 8HN

Chair: Jonathan Levy (Partner, Reynolds Porter Chamberlain)

7/9/2013 - 7/9/2013

http://www.iiribcfinance.com/appdata/downloads/HMRC-and-HNWIs/Final_HMRC_FKW52582_Brochure.pdf

TAXATION ISSUES IN THE BOARDROOM

TolleyConferences

Venue: London, UK, TBA

Key speakers: Vanessa Houlder (Financial Times Journalist), Neil Sharmen (Head of Group Tax at Brit Insurance), among others

7/9/2013 - 7/9/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/Taxation-Issues-In-The-Boardroom-Jul-13/

OFFSHORE TAX PLANNING BUDGET AND FINANCE BILL SPECIAL

IBC

Venue: Central London, UK, TBA

Key speakers: Patrick C Soares (Gray's Inn Tax Chambers), Giles Clarke (Author, Offshore Tax Planning), Michael Flesch (Gray's Inn Tax Chambers), Emma Chamberlain (Pump Court Tax Chambers)

7/11/2013 - 7/11/2013

http://www.iiribcfinance.com/download/send-file/iddownload/9058

TRANSFER PRICING AND INTRA-GROUP FINANCE

IBFD

Venue: IBFD head office, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands

Key speakers: Michel van der Breggen (PwC), Danny Oosterhoff (Ernst and Young), Antonio Russo (Baker & McKenzie)

7/11/2013 - 7/12/2013

http://www.ibfd.org/Courses/Transfer-Pricing-and-Intra-Group-Finance

TRANSFER PRICING AND INTANGIBLES

IBFD

Venue: IBFD head office, H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands

Key speakers: Anuschka Bakker (IBFD), Giammarco Cottani (European Tax College, Leuven), Monica Erasmus-Koen (PwC), Danny Houben (Global Transfer Pricing Manager with Shell International BV), among numerous others

9/2/2013 - 9/2/2013

http://www.ibfd.org/Courses/Transfer-Pricing-and-Intangibles#tab_program

CORPORATE TAX REFORM

TolleyConferences

Venue: Halsbury House. 35 Chancery Lane, London WC2A 1EL, UK

Key speakers: TBA

9/12/2013 - 9/12/2013

http://www.conferencesandtraining.com/en/Browse-Events/tax-conferences/Corporate-Tax-Reform/

PRACTICAL APPLICATION OF THE STATUTORY RESIDENCE TEST

IBC

Venue: Millennium Gloucester Hotel, 4-18 Harrington Gardens, Harrington Gardens, London

Key speakers: Emma Chamberlain (Pump Court Tax Chambers), Patrick Way (Gray's Inn Tax Chambers), Peter Vaines (Squire Sanders), Keith Gordon (Atlas Chambers), among numerous others

9/12/2013 - 9/12/2013

http://www.iiribcfinance.com/download/send-file/iddownload/9871

BANK INTERNAL FUNDS TRANSFER PRICING

British Banking Association

Venue: Pinners Hall, 105-108 Old Broad Street, London, EC2N 1EX

Chair: Moorad Choudhry (Treasurer, Corporate Banking Division at The Royal Bank of Scotland)

9/16/2013 - 9/16/2013

http://www.bba.org.uk/events-and-training/event/bank-internal-funds-transfer-pricing-ftp

THE CHANGING FACE OF CROSS BORDER INSOLVENCY AND RESTRUCTURING

Mourant Ozannes

Venue: Bishopsgate Institute, 230 Bishopsgate, London EC2M 4QH, UK

Co-chairs: Michael Crystal QC (South Square), Robert Shepherd (Senior Partner, Mourant Ozannes)

9/19/2013 - 9/19/2013

http://www.mourantozannes.com/events-seminars/other-events/the-changing-face-of-cross-border-insolvency-and-restructuring.aspx

THE AMERICAS

Canada

A listing of key international tax cases in the last 30 days

The Supreme Court of Canada heard an appeal from a company, DMI, that had sold two forest tenures, with both sales agreements imparting upon the purchaser the obligation to reforest the areas harvested. The Revenue however assessed the company for the tax on the costs of reforestation under national law. The company brought the issue to the Tax Court, which stated that the reforestation obligation had been a part of the transaction and was included in the price paid by the purchaser. However, the Court ruled that the company was obliged to include in its proceeds the estimated cost of reforestation after 12 months following the sale, plus 20 percent of the remaining amount.

The Federal Court of Appeal disagreed with this point and decided that the company should have been responsible for the entire estimated cost of reforestation, given that the amount was the value included in the sales agreement. Likewise, because a value was not agreed upon in the second sale, the Court of Appeal recommended that the matter be considered again by the Tax Court.

The Supreme Court was to consider whether the reforestation obligation was included in the price paid for the forest tenure, and if any meaning was to be given to the specific value included in the first sales agreement. It pointed out that the company had to obtain permission from the provincial government to sell its forest tenures, and that to be granted permission the purchaser had to assume the reforestation liability. Therefore the obligation was tied to the sale of the tenures as a future expense rather than being separately included in the agreement, and the Supreme Court rejected the argument "that the purchasers' assumption of the reforestation obligations had to be added to DMI's proceeds of disposition for income tax purposes."

The judgment was delivered on May 23, 2013.

http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/13071/index.do

Supreme Court: *Daishowa-Marubeni International Ltd. v. The Queen (SCC 29)*

Canada

The Tax Court of Canada heard an appeal from a Canadian corporate taxpayer that had received dividends as a result of an affiliated company in the United States receiving loan interest from another related US company. The taxpayer sought to deduct the dividends from their taxable income, but the Minister of National Revenue accused the taxpayer of tax avoidance through the use of their ownership in the US company paying the dividends. The Minister did not acknowledge the connection between the taxpayer and the paying company, and therefore refused the deductions in the reassessment.

The taxpayer argued for a narrow interpretation of the anti-avoidance law, in that simply acquiring shares in the US company, isolated from the series of transactions involving loan interest and dividends, did not immediately suggest an intent to avoid tax in the specific manner prescribed by the law. The taxpayer also pointed out that the dividend deductions could have been obtained even if the taxpayer had not bought shares in the US company. The Revenue disagreed with both of these contentions.

The Tax Court stated that the overall purpose of the other transactions may be relevant in discovering the purpose of one specific transaction, and that the law is not so narrow as to limit the circumstances under which an acquisition of shares might have been used to avoid tax. To discover the purpose of the connection between the taxpayer and the US company that paid the dividends subject to tax deduction, the Court considered whether tax had been avoided through the acquisition of the shares.

The taxpayer argued, and the Court agreed, that the test for whether tax would have been payable without the share acquisition was a comparison with an alternative series of transactions without the acquisition. The Court found that the tax benefit could have been received without the acquisition of the shares, and therefore there was no instance of tax avoidance. The taxpayer was permitted to deduct the dividends paid by the US company.

The judgment was delivered on May 29, 2013.

http://decision.tcc-cci.gc.ca/en/2013/2013tcc176/2013tcc176.html

Tax Court: *Lehigh Cement Limited v. The Queen (TCC 176)*

United States

The United States Tax Court heard a motion for summary judgment from a taxpayer who was a resident of the US Virgin Islands and held an interest in a domestic partnership. The taxpayer filed his tax returns with the Virgin Islands Revenue; however the IRS argued years later that the partnership was not valid, that the taxpayer had failed to properly identify all sources of income, and that the returns should have been filed with the IRS.

The IRS made adjustments to negate the tax benefits the taxpayer received from the Virgin Islands on account of the partnership; the taxpayer objected and brought the motion before the Tax Court.

The Court acknowledged that the success of the taxpayer's motion depended on whether he properly filed the required returns with the Virgin Islands Revenue, and that it was required under law to assume that income from the partnership was not suitably recorded in the submitted returns.

The IRS attempted to rely on case law and its own notices to argue that the taxpayer was considered a US resident living abroad and was required to file a tax return with them, but the Court disagreed entirely with their interpretation of the law. It stated that the taxpayer had no reason to consider himself living abroad, that the necessary returns filed with the Virgin Islands Revenue mirrored the returns required by the IRS, and that their notices were published after the taxpayer filed his returns and did not have retroactive effect.

Because the taxpayer correctly filed his tax returns with the Virgin Islands Revenue, despite the matter of income from the partnership being left unresolved, the Court granted his motion for a summary judgment against the tax adjustments, by reason that the notice was issued by the IRS more than three years after the properly filed tax returns and was therefore invalid.

The judgment was delivered on May 22, 2013.

http://www.ustaxcourt.gov/InOpHistoric/AppletonDivJacobs.TC.WPD.pdf

Tax Court: *Arthur I. Appleton Jr. et al. v. Commissioner (140 T.C. No. 14)*

United States

The United States Tax Court heard the case of a taxpayer who excluded income on his tax return resulting from time spent working at US Air Force bases in Iraq and Afghanistan as foreign earned income. The Commissioner disallowed the tax exclusions; the burden of proof was on the taxpayer to justify the claim.

The taxpayer was unable to argue that he had a tax home in a foreign country, due to his strong ties with the United States while abroad, and despite his primary place of business being in a foreign country. He failed to prove that he lived abroad for longer than a tax year or the amount of time specified in the law, and even provided his American address on the tax returns that petitioned for the foreign income exclusion. The Tax Court ruled that the taxpayer was not eligible for the tax exemption on foreign earned income.

As an afterthought, the Court pointed out that the taxpayer could not have had his income excluded from tax as a result of him leaving "such foreign country because of war, civil unrest, or similar adverse conditions in such foreign country which precluded the normal conduct of business" under the law, because in 2008 (one of the years for which tax exemption is claimed for) the list published by the Secretary denoting such countries did not include either Iraq or Afghanistan.

The judgment was delivered on June 6, 2013.

http://www.ustaxcourt.gov/InOpHistoric/DalyMemoKerrigan.TCM.WPD.pdf

Tax Court: *James F. Daly et ux. v. Commissioner (T.C. Memo. 2013-147)*

ASIA PACIFIC

India

The Special Bench of the Mumbai Income Tax Appellate Tribunal was consulted during proceedings concerning a UK law firm, Clifford Chance, partners of which had occasionally provided services relating to projects in India.

The firm had no branches in India, but when Clifford Chance representatives were in the country for longer than 90 days, the Assessing Officer considered that this constituted a permanent establishment (PE) there.

The assessee claimed that Clifford Chance employees should be subject to beneficial provisions contained in the UK-India DTA, and that therefore only services actually rendered in India should be subject to Indian tax; the Revenue claimed that (due to the PE), all receipts relating to the Indian projects should be subject to income tax, and that furthermore, the DTA provisions (which related to the tax treatment of fees paid to individuals) did not apply.

The company appealed against the assessment, and the Commissioner of Income Tax (Appeals) (CIT(A)) agreed that there was no creation of a permanent establishment, and that the company was not liable for tax in the years when their employees spent less than 90 days in India. It based its decisions on an earlier Tribunal judgment.

The Revenue then appealed to the Tribunal on the basis that the previous Tribunal decision which benefited the company involved a law that had since been amended with retroactive effect, which the Revenue insisted made all services received in India taxable regardless of where they were rendered. The company argued that the amendment did not affect the specific law that exempted their services from tax liability. The Tribunal asked the Special Bench whether the amendment to the law affected the company's tax liability in India, and for an interpretation of the tax treaty regarding the taxability of services rendered outside of India.

The Special Bench considered whether the company's income in India took the form of fees for technical services and whether it was therefore affected by the change in the law, as claimed by the Revenue. It concluded that the matter of the income being fees for technical services was not addressed by either the earlier Tribunal decision or the CIT(A), and did not factor into the tax officer's assessment, and therefore there was no reason to consider the company's income as such.

The Special Bench then undertook an interpretation of the UK-India tax treaty with regard to the UN Model Convention brought up during the Tribunal proceedings. It found that the language of the treaty was sufficiently different from the UN model so as to distance it from the concept of all business activities being taxed in the receiving country despite not being tied to the permanent establishment there. The conclusion was that only income attributable to the business carried out by the permanent establishment can be taxed in the source country.

The answers provided by the Special Bench produced a strong case for the company's assertion that only income resulting from employees providing services in India was taxable. However, the Special Bench was not asked to consider whether the employees stayed for longer than 90 days or whether a permanent establishment was created; these questions were left for the Tribunal to consider, with regard to the Special Bench's deliberations.

The judgment was delivered on May 13, 2013.

http://www.itatonline.in:8080/itat/upload/785077208211983070913$5%5E1REFNOMicrosoft_Word_-_Clifford_Chance_-_Spl._bench__1.5_Space_.pdf

Income Tax Appellate Tribunal (Special Bench): *Clifford Chance v. Asst. DIT (ITA 3021/MUM-2005)*

WESTERN EUROPE

Hungary

The European Court of Justice was asked for a preliminary ruling regarding the repayment of VAT to a company which had been denied the right to deduct VAT under legislation that was found to be incompatible with EU law. The company had requested state aid for a subsidized project, which was calculated based on the ''eligible expenditure' of the project including VAT, despite the law not allowing for the deduction of VAT pertaining to the amount of the aid.

After a European Court case whereby a national law that only allowed the deduction of VAT proportionate to the costs not provided for by State aid was found to be incompatible with EU law, the company surmised that it could deduct the entire amount of VAT arising from the project and sought to re-negotiate the State aid based on the VAT that had been non-deductible until the result of the case.

The institution providing the aid refused to re-negotiate, and so the company approached the tax authority with a claim for the repayment of VAT that it had not been allowed to deduct prior to the case. The first judgment allowed the repayment of VAT proportionate to the amount of aid received rather than to the full cost of the project; the second judgment adhered to the case decided in the European Court and insisted that the full amount of VAT relative to the cost of the project be repaid. The tax authority appealed on the basis that a part of the VAT the company sought to recover had been included in the amount of aid it had received, while the company took it upon itself to argue that not being paid the total amount of deductible VAT was against EU law; therefore the court consulted the ECJ.

The ECJ considered whether a Member State is allowed under EU law to limit the amount of repayable tax when the taxpayer had received aid provided by the State. It established that a taxpayer has the right to be refunded any tax that had been incorrectly paid in breach of EU law, but that the repayment of tax must not constitute unjust enrichment of the taxpayer due to circumstances where the taxpayer had somehow offset or recovered the tax paid, and that national law has the power to limit the repayment claim of a taxpayer in such a situation.

The ECJ concluded by pointing out that the taxpayer had received a greater amount of aid due to the inclusion of the non-deductible VAT in the calculation than it would have if the VAT had been deductible from the beginning; therefore in order for the taxpayer to be adequately compensated but not unjustly enriched, the repayment amount should be the difference between the VAT that the company should have been allowed to deduct and the extra amount of aid it received due to the VAT being non-deductible.

The Court stated in conclusion that:

"The principle of repayment of taxes levied in a Member State in infringement of the rules of EU law must be interpreted as meaning that it does not preclude that State from refusing to repay part of the value added tax, the deduction of which had been precluded by a national measure contrary to European Union law, on the ground that that part of the tax had been subsided by aid granted to the taxable person and financed by the European Union and by that State, provided that the economic burden relating to the refusal to deduct value added tax has been completely neutralised, which is for the national court to determine."

The judgment was delivered on May 16, 2013.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=137423&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2973965

European Court of Justice: *Alakor Gabonatermelo és Forgalmazó Kft. v. Hungary (C-191/12)*

Netherlands

The European Court of Justice was asked for a preliminary ruling during proceedings at the Supreme Court of the Netherlands where the tax authority was appealing a Court of Appeal decision that a taxpayer acting as a trader could deduct the VAT imposed on a transfer of shares. The Supreme Court instead considered that the transfer was an economic activity that was exempt from VAT, but was aware that in a past case the ECJ had stated that VAT may be chargeable "where that disposal may be regarded as equivalent to the transfer of a totality of assets or part thereof". The Supreme Court therefore addressed the ECJ concerning this matter, with regard to the facts of the present case.

The ECJ first stated that according to case law a transfer of shares cannot be regarded as a "transfer of a totality of assets" when it is not sufficient enough to establish an independent economic activity that can be carried out by the transferee. It then considered whether the fact that the total shares of a company were being transferred to a single entity by companies including the taxpayer had any impact on the Court's deliberations. The decision was that each transaction must be assessed separately, and that the transfer of a full company by a number of shareholders does not qualify as a "transfer of a totality of assets".

The ECJ ruled in conclusion that:

"Articles 5(8) and/or 6(5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the disposal of 30% of the shares in a company to which the transferror supplies services that are subject to VAT does not amount to the transfer of a totality of assets or services or part thereof within the meaning of those provisions, irrespective of the fact that the other shareholders transfer all the other shares in that company to the same person at practically the same time and that that disposal is closely linked to management activities carried out for that company."

The judgment was delivered on May 30, 2013.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=137829&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=65291

European Court of Justice: *Netherlands v. X BV (C-651/11)*

Romania

The European Court of Justice was asked for a preliminary ruling during proceedings at the Oradea Court of Appeal where a company which had been denied reimbursement of excise duties that it had paid in Romania argued that the law required the request for reimbursement to be made after the products it had exported had arrived at their destination, due to the information that was necessary for the request to be made. The tax authority insisted that it could not accept the request according to EU law precisely because the products had already entered another Member State. The Court of Appeal therefore petitioned the ECJ for an interpretation of the law.

The reimbursement of excise duties is allowed under EU law for the sake of harmonisation and to prevent double taxation by ensuring that excise duties are only levied in one Member State.

The ECJ identified two different methods of reimbursement under EU law, and found that Romanian law appears to only incorporate one of them;

namely the method that requires the request for reimbursement to be made before the goods are dispatched as part of a suspension agreement, and before excise duties are paid in the destination State.

The second method however, does not impose a time for the request to be made; the requirement for reimbursement is that the excise duties have been paid in the destination State. The ECJ stated that the national court was responsible for deciding in which way EU law had been implemented in national law, and which provisions applied to the present case.

The conclusion from the ECJ was that when excise duty has been paid in the destination State, the request for reimbursement from the source State cannot be refused simply because the request was made after the products were dispatched, according to the second method of reimbursement under EU law. When the duty has not been paid in the destination State, the request may be refused due to a failure to follow the procedure required by the first method.

The judgment was delivered on May 30, 2013.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=137825&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=107934

European Court of Justice: *Scandic Distilleries v. Romania (C-663/11)*

Dateline June 13, 2013

It's not fair, is it, at least not judged from the perspective of say a jobless Greek or Italian home owner, that the United States real estate market seems to be back in rude health less than five years after mortgage-linked CDOs nearly brought the global house of financial cards crashing to the ground. Yet the picture in the US looks more positive than it has done than at any time in the last five or six years: metropolitan area median home prices continued to rise in the first quarter of 2013, with the national gain showing the best year-over-year performance in over seven years, according to the latest quarterly report by the National Association of Realtors. The median existing single-family home price rose in 133 out of 150 metropolitan statistical areas (MSAs) based on closings in the first quarter of 2013 compared with first quarter last year, while 17 areas had price declines. At the end of the first quarter there were 1.93 million existing homes available for sale, which is 16.8 percent below the close of the first quarter of 2012, when 2.32 million homes were on the market. In the fourth quarter of 2012 the median price rose 10.0 percent from a year earlier. In March 2013, the Bank of America revised upwards its house price forecast for 2013 from 4.7 percent growth to 8 percent growth. At around the same time, JP Morgan doubled its prediction for house price growth to 7 percent, and it anticipates 14 percent growth by the end of 2015. It remains to be seen though whether reality meets the banks' expectations. The only thing that might dent the animal spirits that are propelling the market upwards would be if the mortgage interest deduction was to be removed; but according to a new study from the Urban-Brookings Tax Policy Center, there is no chance at all of that happening.

Now I'm going to surprise you, saying something good about bête noire Algirdas Šemeta, European Commissioner for Taxation, Customs, Anti-Fraud, Audit and Statistics, who has often figured negatively in this column. Well, he has slapped down a Belgian MEP who wanted him to investigate Gibraltar's e-gaming industry, which has been one of the Rock's success stories as it struggles to scrape a living under the lowering glare of "neighbor" Spain, which has trouble accepting the conclusions of the Treaty of Utrecht, which allocated Gibraltar to England "in perpetuity" a mere 300 years ago this year. I wonder if the Gibraltarians will be celebrating? At home, and very quietly, if they have any sense. Anyway, it's good news about the gaming, and let's hope that Šemeta is equally resistant to equivalent siren calls regarding Malta's even more successful gaming regime from the growing number of EU Member States, including the UK, Greece, Spain itself and many others, which are operating illiberal and almost certainly illegal e-gaming regimes under the selectively sensitive noses of the Commission and the European Court of Justice. All countries have got their peculiarities, and they should be allowed to benefit from them: the Dutch have got their water (tulips), the Greeks have got their islands (tourism), the Danish have got their grass (butter) and Malta, which like Gibraltar is mostly made of rock, has got its wits.

Speaking of Mr. Šemeta, he hasn't had a good week on the dossier which must be keeping him awake at night, which is needless to say the Financial Transactions Tax. He began the week with a ritual denial that the tax was to be scaled back – well he would, wouldn't he – and then took a series of body blows from opponents of the tax, beginning with another attack from the UK when George Osborne (bonus point for him) wrote scathingly to Guido Ravoet, Chief Executive of the European Banking Federation (EBF), calling the tax "poorly designed, badly-timed, and, we believe, unlawfully extraterritorial." Then, from an unexpected quarter, came another blow when Gérard Mestrallet, the president of financial markets organization Paris Europlace, told French Finance Minister Pierre Moscovici about his concerns about the future of the Paris financial center, and stressed his opposition to the tax.Mestrallet warned of the "devastating risks" of the European Commission's plans for an EU FTT, saying that, in its current form, the proposal would have "systemic effects," not only on all financial activities in Europe, with the risk of a relocation of activities outside of Europe, to the benefit of international competitors, but also on corporate financing, including the financing of small- and medium-sized companies and intermediate-sized companies.

Beginning the negative section of the column under the heading of "silly" we have the Philippines indulging in a piece of top-down bureaucratic craziness which will be as ineffective as it is irksome. There is a – widely ignored – system of "official receipts" (ORs) which have to be issued in respect of every transaction worth more than – wait for it – sixty US cents – yes, you can believe your eyes – and needless to say there is a thriving black market in ORs, many of which date back to the 1970s, since it is the ORs, and only the ORs, which entitle you to an income tax deduction. I think I've got it right. Anyway, they should simply scrap the whole lunatic system and allow normal commercial practices to take over instead, as is the case almost everywhere else in the world, instead of which, yes, they are scrapping the system, but only to reinvent it with a whole new batch of replacement ORs. The only people who benefit from the existing system are the golden boys who have official permits to print ORs: while in say France or Russia it's the notaries whose palaces line the streets of the capital, in the Philippines it must be these printer guys and gals who have the palaces. If you could get to the truth, you'd probably find that the biggest of them is married to a sister of someone high up in the tax department. There has to be an explanation!

"Starring Algirdas Šemeta," we should put on the marquee for today's column, because here he comes again with second prize for nuttiness after the Philippines, in a renewed bid to recapture EUR10bn of annual taxes "lost" through tobacco smuggling. There's so much to talk about here it's like a bowl of especially delectable honey cakes, but before starting I will just note that the EU has a special interest in excise taxes and VAT, since it gets a lot of its "own funding" from them. Let's begin with "lost" taxes. Finance Ministers and tax officials are very fond of talking about them: EUR10bn here, USD34bn there (try searching congressional records for Bermuda or the Cayman Islands), GBP5bn there (stamp duty on contracts for differences). But the money isn't "lost" – it was never there in the first place. The reason you can't collect it, dear Finance Minister, is because people don't like being robbed, and if you put your hand too deep into their pockets they will just sew them up. Smuggling is of course one of the best ways of sewing up your pockets, and cigarettes are so highly taxed (up to 95 percent of the purchase price) that they are a particularly tempting target. Just as far more people smoke than you would ever guess from the disinformation put about by do-gooding pressure groups, so also far more people smuggle than Finance Ministers want to accept. I have a UK acquaintance who orders her cigarettes over the Internet from a foreign sales outlet; they are actually manufactured in Birmingham (England) or somewhere like that, and make a 28,000 mile round-trip before being delivered back to the UK at less than one third of the regular UK price. Don't ask me how it is that the Customs don't intercept the shipments, which are made through the regular mail, but it's a fact that so far there have been no losses to official theft! I don't smoke myself, but on regular trips to Russia I used to bring back my allowance of Marlboro Lights for smoker friends: USD100 of profit ("loss," that is) each time; that was in the 1990s, by now it would be more than twice as much but I don't go to Russia any more.

The Jester