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a closer look

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Global Tax Weekly – A Closer Look

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

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New IP Regime To Be Introduced In 2018

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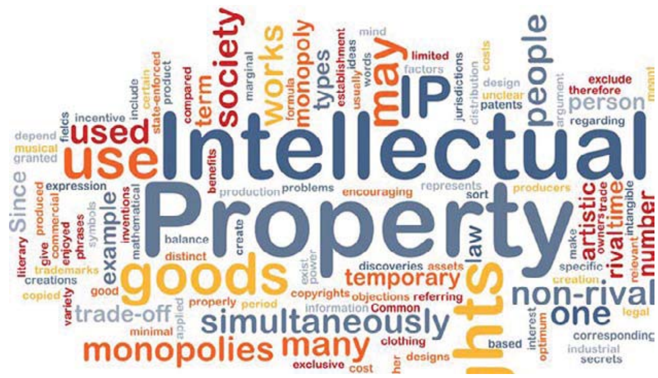

Introduction

On August 4, 2017, the text of the draft law introducing the new Luxembourg BEPS-compliant Intellectual Property (IP) regime was released. As from January 1, 2018, Luxembourg taxpayers will be able to benefit, under certain conditions, from an 80 percent exemption regime applicable to income related to patents and copyrighted software. In addition, IP assets which qualify for the 80 percent (corporate) income tax exemption will be fully exempt from net wealth tax.

The new regime will replace the former IP regime which had to be repealed as of June 30, 2016, since it was, as many other IP regimes, not in line with the so-called "modified nexus approach" defined in the OECD report on Action 5 of the BEPS Action Plan and agreed upon at EU level.

Who will be able to benefit from the new regime? Which income from which IP assets will be covered and which conditions and limitations will apply? We provide answers to these questions based on the recently released draft law, which may still evolve and change during the legislative process.

Who Can Benefit From The New IP Regime?

As the former IP regime, the new regime will apply to all Luxembourg taxpayers. This means that the regime will be available to both individuals and companies. In addition, it will apply to Luxembourg permanent establishments of foreign companies located in a European Economic Area country (*i.e.*, European Union, Iceland, Liechtenstein, and Norway).

Which IP Assets Are Covered By The New Regime?

Luxembourg has defined the scope of the new IP regime in line with the conclusions reached in the BEPS Action 5 report. Accordingly, patents and other IP assets that are considered as functionally equivalent to patents if those IP assets are both legally protected and subject to similar approval and registration processes, where such processes are relevant, qualify for tax benefits under an IP regime.

In accordance with the draft law and in line with the conclusion reached in the BEPS Action 5 report, IP rights covered by the new Luxembourg regime are:

(i) Patents defined broadly; and
(ii) Copyrighted software.

These IP rights fall within the scope of the new regime to the extent that they are not marketing-related IP assets and were created, developed or enhanced after December 31, 2007 (same limitation in time to the application of the regime as under the former regime) as part of research and development (R&D) activities:

(i) Patents defined broadly: inventions protected pursuant to domestic and international provisions in force, by a patent, a utility model, a supplementary protection certificate, a patent extension for pediatric medicines, a plant variety protection, orphan drug designations; and
(ii) Copyrighted software: software protected by copyright according to the internal and international provisions in force.

Trademarks and domain names are expressly excluded as they fall into the category of marketing-related IP assets.

How To Compute The IP Income Which Can Benefit From The New Regime?

The modified nexus approach defined in the BEPS Action 5 report aims to ensure that IP regimes provide benefits to taxpayers that engage in R&D since the intention of IP regimes is to encourage R&D activity.

As a consequence, according to the nexus approach, a taxpayer is able to benefit from the IP regime to the extent that it can be demonstrated that the taxpayer incurred expenditures, such as R&D which gave rise to the IP income.

The nexus approach which determines what income may receive tax benefits is as follows:

$$\frac{\text{Qualifying expenditures incurred to develop IP asset}}{\text{Overall expenditures incurred to develop IP asset}} \times \text{Adjusted net qualifying income from IP asset} = \text{Income receiving tax benefits}$$

This means that if a company has only one single IP asset and incurs all of the expenditures to develop that asset itself, the nexus approach will allow all of the income from that IP asset to qualify for tax benefits.

In order to compute the amount of income which comes within the ambit of the beneficial Luxembourg IP regime, it is necessary to determine:

- Which expenditures are considered as "qualifying expenditures incurred to develop IP assets";
- Which expenditures are considered as "overall expenditures incurred to develop IP assets"; and
- How the net qualifying income from IP assets is computed.

Both the qualifying expenditures incurred to develop IP assets and the overall expenditures incurred to develop IP assets have to be taken into account at the time when they are incurred, no matter the treatment for accounting or tax purposes.

The draft law has defined these expenditures as follows:

Qualifying expenditures incurred to develop IP assets

Qualifying expenditures are expenditures which are necessary for undertaking R&D activities, directly linked to the creation, the development or the enhancement of a qualifying IP asset and incurred by the taxpayer for undertaking his own R&D activities.

Expenditures which are not directly linked to the qualifying IP assets are not taken into account.

It follows that the following expenditures are not considered as qualifying expenditures:

- Interest and other costs for financing the IP assets;
- Real estate costs;

- Acquisition costs; and
- Costs not directly related to a qualifying IP asset.

Expenditures for unrelated-party outsourcing performed through a related party are considered as qualifying expenditures, as long as no margin is realized by the related party on its activity linked to the qualifying IP asset.

Qualifying expenditures also include expenditures incurred by a foreign permanent establishment (PE), provided that the foreign PE:

- Is located in a state which is party to the Agreement on the European Economic Area;
- Is operational when the qualifying IP income is realized; and
- Does not benefit from a similar IP regime in the country where it is situated.

Finally, when computing the amount of qualifying expenditures, taxpayers are allowed to apply a 30 percent "up-lift" to expenditures that are included in qualifying expenditures (up to the amount of the taxpayer's overall expenditures). Hence, the up-lift may increase the amount of IP income that benefits from the new IP regime.

Overall expenditures incurred to develop IP assets

The overall expenditures incurred to develop IP assets correspond to the sum of the qualifying expenditures as defined above (but without the 30 percent lift-up), the costs for the acquisition of the qualifying IP assets, as well as the costs for related-party outsourcing.

Adjusted net qualifying income from IP assets

The net qualifying income from IP assets corresponds to the net positive difference between:

- The income realized on the qualifying IP assets (the "qualifying income"), *i.e.*, positive income received for the right to use the qualifying IP right; income directly linked to the qualifying IP asset and incorporated in the sale price of a product or service; income realized on the disposal of such IP rights; and the indemnity received in relation to the qualifying IP asset following a judicial proceeding or an arbitration procedure; and
- The overall expenditures and the expenditures incurred during the financial year which are indirectly related to a qualifying IP asset.

The draft law also provides for adjustment and offset of the net qualifying income. The purpose of such adjustment is to ensure that the net qualifying income incurred by a qualifying IP asset during a financial year only benefits from a partial IP exemption provided that the overall net qualifying income exceeds the operating expenses (*i.e.*, direct and indirect expenses in connection with the asset). The offset is applicable when the taxpayer holds more than a qualifying IP asset. In that case, the positive adjusted net qualifying income generated by a qualifying IP asset shall be offset against the negative adjusted income of any other qualifying IP asset. The positive net qualifying income after such adjustment and offset shall benefit from the partial exemption.

How Is Income Receiving Tax Benefits Treated Under The New Regime?

Under the new regime, the income receiving tax benefits, as computed above, will benefit from an 80 percent corporate income tax (CIT) exemption. Since the taxable basis for municipal business tax (MBT) purposes is the same as the CIT basis, the 80 percent exemption will apply for both CIT and MBT purposes.

Taking into account the CIT rate decrease taking place in 2018 and the additional MBT charge, the effective corporate tax rate applicable to the income receiving tax benefits will be 26.01 x 20 percent equals 5.20 percent.

How Are Qualifying IP Assets Treated For Net Wealth Tax Purposes Under The New Regime?

IP rights qualifying for the new IP regime will benefit from a 100 percent net wealth tax (NWT) exemption.

Next Steps

The introduction of a new IP regime will be positive for both Luxembourg taxpayers and for Luxembourg itself as the regime should attract new R&D activity to Luxembourg and strengthen existing IP management and development activities. IP regimes in countries participating in the BEPS project will become more and more similar in the future given that they will all have to comply with the modified nexus approach. Therefore, it was important that Luxembourg make the right choices and exhaust all options provided in the BEPS report: the Luxembourg legislator decided to adopt the optional 30 percent up-lift on qualifying expenses, which is good news for Luxembourg taxpayers.

The draft law also states that the transfer of a qualifying IP asset as part of a tax neutral transfer of business or autonomous part of business shall be realized as if no transfer had taken place. In addition, the scope of the regime might be expanded in the future as the concept of "IP assets functionally equivalent" to patents might evolve and be defined in future OECD publications. This new IP regime shall apply as from the 2018 tax year.

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Mauritius And The Quest For Substance

by Stuart Gray, Senior Editor, Global Tax Weekly

Last year, Mauritius gained the sort of publicity that all offshore financial jurisdictions must dread, when Oxfam accused it of displaying all the characteristics of a "tax haven".[1] That label may or may not be appropriate, but as the International Monetary Fund (IMF) recently observed, Mauritius is a financial jurisdiction which is in the process of reinventing itself [2] as a high-tech business, research and manufacturing hub, and tax policy is playing a large part in this transformation.

Introduction

Mauritius is situated in the Indian Ocean to the east of Madagascar, and is a sovereign state within the British Commonwealth. The Mauritian legal system is a mixture of English Common Law and French Civil Law, but company and procedural law is based on English law. Although Mauritius has been obliged to phase out its "offshore" company regime, Global Business Companies (GBCs) meeting certain requirements may reduce their corporate tax to as low as 3 percent (see below).

Ever since gaining independence from Britain in 1968, the economy of Mauritius has grown steadily. The financial services industry has been a more recent Government-inspired initiative, but is now developing strongly. Mauritius has attracted tens of thousands of offshore entities, many aimed at commerce in India, South Africa, and China.

In support of its international financial credentials, Mauritius has entered into a considerable number of double tax treaties (over 40). Generally speaking, the treaty benefits are available to all Mauritian companies other than legacy "offshore" companies, known as GBC2 companies. All of its treaties are based on the OECD model treaty and contain exchange of information clauses.

Due to its network of double tax treaties with most of the significant economies in its region, and above all with India, Mauritius is often chosen as a base by firms needing to set up an offshore holding or investment company, or trading subsidiary.

Corporate Income Tax

Under the Income Tax Act 1995,[3] a company is treated as resident in Mauritius if it is incorporated in Mauritius or if it is managed and controlled from Mauritius. A resident company is taxed on its worldwide income, which includes foreign-source income. Non-resident companies are taxed on their Mauritius-sourced income only.

Taxable income includes rents, dividends, royalties, and interest. Capital gains are not included in taxable income except on gains arising from the parceling out of land. As from July 1, 2008, the corporate income tax rate is 15 percent.

Special rules apply to GBCs.

Global Business Companies

Considerable tax savings are possible for foreign investors using the GBC formats, of which there are two, provided certain strict requirements are met.

GBC1 (Offshore)

A GBC1 is defined as a company engaged in qualified global business and which is carried on from within Mauritius with persons all of whom are resident outside Mauritius and where business is conducted in a currency other than the Mauritian Rupee. A GBC1 may be locally incorporated or may be registered as a branch of a foreign company. The business of a GBC1 must be conducted in foreign currency other than for day-to-day transactions; and a GBC1 must not do business in Mauritius, other than to take professional advice, employ local labor, and rent property.

A GBC1 is treated as resident, and has access to Mauritius' double tax treaties, subject to possession of a Tax Residency Certificate. Traditionally, the tax treaty with India is particularly favorable, and Mauritius is a favored location for holding companies for those trading with or investing in India. However, India has insisted on certain changes to the Indo–Mauritius tax treaty in order to prevent the avoidance of Indian taxation on investment routed through Mauritius to India (see below).

A GBC1 pays corporate income tax at 15 percent (0 percent if it was incorporated before July 1, 1998). It is also exempt from stamp duty, land transfer tax, and capital gains (*morcellement*) tax. The expatriate staff of offshore companies pay half the normal rate of personal income tax.

There are no withholding taxes or equivalent deductions on dividends or other payments made by a GBC1 to non-resident shareholders (residents are not normally allowed to hold the shares of such companies).

GBC1s can also utilize the unilateral foreign tax credit, which is 80 percent of the Mauritian tax rate (leaving a residual liability of 20 percent of the Mauritian tax rate, *i.e.*, 3 percent); the credit used to be at the rate of 90 percent, and it is possible that there will be further reductions.

By the end of 2009, 75 percent of all GBC1s were operating in the field of investment holding. Other activities of GBC1s included: collective investment schemes, financial business activities, trading, consultancy, closed-ended funds, ICT, and intellectual property.

GBC2 (International)

A GBC2 can take any of the forms permitted under the Companies Act 2001. Unlike the GBC1, the GBC2 used to be able to issue bearer shares, but this is no longer permitted; however, in other respects the share structure can be flexible:

- There is no minimum capital requirement, although at least one share must be issued and paid up;
- Registered shares and a variety of shares such as preferred, redeemable, and fractional are allowed;
- Shares may be issued with or without par value;
- Redeemable preference shares may be issued; and
- Only one shareholder and one director are required.

A GBC2 is treated as non-resident, cannot benefit from Mauritius' double tax treaties, and cannot operate in the Free Port (see below for further information). However, in most other ways, a GBC2 receives the same tax treatment as a GBC1.

Mauritian citizens are not permitted to own shares in a GBC2. There are a number of other restrictions on GBC2s; they may not:

- Raise capital by public subscription;
- Carry on banking or insurance business;
- Own real property in Mauritius;

- Own or manage a collective investment fund; and
- Provide nominee services, or provide trustee services to more than three trusts.

GBC2s are not required to file annual accounts, and confidentiality may be preserved through the use of nominee directors and shareholders.

The India Tax Treaty

The most important of the treaties has been the 1982 Indo–Mauritius double tax agreement, which had underpinned the emergence of Mauritius as the dominant channel for foreign direct investment (FDI) into India – out of the total FDI equity inflows of USD217.6bn into India from 2000 to 2014, Mauritius supplied 36 percent, or USD78.5bn.[4]

However, the treaty came under attack from Indian tax authorities in 2002 as a result of alleged abuses by Indian-resident investors through what was termed "round-tripping." In particular, concern was expressed regarding the capital gains clauses that permit both resident Indian and foreign investors to route investment into India via Mauritius to take tax-free gains.

Eventually, India and Mauritius came to an agreement, and on May 10, 2016, a protocol to the tax treaty was signed in a bid to limit abuse of the arrangement.[5] The protocol, which was ratified by the Indian Government later in the year, provides India with the right to tax capital gains arising from the alienation of shares acquired on or after April 1, 2017, in an Indian company with effect from the 2017/18 financial year. It also stipulates that in respect of capital gains arising during the transition period from April 1, 2017 to March 31, 2019, the tax rate will be limited to 50 percent of the Indian domestic tax rate (subject to a limitation of benefits (LOB) clause).

Under the protocol's new LOB clause, the reduced tax rate during the transition period will not apply if the Mauritian resident (including a shell or conduit company) fails to satisfy a "main purpose" test and a "bona fide business" test. The protocol notes that a resident is deemed to be a shell or conduit company if its total expenditure on Mauritian-based operations is less than INR2.7m (USD42,000) in the immediately preceding 12 months.

Interest arising in India to Mauritian resident banks is subject to a withholding tax in India at the rate of 7.5 percent in respect of debt claims or loans made after March 31, 2017 under the 2016 Protocol.

The text also updates Article 26 of the tax treaty, on exchange of information, to provide for assistance in the collection of taxes, and introduces a new Article 26A in the treaty to facilitate collection of taxes.

Announcing the changes to the tax treaty, India's Central Board of Direct Taxes said on May 10:[6]

> "The protocol will tackle the long pending issues of treaty abuse and round tripping of funds attributed to the India–Mauritius treaty, curb revenue loss, prevent double non-taxation, streamline the flow of investment, and stimulate the flow of exchange of information between India and Mauritius. It will improve transparency in tax matters and will help curb tax evasion and tax avoidance. At the same time, existing investments, *i.e.* investments made before [April 1, 2017,] have been grand-fathered and will not be subject to capital gains tax in India."

Time will tell how the protocol affects financial business between Mauritius and India, although there is some evidence to suggest that investors were increasingly choosing to route investment into India via Singapore prior to the update to the Indo–Mauritius treaty. These figures show that out of the total equity inflow to India of USD24.3bn in 2013/14, Singapore accounted for USD6bn (against USD2.3bn the previous year), and Mauritius supplied USD4.86bn (down from USD9.5bn in 2013/14).[7]

Recent changes aimed at limiting abuse of the Indo–Singapore tax treaty through the addition of a third protocol in 2017 may alter the course of these investment flows yet again. Nevertheless, it could be argued that the greater emphasis placed on increasing tax transparency and reducing tax avoidance by governments around the world has prompted Mauritius to alter its economic strategy to some extent, with tax policy geared towards encouraging investments in physical operations in the jurisdiction.

Mauritius' attempts to comply with these new global tax standards are outlined in the next section, followed by a summary of existing and recently announced tax incentives.

Information Exchange

In November 2013, the Global Forum on Transparency and Exchange of Information for Tax Purposes rated Mauritius as largely compliant with the international standards on transparency and exchange of information, and the Mauritian Government was keen to point out that the jurisdiction scored similar ratings to the United States, the United Kingdom, Germany, Italy, Singapore, and Hong Kong.

Since then, Mauritius has taken a number of steps to improve its transparency ratings. On October 24, 2014, Mauritius was among the first 51 jurisdictions (the early adopters) to sign the multilateral competent authority agreement to automatically exchange financial account information under the new global Common Reporting Standard (CRS). Then, in January 2016, the Mauritius Revenue Authority confirmed that the first information exchanges under the CRS would take place in September 2018, although this was a year later than originally envisaged.

Furthermore, Mauritius signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in June 2015, and has entered into a Model 1 inter-governmental agreement with the US for the implementation of the Foreign Account Tax Compliance Act (FATCA) between the two countries, as well as a bilateral tax information exchange agreement with the US.

BEPS

Mauritius has also signed up to the OECD's BEPS minimum standards, and on July 5, 2017, it signed the Multilateral Convention to implement the tax treaty-related recommendations to prevent base erosion and profit shifting under Action 15 of the BEPS Action Plan.

As a member of the BEPS Inclusive Framework, Mauritius is also working on an equal footing with other members and G20 and OECD countries in the development of further anti-BEPS measures and the peer review process. In addition, Mauritius will implement and support the review of the four BEPS minimum standards, on harmful tax practices, tackling tax treaty abuse, country-by-country reporting, and improvements to cross-border tax dispute resolution mechanisms.

Tax Incentives: The Freeport

Mauritius is already more than a mere conduit jurisdiction for FDI flows. Agriculture, predominately sugar production, remains a major pillar of the economy, but there are growing industrial, services and tourist sectors, and an export processing zone set up in 1970 has been successful.

Freeport facilities were established at the port and airport under the Freeport Act 2001. The Freeport legislation provides for a comprehensive package of liberal incentives for companies looking for a cost-effective storage, assembly and redistribution platform. Freeport companies in Mauritius benefit from:

- Duty free and value-added tax (VAT) free goods and equipment;
- Exemption from corporate income tax;

- 100 percent foreign ownership;
- Free repatriation of profits;
- A 50 percent reduction on port handling charges;
- 50 percent of turnover can be realized from local market sales; and
- Access to offshore banking facilities.

SME Development Scheme

The Government has sought to improve fiscal conditions for industry and small businesses; indeed, it is the Government's stated goal that SMEs become the "backbone" of the Mauritian economy.

Agreed by the Government in January 2016 and launched in December that year, the SME Development Scheme provides eligible small and medium-sized enterprises with generous tax incentives, among other benefits.

In addition to providing a subsidized interest rate on credit, SMEs within the Scheme benefit from tax exemptions for the first eight years of their operations, together with VAT and import duty exemptions on purchases of productive equipment.

The incentives in the Scheme are extended to companies that are registered with the Small and Medium Enterprise Development Authority (SMEDA) and are engaged in a broad range of productive manufacturing, agricultural, or energy sectors capable of creating employment. SMEs deemed eligible by SMEDA are granted an SME Development Certificate and are then entitled to the Scheme's tax and financial benefits.

According to the Minister of Finance and Economic Development, Vishnu Lutchmeenaraidoo, speaking at a presentation on January 28, the SME Development Scheme is intended to make SMEs the main engine of economic activity in Mauritius within the next five years.[8]

Budget 2016/17

The 2016/17 Budget, announced on July 29, 2016, looked to improve economic growth in Mauritius though various measures to encourage entrepreneurship, jobs, and private investment.

In particular, the existing eight-year tax holiday for SMEs was extended to new enterprises engaged in approved activities, such as ICT, manufacturing, bio-farming and other value-added agri-business activities, and renewable and green energy. In addition, existing enterprises registered with SMEDA with a turnover of less than MUR10m (USD289,000) and engaged in qualifying activities under the same scheme were granted a four-year business income tax holiday.

Changes were also made to the existing investment tax credit whereby a manufacturing company is able to offset 5 percent of its investment in new plant and machinery over three years (*i.e.*, 15 percent in total) against its income tax liability. The minimum eligibility requirement of a MUR100m investment was removed to allow more businesses to benefit from the credit; furthermore, the tax credit was increased from 5 percent to 15 percent (*i.e.*, 45 percent in total) for:

- Manufacturers of textiles and wearing apparel, ships and boats, computers, and pharmaceuticals, and
- Film production.

The refund on qualifying production expenditure under the Film Rebate Scheme was also increased to a maximum of 40 percent, and the production of films for export was zero-rated for VAT purposes. Also, the importation of lighting equipment for use in film-making was exempted from customs duty.

To diversify manufacturing in Mauritius, VAT was removed from 3D printers to support the application of the technology; photovoltaic inverters and batteries will also be VAT-exempt; and customs duty exemptions were provided on materials used in the manufacture of medical devices.

To create additional jobs, seafarers employed on vessels registered in Mauritius or on foreign vessels were given an exemption from the payment of income tax, and industrial fishing companies operating from Mauritius and contributing to the development of its seafood industry were provided with an eight-year tax holiday.

To provide a new impetus to the development of the financial services sector in Mauritius, various tax incentives were proposed. For example, companies holding a Global Headquarters Administration License issued by the Financial Services Commission will be granted an eight-year corporate tax holiday, as long as they meet conditions of "minimum employment and substance."

Five-year tax holidays were also announced for companies holding a Treasury Management Center License; to individual holders of an Asset and Fund Managers License, who manage a minimum asset base of USD100m; to international law firms with a Global Legal Advisory Services License; and to holders of Investment Banking and Corporate Advisory Licenses.

Budget 2017/18

The 2017/18 Budget, delivered in June 2017, built on these measures by providing a reduced corporate income tax rate of 3 percent on the profits derived by any company from exportation of goods, to be applied from the next financial year.

In addition, it included an announcement of an eight-year tax holiday for companies engaged in the manufacture of pharmaceutical products, medical devices, and high-tech products. Qualifying hi-tech manufacturing activities were to be granted an exemption from registration duty and land transfer tax on the transfer of a building or of land for construction of a building.

The Government also announced a new research and development tax incentive scheme, under which a company investing or spending on innovation, improvement, or development of a process, product, or service will be eligible for accelerated depreciation.

In another concession, companies using deep ocean water in air conditioning installations, facilities, and services also qualify for the tax holiday, and for a double tax deduction on certain expenditure.

These measures were welcomed by the IMF, which noted in its recent evaluation of the Mauritian economy that Mauritius is under pressure as a result of changing attitudes to tax avoidance globally.

"Mauritius is facing a challenging environment and vulnerabilities are rising," observed Amadou Sy, who led an IMF mission to the territory.[9] He continued:

> "The authorities seek to graduate Mauritius to a high-income economy within the next ten years on the basis of an ambitious public investment program and improvements to the business climate. Attaining the next level of economic development will require Mauritius to use strong and independent institutions to overcome the variety of policy challenges … Early signs are promising, with both the pending formation of the National Economic Development Board, and the drafting of the Financial Sector Blueprint, important welcome steps towards harmonizing the policy direction and implementation across sectors. Considering Mauritius' track record of reinventing its economic model, there are grounds for optimism that the country will successfully manage the reform process. …
>
> The Global Business Sector is under pressure from international anti-tax avoidance initiatives. The authorities are undertaking efforts to address the concerns raised by the OECD

and the EU in these matters. Prioritizing the adoption of the Blueprint for the Financial Services Sector can help the GBC sector transition from a system based largely on tax incentives to one that provides higher value-added services."

Conclusion

In summary, Mauritius will probably find the "tax haven" label difficult to shed while it keeps in place generous tax concessions for non-resident companies that conduct little in the way of business domestically. Nevertheless, it appears to be doing its reputation – and the economy – no harm at all by adhering to international standards in the areas of information exchange and BEPS prevention, and with its attempts to attune the tax regime to the needs of manufacturing and hi-tech industries. In other words, with its quest for substance.

Endnotes

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Protection Of The Taxpayer In The Information Exchange Procedure

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Economic globalization and the interdependence of tax authorities highlight the limits of strict national approaches to combating fraud, tax avoidance and evasion. In this context, mutual assistance between tax authorities, in search of direct information to enable the control on the fulfillment of tax obligations by taxpayers, has assumed an increasingly central role.

However, the information exchanged through the different stages and tools of administrative cooperation in tax matters should be adequate regarding the various interests involved. On the one hand, those of the States to both exercise their power of taxation as well as fight tax avoidance and evasion; while on the other, those of the taxpayers in the correct use of this instrument to safeguard their rights.

1. Introduction

Economic globalization and the interdependence of tax authorities highlight the limits of strict national approaches to combating fraud, tax avoidance and evasion. It reinforces the need for a common action, since this fight not only allows to safeguard the revenue of the national budget, but also ensures the confidence of citizens in the equity and effectiveness of tax systems.

In this context, mutual assistance between tax authorities, in search of direct information to enable the control on the fulfillment of tax obligations by taxpayers, has assumed an increasingly central role: the exchange of information is considered the most appropriate response to detecting and counteracting the opportunities for transactional tax avoidance and evasion as well as to ensure an adequate level of inter-nation fiscal transparency.[1]

However, it is worth considering that the information exchanged through the different stages and tools of administrative cooperation in tax matters should be adequate regarding the various interests involved. On the one hand, those of the States to both exercise their power of taxation as well as fight tax avoidance and evasion; while on the other, those of the taxpayers in the correct use of this instrument to safeguard their rights.

2. The Need To Provide Protection For Taxpayers Affected By An Information Exchange Procedure

In the current economic context, it is becoming increasingly more frequent that income earned by a taxpayer comes from another country than where he is resident or can be significantly affected by foreign factors.

The tool that helps prevent that tax competition between the States may allow cross-border investment activity to escape the assessment of tax authorities is represented by a form of mutual administrative assistance, which finds its regulation in the European and international sources of exchange information.

However, in an environment strongly characterized by the need to achieve a higher level of efficiency in the control of economic and financial cross-border activities, the States have resorted to means of verification which, although engaged in specially regulated forms of transnational tax cooperation, do not, in some cases, fully respect the fundamental rights of taxpayers. In fact, the concern of the States of the international community as well as those of the European Union to preserve the good governance from aggressive tax planning and the need to stem the phenomenon of harmful tax competition, cannot ignore the need to protect the rights of taxpayers affected by an information exchange process.[2]

In order to achieve an equitable international cooperation in tax matters, it is therefore necessary to consider the various interests involved:[3] on the one hand, the need of the contracting States of a bilateral or multilateral agreement to create a mutual exchange of information in order to combat tax avoidance and evasion, ascertaining the actual income earned by taxpayers, while also eliminating double taxation by means of a more efficient and integrated control system; on the other, the interest of the taxpayers for a correct acquisition of information and data as well as the confidentiality of the information exchanged and protection against the unlawful exchanging of information.

European and international legislation on the exchange of information[4] has no specific provisions governing the relations between the taxpayer and the tax authorities, which are generally regulated by domestic law mechanisms and procedures.[5] Said legislation highlights a limited or no consideration of the legal position the taxpayer in the procedures of the exchange of information between tax authorities, even though he is the recipient of the consequences of the exchange (being the owner of the information) or the person who is assessed. For a definition of the legal status of the taxpayer, reference should be made to the domestic laws of each State, according to the principle of procedural autonomy.[6] From these considerations, it follows that the States are more interested in obtaining the required information, rather than ensuring the procedural rights of taxpayers in this phase.

This situation gives rise to considerable concern, not only in terms of the internal equilibrium in the relations between tax authorities and taxpayer, but also in a comparative perspective. It is well-known how national rules are not consistent with each other and provide a different level of interference of administrative activity in the private sphere of taxpayers, depending on the approach that each State adopts in carrying out their activities.

In most of the OECD Member States, there are no regulations that specifically protect the taxpayers affected by the exchange of information.

Furthermore, even when there is some form of protection, it can be on three levels of increasing protection[7] which provide:

- The taxpayer's right to receive notification of a prior notification (*notification rights*);
- The taxpayer's right to be heard by the proceeding administration before transmitting information concerning him, in spite of the decision to transmit the information remaining at the discretion of the requested tax authority (*consultation rights*);
- The right to intervene in the proceedings (*intervention rights*), which represents the highest level of protection of taxpayers' rights, since it has the ability to verify the legitimacy of the request for assistance and the correctness of the information that is wanted to be exchanged. In other words, States which provide for this right allow the taxpayer to block the transmission of the information requested by the other State in cases where there are formal or substantive defects found by the competent authority.

Intervention rights are recognized only when they are also notification and consultation rights, to allow the taxpayer affected by the information exchange to know exactly what information is involved and to challenge, before the competent authorities, the legitimacy of the request and correctness of the information prior to it being transmitted.

Legal protection may only be effective if taxpayers are informed of the request before the information is transmitted to another State, otherwise, they would have no possibility of appealing. It is, however, evident that the provision of notification rights should not cause delays in the exchanging of information or make it ineffective. It is, therefore, necessary, on the one hand, to ensure the protection of the taxpayer affected by the exchange procedure; while on the other, create regulations that enable the efficient and rapid exchange of information between States.

In several States (as in Italy), there is no obligation for the tax authorities to warn taxpayers about the activation of a procedure for mutual administrative assistance and the impending transmission of requested information, so as to avoid invalidating the international investigations or affecting the investigative secrecy inherent in the tax investigation. Consequently, if the taxpayers are not aware of the request, they will have no right to intervene. In Member States without notification rights, taxpayers may only intervene when they "exceptionally" become aware of the request, *e.g.*, when the tax authorities are not in the possession of the necessary information and have to request it.

At an international level, the exchange of information is still perceived as a necessary tool for States to identify cases of international tax avoidance and evasion, which considers that the taxpayer be notified of the activation of a procedure for mutual administrative assistance as merely optional.

However, it is evident that the exchange of information has transcended its initial purpose, namely an instrument for countering tax evasion and abusive or aggressive tax planning. In fact, the exchange of information has become a tool for the correct application of a domestic tax system.

It is worth noting that in Italian law, there is Article 31-*bis* of Presidential Decree No. 600/1973 on assistance for the exchange of information between competent authorities of EU Member States. The aforementioned article does not consider the need to ensure legal protection to the taxpayer involved in the exchange of information, but only provides that the collection of information to be transmitted must be effected according to the procedures and time limits for the assessment of income taxes. Therefore, if the tax authorities already have all the information related to the taxpayer (because, for example, they have been provided by the latter through the tax return), the aforesaid Administration may proceed to transferring the information to the tax authorities of another State, without prior notice to the taxpayer or requesting his consent. It follows that if the taxpayer does not have the right to be informed of the inquiry, he will not have the right to prevent the tax authorities transmitting the information. Article 31-*bis* only provides that the transmission of information may be refused where it would involve the disclosure of a commercial, industrial or professional secret or of a commercial process, or the disclosure of the information would be contrary to public policy.

Moreover, the facts relating to the legitimacy of the request for the exchange of information cannot be appealed before a tax commission, since it is not within the competencies of this type of commission. However, if the taxpayer becomes aware of the request concerning him, he would have the right to object to the exchange of information, presenting an appeal before the civil courts and, if necessary, demand compensation for damages.[8]

The situation would be different if the information were used, in Italy, to notify a payment notice, since, in this case, the taxpayer would be entitled to challenge such a measure (but not the preliminaries) before a tax court, according to the rules provided by Italian law.[9]

In conclusion, there are no laws governing the legal status of a taxpayer involved in an information exchange mechanism, whether the request comes from another state or it is requested by an Italian Administration. The National Tax Authority operates as if it were an internal assessment of the situation of the taxpayer, without international implications, *i.e.*, in both cases, they would be considered as actions of the internal tax authority.

However, there are other countries (*e.g.*, the United Kingdom) which, while not believing that there are notification rights, provide a series of exceptions to this principle.

Finally, there are other legal systems (*e.g.*, Germany and Luxembourg) which, however, expressly contemplate various participation rights in respect of resident taxpayers for which another State requests information.[10] These rights are also provided, with some variations, in other countries[11] (*e.g.*, Portugal), that recognize the taxpayer's right to be informed only when the decision to send the information has already been taken by the tax authorities, allowing the taxpayer to appeal against the decision; in other cases, however (*e.g.*, Hungary and Sweden), the taxpayer's right to information exists only if the information has been sent to the requesting State.

Whatever the case, it is believed that, for practical purposes, referral to the domestic laws of the States of the regulation of the procedural rights granted to the taxpayer is not sufficient to achieve a full balance between the interests of the State requesting assistance and those of the taxpayer, whose income situation is the focus of the cooperation mechanism. In addition, it should be considered that, in such situations, the protection of the taxpayer's rights is even more delicate: the taxpayer may, in fact, be in a situation of having to defend himself in multiple legal systems, given that the cooperation involves the fractionation of the activity of the fiscal administration. The taxpayer could benefit from only partial protection, as well as the "national protections" could be conflicting.

Another aspect to consider is whether the participation rights are granted (by the requesting State) to the taxpayers resident in the requesting State.

In this case, it is rare that these rights are granted to taxpayers.

In other words, considering the incoming requests, the legal protection of taxpayers against the submission of requests is even weaker, since most States do not provide for any right to notification.

Only in some cases (in Poland), tax authorities have a duty to inform resident taxpayers about their decision to request information from another state.

In other States (*e.g.*, Belgium and Germany), the right of the taxpayer to challenge the request for information before the national courts is recognized, in order to prevent the tax authorities sending a request for information.

Nevertheless, there is a positive aspect in the fact that some Member States, before sending the request to another Member State, cooperate with the taxpayer to try to obtain the information. This could be an effective and satisfactory resolution of the problem of protection of the rights of the taxpayers.[12]

The issue of prior information on the starting of an exchange of information procedure ensures both the right of defense (in administrative proceedings) of the taxpayer in relation to the competent tax authority asking for information to the tax authority of another State, as well as the protection of taxpayers' rights in relation to the requested tax authority acquiring and transmitting the information to the requesting tax authorities.

The acquisition and transmission procedure could potentially be detrimental to the rights of the taxpayer, regardless of later events, since the control activities (national or transnational) do not always lead to a payment notice. The taxpayer's position may also be damaged by invasive, illegal investigative activities or the use of confidential information, but for this reason it should not be considered less damaging to the legal position of the subject.

It has been argued that the possibility of appealing to ordinary courts for compensation for damages suffered is a sufficient means of protection that allows for compensating any damages incurred. However, it is believed that it would be more desirable to prevent a violation of rights, especially in light of the fact that an effective and rapid protection of the violations suffered at the hands of the States is not ensured.

Considering that in part the exceptions of the doctrine which sees a danger in the involvement of the taxpayer prior to the acquisition of information by the requested State (since there might be an attempt to hinder the success of the procedure), it is not possible to anticipate what damage (if not a mere slowing down) could cause a notice to the taxpayer following the investigation stage of collecting information, but prior to the transmission of the information to the requesting State.

There may be valid reasons for the lack of involvement of the taxpayer in the investigation procedure, as in the risk of destroying "essential" information. However, this should be the exception to the general rule that should include the involvement of the taxpayer.[13]

Informing the taxpayer of the findings of the investigation stage and allowing him to correct any errors could avoid, on the one hand, the violation of rights of the individual and, secondly, that the investigation stage be hindered by incorrect knowledge, understanding and evaluation of the evidence adduced by the requested foreign State.

3. The Importance Of The Right To Be Heard In European And International Contexts

As previously mentioned, the fight against transnational tax avoidance and evasion must be reconciled with the protection of the taxpayers' rights, since, even if it is contrasting interests, the latter must be implemented by the various States in compliance with the principles of equivalence and effectiveness.[14]

The pursuit of a balance between these interests is expected to be achieved with the provision and guarantee of the implementation of a general right to be heard between the tax authorities and the taxpayer.

The position of the taxpayers is, in fact, more and more frequently the subject of complex investigations, with the right to be heard in tax proceedings becoming even more important.

The establishing of a right to be heard between the parties of the tax liability allows for an effective perception of the reality of the facts as well as a correct legal interpretation of the same. In other words, it is a useful tool to overcome the difficulties resulting from over-technical systems, that are characterized by the use of increasingly "indeterminate legal concepts," where frequently the tax authorities and taxpayer are in a conflictual situation in identifying the taxable event or the quantification of the exact ability to pay. It is evident that both the control activities as well as the participation of private individuals in the right to be heard are, at least in principle, functional to the same goal: to reach the determination of the tax liability corresponding to the real ability to pay of the taxpayer.

It is, therefore, easy to understand the importance the recognition of the principle of the right to be heard during tax cooperation procedures assumes. Considering, for example, the disclosure of secrets (industrial, professional, *etc.*) is prohibited (although with different nuances) by all agreements: only if the holder of the secret is informed in advance and can participate in the proceedings can he protect himself against any harmful consequences that could result from the disclosure of the information.[15]

The relevance and importance of the search for forms of protection of the taxpayer during the course of control activities is also documented in some Court of Justice[16] rulings on the subject of the right to be heard[17] that European judges have elevated to a general legal principle of the European Union, as a direct and immediate manifestation of the right of defense.[18] In particular, the Court has recalled among the fundamental rights, the principle of the right to defense, pointing out that this principle is intended to primarily affect the regulation of administrative proceedings and, therefore, appears to be distinct and separate rather than the guarantee of a fair trial and within a reasonable time, as well as than the right to full and effective protection, affecting judicial activity. The judges have highlighted how respecting the right of defense must be applied in all cases in which the administration intends to adopt an act capable of producing significant legal effects on the recipient, which must be given the right to make known his views before the end of the tax proceedings. This right is expressly considered as functional to the realization, on the one hand, of the protection of the interests of the person affected by the proceeding; while on the other, the goodness of the administrative action, since knowledge of useful elements about the factual situation is acquired through the right to be heard. European judges[19] have again pronounced on the subject of the right to be heard in administrative proceedings and the consequences of its violation.

In particular, the Court, by invoking the principle of law already expressed in the *Sopropé* judgment, reiterated that the right of the subject to be heard prior to the adoption of the final measure is a fundamental and general principle of European Union law, since it is the implementation of the right of defense and the obligation for an adequate investigation. Therefore, even if not expressly stated, this right must be recognized in all the areas in which European Union law applies. Nevertheless, this right may be restricted, provided it is justified and proportionate. In other words, it is possible to expect a shortening of the period to be heard, but not the total elimination of the right to be heard. With reference to the consequences associated to the infringement of the right to be heard, the Court noted that such a breach may result in the annulment of the measure adopted, on the condition that "had it not been for such an irregularity, the outcome of the procedure might have been different." According to European judges, a taxable person who alleges the violation of the right to be heard has the onus of attaching themes that would have potentially and reasonably extended the investigative framework to be taken into consideration.

The consecration, at a European level, of the principle of the right to be heard as a fundamental principle of the European Union occurred, at a regulatory level, with the proclamation contained in Article 41 of the Charter of Fundamental Rights of the European Union. As it is known, the Treaty of Lisbon amending the Treaty establishing the European Community (TEC) and the Treaty on the European Union (TEU), gave legal force to the Charter through a reference made by the new version of Article 6 TEU. The latter, in fact, expressly states the centrality of the fundamental rights of EU citizens and gives the Charter the same legal value as the Treaties.

Article 41, paragraph 2 of the Charter of Fundamental Rights of the European Union establishes the right of every person to be heard before any individual measure against him which might prejudge him and the right of every person to have access to his file in accordance with the legitimate interests of confidentiality and professional and commercial secrecy. However, it is evident that in order to have access to a dossier, it is necessary that the subject knows of its existence.

In other words, Article 41 of the Charter establishes a right to good administration, and its content is particularly important for the proceedings, since it gives each individual the right to be heard before an individual measure is taken against him,[20] to have access to the files concerning him, and states the obligation of the administration to give reasons for their decisions, so that the taxpayer can verify the provenance of information, compliance with the formal requirements, and the correspondence of the information acquired with subjective and objective profiles of the taxpayer merged in the assessment notice issued against him.

This right is both an individual right as well as a rule that must guide institutions, authorities, offices and agencies of the EU, the impartiality of proceedings and their reasonable duration. The authorities of the Member States should always ensure the abovementioned right in the conduct of its prerogatives which affect subjective situations, in whichever sector they fall. Thus, a good tax governance approach can be considered fundamental to the protection of taxpayers' rights in cross-border situations, for the "complete" protection preserved by legal remedies.

The contents of the Article present a common ground with other more general provisions that are included in the Charter and in the European Convention of Human Rights (ECHR), in particular those on the right to respect for private and family life (Article 8 of the Charter and the ECHR) and the right to a fair trial (Article 47 of the Charter and Article 6 of the ECHR).

Article 47 of the Charter establishes the right to effective judicial protection.[21] This protection is based on the principle of sincere cooperation between European institutions and the Member States, which must ensure the effectiveness of the recognized means of protection of individuals. A proceeding characterized by the prior hearing of a subject against whom alleges a breach of the violation of internal rules is compatible with the principle of effectiveness, since it allows to guarantee the fundamental right to be heard. In other words, among the requirements of the principle of effective judicial protection, there is the principle of the right to be heard,[22] which must be applied to any procedure liable to affect the interests of a subject.[23]

The first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR, but it is more demanding than Article 13 of the ECHR, since the former requires an effective remedy before a "tribunal," whereas Article 13 is satisfied with a "national authority." In addition, Article 47 has a wider scope *ratione materiae*. It applies where the rights and freedoms guaranteed by the law of the Union are violated (whether or not they are set out in the Charter), whereas Article 13 of the ECHR requires a violation of the rights and freedoms as set forth in the ECHR. In addition, Article 6, paragraph 1 of the ECHR limits the right to a fair trial to the determination of civil rights and obligations or of any criminal charge. No such restriction is to be found in the second paragraph of Article 47 of the Charter.

The principle of effectiveness of European Union law requires the elaboration of a draft act, to be considered as an impulse act of the right to be heard;[24] compliance with a reasonable time limit for its implementation;[25] and an enhanced motivation of the damaging act.[26]

These considerations highlight the need to configure a system in which both the assessment activity as well as that of the defense should be ensured by providing a series of deduction, allegation and evidence rights in the proceedings, which are effective in ensuring the effectiveness of the protection of the taxpayer.

It is believed that there may be no effective legal protection in the judicial proceedings, if the taxpayer is not even protected in the procedural stage, since the confrontation between the parties had already begun in this context.[27]

The right to an effective judicial remedy can be considered the consequence of the principle of effectiveness of European Union law. In fact, if the right to an effective judicial remedy had not been provided, the European rights of the subjects may not be effective. Consequently, the right to an effective judicial remedy and the principle of effectiveness of EU law must be considered different, though complementary to each other.

For the purpose of this article, it is worth considering another Court of Justice judgment,[28] since it allows to comment on the balance between the tax interests of the Member States that make use of the administrative assistance of foreign tax authorities to gather information, and the taxpayer's position affected by such mechanisms of international tax cooperation. In the aforementioned judgment, it should be noted that the protection of the taxpayer has its source in the domestic law of the Member States, with the result that it is for the national court to determine what probative value, in this case, the information communicated by a Member State has. According to this approach, in the absence of a reference for the protection of the taxpayer within European legislation, it would find its source in the national laws of the Member States, with the inevitable penalization of taxpayers resident in States that provide more limited forms of protection. The judges reached this conclusion considering, in whatever case, that the information to be exchanged according to European legislation does not constitute "decisive proof of a fact to be established."[29] The Court, therefore, considers that "where the authorities gather information, they are not required to notify the taxpayer of this or to obtain his point of view." It is, however, possible for a Member State to extend "the right to be heard to other parts of the investigation stage."[30] European judges, therefore, consider the case law on the subject of the aforementioned mandatory right to be heard inapplicable, since the mere gathering of information would constitute an activity preceding the real assessment phase.[31]

It is believed that this is an unjust and non-guarantee conclusion for the taxpayer, because in practice the decision to request information from another Member State is not always merely "an investigate measure in administrative proceedings culminating in a payment notice,"[32] as it may be the only investigate measure upon which the payment notice is based, with the result being that the data and evidence provided by taxable persons constitute the evidentiary basis upon which to base the payment notice.

Therefore, the absence of a European recognition of a *minimum* procedural protection for taxpayers subjected to mechanisms of mutual administrative assistance and the tendency of the tax authorities to use the information as the basis of their objections[33] determine a strongly biased tax authorityâ€"taxpayer relationship.[34] The relationship between the State and taxpayer should, however, be basically equal and conform to the principles of trust, collaboration and transparency, within which to establish a successful, mutual exchange of information between the tax authorities and taxpayers, thus allowing the tax authorities to have a greater understanding of the economic position of the taxpayers or those not complying with the tax laws; while on the other hand, allowing the taxpayers to have approval about the economic behavior in place, with more certainty of their tax position. In the current international economic context, the absence of such a relationship in combination with information and legal asymmetries existing between the different countries, leads to an overlap of taxing rights between States and, therefore, to double taxation phenomena, but also loopholes that allow companies a significant reduction (if not the complete elimination) in income tax. In this context, the construction of a better relationship between tax authorities and taxpayers is therefore essential, based on dialogue, mutual trust and cooperation.

The sources, both conventional and supranational, regarding the exchange of information pose a number of limitations that States are obliged to observe for the proceedings to succeed. Despite the lack, in the above sources, of provisions on the protection of fundamental rights of the taxpayer, part of the doctrine[35] considers that, in these limits, there is a form, albeit indirectly, of protection of the taxpayer. In particular, this protection would result in articles that provide for the general obligation of States to protect the confidentiality of the assessed taxpayer and the duty to maintain the secrecy of the information collected by the tax authorities, in accordance with Article 26 of the OECD Model Convention and Articles 16 and 17 of Directive 2011/16 /EU.[36]

Apparently, it is possible to consider that the secrecy and confidentiality obligations of the States involved in the exchange of information procedure delineate a *minimum* standard of procedural protection of the taxpayer, but, in reality, it is believed that those rights cannot sufficiently guarantee the rights of the taxpayer, since they offer a merely passive protection of the latter, subject to the discretionary appreciation of the tax authorities of the States concerned. It follows that the taxpayer subjected to an exchange of information procedure cannot invoke any right or initiative, in terms of activating a right to be heard in tax proceeding and in terms of submitting an effective legal remedy. It is, therefore, evident that the international and supranational framework for the exchange of information outlines a merely indirect form of protection of the taxpayer,[37] mediated by the discretionary power of the tax authorities that have initiated the proceedings.

On the basis of these considerations, there is the need to ensure the protection of the taxpayer's rights against violations caused by the unlawful use of its investigatory powers of investigation at the time of transmitting the information, but also in the preceding phase of its acquisition.[38] The subject under investigation should, therefore, be offered guarantees and protection, administrative or judicial, at the moment he is controlled in a broad sense, regardless of the possible use of the documentation acquired by the tax authority.[39] In particular, in the case of information exchange procedure, the taxpayer must be put in a position to express his views on the elements and facts upon which the Administration intends to direct its action. In other words, it is believed that the procedural right to be heard should also be extended to the procedures for mutual administrative assistance for the exchange of information.[40] Administrative action cannot be determined solely under the evidentiary profile: the provision of a form of active participation of the taxpayer (in terms of the right to be heard) during the procedure for mutual assistance between foreign tax authorities could prevent the latter exchanging and using incorrect or incomplete information, reconstructing the ability to pay that does not reflect the effective one.

In summary, the lack of remedies, both of an administrative and judicial nature, available during the course of the exchange of information procedure is a weakness of the discipline (conventional and supranational) on mutual administrative assistance in tax matters. It is structured according to the model of "deferred protection," since the taxpayer has the possibility to appeal against the violation of his rights only after the conclusion of the proceeding and the formalization of the tax request by the prosecuting office. In other words, the taxpayer may only submit an appeal against the payment notice issued upon completion of the procedure.[41]

This is in contrast not only with the previously discussed orientation of the Court of Justice, but also with that of the European Court of Human Rights,[42] which ruled on the possibility of bringing forward the protection of the guarantees of the taxpayer to an earlier stage to that of litigation.

As it is known, the traditional approach of the European Court of Human Rights considers that Article 6 of the Convention is not applicable to tax relationships,[43] since they are part of the power of the States belonging to the Council of Europe,[44] with it also being impossible to reduce disputes relating to tax obligations to those civil and criminal rights and duties which the aforementioned Article 6 refers to.

The *Ravon* decision does not contain, either explicitly or implicitly, any modifications in relation to the traditional orientation,[45] but this does not mean it is not interesting. This is due to the fact that it has been noted that the judges consider the entrusting of the care of the interests of protection to a third party, impartial and independent (*i.e.*, the judge) to be insufficient, considering the recognition of procedural guarantees to be necessary, with the hearing assuming paramount importance, which constitutes an effective guarantee, not irreplaceable, of the independence of the guarantor.[46]

Taxpayers are no different from all other human beings and, as such, are entitled to be protected against improper or illegal action by the tax authorities, just like all people have the right to protect their personal life from actions by the State. Therefore, the protection of rights must be the same as that provided for by other areas of the law.

It is evident that the importance of ensuring effective protection of the interests of the State in the perception of the tax revenue is acknowledged, but this must be done without violating the fundamental rights of the taxpayers. In cross-border situations, the protection of the rights of the taxpayers may be more complicated to achieve, due to the various national sovereignties, but if States strive to achieve a greater coordination of their fiscal activities, this should simultaneously provide greater protection of the taxpayers' rights.

4. The Protection Of Personal Data

Among the rights of taxpayers which are likely to be affected by the exchange of information, there is the right to the protection of personal data and the right to a processing of these data to the extent consistent with the purposes of their collection.

The issue of confidentiality of the exchanged information is one of the most delicate aspects of the exchange of information. This principle requires that the authority receiving information from another Member State cannot communicate it to third parties, nor to individuals, or to other types of authority, not involved in the proceedings for which the information was provided.

Information received through the exchange of information should be accessible only to persons directly involved in the inspections and assessment of taxes.

The interest in the confidentiality of information concerning taxpayers is recognized and protected in the different jurisdictions and in some States with constitutional standards. Thus, the intensity of the relative protection varies according to the tax systems of the States receiving the assistance.

The right to ensure an effective collection of tax revenue should not constitute a valid justification for intruding the privacy of taxpayers or any human being, unless there are specific reasons for doing so. Such reasons may be linked to particular situations and may arise as the hypothesis of a taxpayer who, by virtue of his past behavior towards the tax authorities, may threaten to undermine the present obligation. There may also be other assumptions that, to ensure the effectiveness of fiscal supervision and to prevent the taxpayer building intentionally false evidence, justify restrictions on these rights, provided that such situations and risks are motivated by the tax authorities.

The widespread use of technological applications is changing the meaning and perception of the right to privacy and its protection, since personal data have now become an asset with an independent value. This also has to be considered by the tax authorities of individual countries as they exchange such information with each other.

Effective protection of the right of privacy of individuals should, in general, be ensured through an *ex ante* approach and not with the provision of the right to obtain compensation for damages resulting from undue violations suffered.

The ECHR provides with Article 8 the right to respect for private and family life, while the Charter of Fundamental Rights of the European Union recognizes the right to respect of private and family life, home and communication (Article 7), and grants protection to an individual's personal data (Article 8). The latter provision also allows the person to access the data collected concerning him and to have it corrected. Therefore, the ECHR and Charter recognize that any public interference in an individual's private life can take place: if it is in accordance with the law; in the case where it is necessary; provided this is based on a valid reason in the public interest, such as, for example, the economic well-being of society, since it is considered a fair contribution to public expenditure. In other words, the collection, storage and exchange of information between tax authorities is, *prima facie*, a violation of the right to privacy under Article 8 of the ECHR and Article 7 of the Charter. However, the aforementioned collection, storage and exchange can be lawful if it is in accordance with the law and necessary in a democratic society (so that there is a proper balance between the rights of the individual and the interests of the State) and the collection of information is not disproportionate.

It is believed that a profile to be considered is whether the fundamental right to protection of personal data may be a limit to the implementation of information exchange mechanisms.

In the case of information concerning financial revenue, the gradual elimination of banking secrecy as a valid justification on a national level, due to the protection of personal information, limits the possibility of invoking the protection of personal data which limits the exchange of information. Only other confidential reasons, such as professional secrecy,[47] could be a limit to the obligation to provide information (in spite of its expected relevance).

Consequently, the right to the protection of personal data can hardly be relied upon as an effective limit to the exchange of information or the use of economic data relevant for tax purposes, given the major significance of the financial interests of the State, aimed at safeguarding the proper and equitable distribution of the tax burden among taxpayers.

However, the processing of personal data must be in accordance with the principle of proportionality, not exceeding what is necessary, and provided that the interests or rights and freedoms of the individual are not prevalent.

It is worth considering a Court of Justice judgment,[48] which, although not relating directly to the cross-border exchange of information between tax authorities, is certainly of great interest. The ruling declared the invalidity of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of electronic communication services or of public communication networks. The judges believed that the Directive, allowing for the storage of these data and allowing the competent national authorities access to them, interferes with the fundamental right to respect for private life and protection of personal data. Moreover, the fact that the data retention and the use of the same are carried out without the subscriber or registered user being informed can engender in those affected a feeling that their privacy is under constant surveillance. Nevertheless, the Court considered that the retention of data is not liable to undermine the essential content of the fundamental right to respect for private life and protection of personal data.[49]

Even if the retention of data required by the Directive can be considered appropriate for achieving the objects of the same, the Court considered that with the adoption of the Directive on data retention, EU law exceeded the limits imposed for respecting the principle of proportionality.

Proportionality allows to verify if the security mechanisms provided by the Member States are adequate or excessive to get the results that they are pursuing.

It is, however, necessary to verify whether proportionality can be considered a tool to be used in the analysis of the measures with which it implements the new standard of the automatic exchange of information.

The automatic exchange of information can be justified by compelling reasons of public interest, but this does not mean that any type of automatic exchange of information should be considered in line with the regulations and justified by public interest. The relevance of data should, however, be evaluated rigorously and previously defined.[50]

Settled case law of the Court of Justice provides that the exceptions and limits of the protection of personal data are only applied to what is strictly necessary.[51]

There is a growing number of judgments on the right to privacy under Article 8 and its application for the collection and exchange of information between tax authorities.[52]

In particular, in the most recent judgments of the European courts,[53] it is possible to discern the will to reassert the primacy of human rights and strengthen the recognition of the centrality of the right to data protection, especially considering that the subject of reconciliation with the aforementioned eligibility for protection are interests and rights of different kinds, such as public security, economic initiative, freedom of information and expression, as well as the parties involved are different, since these relations are between natural and legal persons or between citizens and public authorities.

EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards. Moreover, "protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary."

Legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.

The above considerations also apply to the exchange of information in tax matters.

5. Final Considerations

The considerations made in the preceding paragraphs highlight how, in finding a fair balance between the need for the taxpayer to optimize the tax variable (through the pursuit of legitimate tax savings) and the need for tax authorities to combat the phenomena of aggressive tax planning (involving the removal of area of taxation), there is a need to reassure taxpayers of the protection of their rights.

The rules on mutual administrative assistance[54] turn out to be insufficient to guarantee the fundamental rights of the taxpayer in both the administrative phase as well as the possible judicial phase, with them not providing for a right to be heard nor the right to information of the taxpayer during the course of the procedure and the right to make use of an effective legal remedy based on "immediate protection."

The lack of a right to information about the starting of the exchange does not allow the taxpayer to exercise control over the legality of the procedure and, therefore, to provide evidence that the conditions laid down by the international and European laws have been complied with by the tax authorities involved. It is, therefore, believed that it is essential to recognize the taxpayer a right to information on the starting and progress of the procedure.

In addition, when a procedure for the exchange of information is started between two or more States, the taxpayer must be able to properly express his views about the basis upon which the tax authorities intend to base their acts.[55] In other words, the establishing of the right to be heard should also be ensured in the mechanisms of mutual administrative assistance: the taxpayer should not be considered as a mere recipient of fiscal policies, but as a person with whom an equal legal relationship[56] is established, intensifying the administration's need to seek the cooperation of the taxpayer when carrying out its activities.

At present, the rights of taxpayers under the procedures for mutual administrative assistance are not effectively protected or, at best, are regulated in a disorganized way by the national laws invoked in both physiological and (in most cases) pathological situations.

Thus, the growing interest of the States to intensify administrative cooperation so as to pursue a correct application of the tax systems and combat abusive and elusive phenomena, has not resulted in a change of instruments to ensure the interests of taxpayers, who continue to be remitted (where included) to the laws of each State, without considering that the level of protection of the rights of taxpayers and third parties involved in information exchange system affects the level of collaboration with the tax authorities.

In other words, taxpayers are only protected by national laws, even if the acquisition activities are carried out abroad according to the preliminary rules in force in the foreign state, with the result that an improper equalization between foreign and domestic procurement procedures is created. Moreover, the right of defense of the taxpayer can generally be exercised in the State that has requested the information, which presumably will use it.

It is also necessary to consider another fundamental element: the proportion of the assessing instruments available to the tax authorities and the rights of taxpayers. In fact, the provision of a combination of protections in favor of the tax interests would result in a violation of the European principle of proportionality, which must also be applied in the exchange of information.

The principle of proportionality constitutes a guarantee for the rights and freedoms of taxpayers, since it must inspire the administrative action as a whole.

The application of this principle in the exchange of information requires that the aim is achieved through a measure which is appropriate, but also necessary, in the sense that the above-mentioned purpose must not be attainable with another measure that is less burdensome for the taxpayer. In addition, it is necessary that the limitation the taxpayer suffers due to the administrative intervention in relation to his rights and guarantees is proportionate with the objectives to be pursued, represented, as previously stated, by tax avoidance and evasion.

The Court of Justice has had occasion to rule in different ways in relation to the principle of proportionality.[57]

As previously discussed, tax cooperation poses a problem of reconciliation between the conflicting interests of the tax authorities and the taxpayer in the exercising of personal and economic freedom. The European principle of proportionality is appropriate for pursuing such reconciliation, according to the criterion with which the Public Administration may not impose obligations or restrictions on an individual's freedom in excess of what is necessary for the satisfaction of the interest to be achieved. The tax authorities must, therefore, examine whether there are less intrusive measures which could lead to the same result and consider all the possible domestic lines of investigation, including the use of cooperation with the taxpayer. The exchange of information should be appropriate for what the Administration intends to achieve, with the result being that the request for assistance should not be made if it is not able to help clarify the tax position of the taxpayer or if the facts have already been explained and, therefore, the information would only serve to verify the facts that have already been determined.

States should make a request for cooperation only when they are not able to determine independently the elements necessary for a correct quantification of the tax base except through information of another tax authority or when the correct reconstruction of the facts would be possible only by high supporting costs.

This principle prevents (or rather should prevent) that a taxpayer should have to bear a discriminatory or restrictive tax treatment due to the difficulties of the tax authorities in obtaining or communicating information.

In conclusion, if from the point of view of the States the European and international community has introduced specific tools to protect their reasons, it is believed that what should also happen in relation to the rights and guarantees of taxpayers involved in the exchange of information (in all its possible configurations: upon request, spontaneous, automatic)[58] is that a clear and common set of rules be established. In particular, it would be appropriate to establish a "common" catalogue containing the procedural guarantees necessary to protect the taxpayers involved in mutual assistance procedures, given that the remission of the rights (if any) specified in the internal regulations of each individual State is not sufficient and does not guarantee a full homogeneity between the rights of taxpayers.

The European Commission has planned the development of a European tax code, which contains guidelines that aim to ensure a balance between the rights and obligations of both taxpayers and tax administrations. The European Taxpayers' Code should contribute to more effective tax collection by improving relations between taxpayers and tax administrations.[59]

The Member States should therefore be able to adopt or adapt their national codes considering common and generally recognized standards. Necessary adjustments might be required so as to adapt the individual codes to the specificities of each country, but, whatever the case, the provision of common *minimum* standards could improve the general understanding of the principles that should govern the relations between taxpayers and tax authorities.

The European Taxpayers' Code might: ensure equal treatment of all taxpayers; ensure a higher level of legal certainty; enhance transparency; reduce disputes; standardize compliance processes; be a benchmark for third countries; improve practices and predictable assessment of tax liability; specify principles (*e.g.*, audit and investigations, conclusions on certain facts); and ensure a better understanding when communicating with the tax administration of another Member State.

However, the report states that a European tax code would not be binding, since national tax issues are highly sensitive.

The differences between the national laws are so deeply embedded that it could be a problem to ensure the equal treatment of European taxpayers. It would therefore be necessary to accelerate the development of participation rights at a European level in order to achieve a complete system of rules, and a European tax code could be the most appropriate instrument for the protection of procedural rights.

The role of case law (national and European) has been crucial in strengthening the position of the taxpayer, but it is evident that the provision of a code highlights the trend towards a further consolidation of his position, although it is believed that to be more effective, the code should be of a binding nature.

The conflict between the interests of the State to the perception of tax revenue and the protection of fundamental rights of the taxpayer does not concern only EU members, but is a global problem, even if it is more perceived in developed countries.

As discussed above, States have felt the need to apply more and more homogenous cooperation procedures, encouraging the development of an automatic information exchange standard.

However, the objectives of uniformity cannot ignore the different levels of efficiency and culture of the administrative apparatus in the world that can lead to problems with developing countries.

There are countries that now move towards the implementation of a new model of relations between tax authorities and taxpayers, inspired by the concept of open government that encourages voluntary compliance with tax obligations.

There are, in fact, tax authorities that have not launched programs to improve relations between the Administration and the taxpayers: the objective is to increase the volume of revenue and not establish a less conflictual relationship, characterized by a greater legal certainty. Tax revenue is, therefore, represented mainly by penalties and interest on unpaid taxes, with encouraging taxpayers to fulfill their tax obligations regularly not being considered a priority.

Efficient and fair tax systems are crucial for good governance and state-building. Progressive and equitable taxation systems are crucial for development as they contribute to financing the provision of public goods and to state building and good governance.

Tax revenue must not be regarded as an alternative to foreign aid, but rather as an integral part of public revenue facilitating the development of the developing countries, whereas tax provides a source of income that is potentially more stable and sustainable than aid flows and fosters the ownership of the respective countries in a better way.

More emphasis should be placed on efforts to undertake capacity building within developing countries in order to help them make effective use of the exchange of information and effectively counter tax evasion with their internal legislation.

Good governance in tax matters cannot be exported or imposed from outside, and that it is up to each of the countries to decide its own tax policy.

In the fight against tax evasion, avoidance and aggressive tax planning, it is necessary to consider the cultural, economic and legal peculiarities of each country, along with the fact that, although the legal systems in the world differ significantly, there are fundamental principles common to rule of law, such as, for example, the right to defense (even in its procedural dimension, intended as a right of the person whose interests could be affected by the administrative action to plead his case) and the principle of legal certainty.

In several developing countries, the lack of transparency of the State produces a corrosive effect on the relationship with taxpayers (in particular, with companies), creating uncertainty and increasing, for both sides of the tax relation, the risk of being involved in a legal conflict. Therefore, increasing transparency would contribute to tax compliance as well as help to eliminate uncertainty. In other words, if the actions of tax authorities were adopted in a more transparent way, these actions would probably be perceived as impartial by the taxpayer. It is therefore necessary to consider and protect the interests of the taxpayer in these countries as well as adopt a harmonized approach to the issue of protection, given that the provision of more remedies in different States (primarily, if not provided for in the procedural stage) does not provide an effective protection of the taxpayer.

In fact, a different level of protection of rights or a different interpretation of the rights in the State of origin of the information and the State of use of such information may result in different and conflicting results.[60]

In conclusion, taxpayers should no longer be regarded as "the object" of the exchange of information, but also as the holders of rights with adequate and timely protection, which should prevent the damage that would result from the exchange, preferable to the provision of remedies to provide compensation for the violations.

Endnotes

1 In addition, this process has become increasingly evident since the adoption, by part of the States, of the world-taxation principle of the income of natural and legal persons.

2 X. Oberson, *International Exchange of Information in Tax Matters* 209 *et seq*. (Edward Elgar 2015).

3 For a more detailed analysis, *see* P. Adonnino, *Lo scambio di informazioni fra amministrazioni finanziarie*, *Diritto tributario internazionale* [Exchange of Information between Financial Administrations, International Tax Law], 1127 *et seq*. (V. Uckmar ed., Padua 2005).

4 *See* J. M. Calderón Carrero, *Intercambio de Información y Fraude Fiscal Internacional* [Information Exchange and International Tax Fraud], 337 (Madrid 2000).

5 L. Del Federico, *Scambio di informazioni fra autorità fiscali e tutela del contribuente: profili internazionalistici, comunitari ed interni* [Exchange of information between tax authorities and the protection of taxpayers: international, community and internal profiles], Riv. dir. trib. int., 222 *et seq.* (2010).

6 *See* T. Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers* (Alphen aan den Rijn 2009); M. E. Sánchez López, "La tutela del contribuyente en relación con las actuaciones de intercambio de información tributaria en el ámbito internacional [The protection of the taxpayer in relation to the actions of exchange of tax information in the international scope]," in *Intercambio Internacional de Información Tributaria: Avances y Proyección Futura*, 138 *et seq*. (M. A. Collado Yurrita ed., Navarra 2011); S. De Miguel Arias, "Los derechos de los obligados tributarios ante los requerimientos de información entre Estados miembros de la Unión Europea en la Directiva 2011/16/UE [The rights of taxpayers on information requirements between Member States of the European Union in Directive 2011/16 / EU]," *Revista española de derecho financiero* (2012), n. 135.

7 *See* OECD, *Tax Information Exchange between OECD Countries: A Survey of Current Practices* (Paris 1994).

8 L. Del Federco, "The Issue of Taxpayer's Legal Protection," *Int'l Tax L. Rev.*, Reports of the meeting, *The Mutual Assistance in Tax Matters Situation and Perspectives in the EU Member States*, 30 *et seq*. (2009).

9 Del Federico, *supra* note. 5.

10 For more details, *see Mutual Assistance and Information Exchange* 23â€"54 (R. Seer & I. Gabert eds, Amsterdam 2010).

11 It should be noted that in the Netherlands, the notification procedure to the person providing the information, in the case of the exchange of information, has been removed with a law enacted on December 18, 2013, demonstrating the propensity of states not to strengthen the rights of taxpayers with the sole purpose of making the exchange of information more efficient.

12 R. Seer, "Exchange of Information Between Tax Authorities: Structures and Recent Developments," in *Practical Problems in European and International Tax Law*, 469 *et seq.* (H. Jochum *et al.* eds, Amsterdam 2016).

13 For further details on taxpayers' rights during the investigation stage, *see* Court of Justice, October 17, 1989, Case C-85/87, *Dow Benelux*, according to which "In interpreting Article 14 of Regulation No. 17, regard must be had in particular to the rights of the defense, a principle whose fundamental nature has been stressed on numerous occasions in the Court's decisions (*see*, in particular, the judgment of November 9, 1983, in Case 322/81, *Michelin v. Commission* [1983] ECR 3461, paragraph 7). In that judgment, the Court pointed out that the rights of the defense must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable. Consequently, although certain rights of the defense relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client (recognized by the Court in the judgment of May 18, 1982, in Case 155/79, *AM* & *S v. Commission* [1982] ECR 1575) must be respected as from the preliminary-inquiry stage (paragraphs 25â€"27)".

14 When European Union law does not set out the conditions under which respect for the right of defense and the consequences of the violation of this right must be guaranteed, the above conditions and consequences are a matter of national law, provided that the measures taken are the same type as those enjoyed by individuals under comparable national law situations (principle of equivalence) and must not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). *See* P. Pistone, "The Protection of Taxpayers' Rights in European Tax Law," in *Protection of Taxpayer's Rights*, 36 *et seq.* (W. Nykiel and M. Sek eds, 2009). In particular, the principle of equivalence requires that the Administration of the State to which the information is requested is not obliged to carry out inquiries or to communicate information if the laws or

administrative practice of that State does not allow the competent authority to conduct such inquiries or to gather the required information. The interests guaranteed by the procedural limitations that impose the respect of the State which must provide the information, should help prevent the circumvention by national authorities of the bans imposed by domestic law to obtain, in whatever the case, information through the legislation of another State. *See* among the many, Court of Justice, October 23, 2014, Case C-437/13, *Unitrading*.

15 Adonnino, *supra* note 3, at 1156 *et seq*.

16 Court of Justice, December 18, 2008, Case C-349/07, *Sopropé*.

17 The theme of the right to be heard has been subject to multiple judgments by national case law. It is considered appropriate to report at least the recent ruling of the Supreme Court (Court of Cassation, Joined Sections, December 9, 2015, n. 24823) according to which on the subject of "non-harmonized" taxes, the Administration's obligation to enable the right to be heard, on pain of invalidity of the act, exists only in relation to the cases for which such a requirement is specifically enshrined; while on the subject of "harmonized" tax, taking place the direct application of EU law, the violation of the right to be heard by the Administration involves, in any case, even in the fields of taxation, the invalidity of the act provided, but it is necessary that the taxpayer proves the reasons that he could have argued, if the right to be heard had been promptly activated and that taking into account of those reason be not purely specious.

18 On the importance of the right to be heard for an effective exercising of the right to defense, *see* P. Baker and P. Pistone, *General Report on "The Practical Protection of Taxpayers' Rights"*, 38 (IFA Basel Congress Main Topic 2, IFA Cahiers 2015).

19 Court of Justice, July 3, 2014, in Joined Cases C-129/13 and C-130/13. On the relevance of the right to be heard in relations between tax authorities and taxpayers, *see* recently, the Court of Justice, February 12, 2015, Case C-662/13, which considers compatible with the VAT Directive, the provisions of the Member States which require the participation of the taxpayer in the course of the investigation stage achieved to challenge the violation of anti-abuse rules. In other words, the judges state that if a European directive does not specifically regulate the possibility of exercising the right to be heard, the national legislation which provides for the obligation to initiate right to be heard with the taxpayer prior to notification of a tax act does not arise in contrast to the Directive, since the necessary measures to counter tax evasion and avoidance shall be referred to the procedural autonomy of the national legal systems of the Member States.

20 The Court (Court of Justice, November 22, 2012, Case C-277/11, *M.M.*, paragraphs 82â€"84) states, with particular regards to Article 41, that the right to good administration involves that the right to be heard is guaranteed in all proceedings which are liable to culminate in an act adversely affecting a person. This article is intended to be universally applicable.

[21] According to European judges (Court of Justice, June 27, 2013, Case C-93/12, *ET Agrokonsulting-04-Velko Stoyanov*), such a provision constitutes "a reaffirmation of the principle of effective judicial protection, a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[22] *See also* recently Opinion of Advocate General Wathelet, delivered on January 10, 2017, Case C-682/15, *Berlioz*.

[23] *See* recently Court of Justice, February 12, 2015, Case C-662/13.

[24] The violation must "significantly" affect the interests of the controlled entity, having no effects on acts that do not reflect significantly on the patrimonial and/or personal spheres of the latter. *See* Court of Justice, September 26, 2013, Case C-418/11, *Texdata*.

[25] *Supra* note 16.

[26] Court of Justice, November 5, 2014, Case C-166/13, *Mukarubega*, paragraph 42 *et seq.*; Court of Justice, November 22, 2012, Case C-277/11, *M*, paragraph 88.

[27] Pistone, *supra* note 14, at 39 *et seq*.

[28] Court of Justice, October 22, 2013, Case C-276/12, *Sabou*.

[29] Opinion of Advocate General Kokott, delivered on June 6, 2013, Case C-276/12, *Sabou*, paragraph 24.

[30] The same argument is used by the Court in relation to the participation of the taxpayer in the hearing of witnesses in the requested State and the possibility to block the exchange of information on the basis of procedural issues or related to the acquisition of information.

[31] The judges have highlighted "that, in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment."

[32] Opinion of Advocate General Kokott, delivered on June 6, 2013, Case C-276/12 *Sabou*, paragraph 56.

[33] In this regard, it is worth considering the phenomenon of so-called "lists" (lists of taxpayers who are holders of availability, equity or other financial investments with credit to low-tax States or institutions), which generated a significant dispute with reference to the legitimacy of the acquisition of the evidences, which they are not always linearly acquired by the States of residence. (On this point, *see* P. Selicato, "Towards Global Standards in Transparency and Exchange of Information: Do Tax Havens Still Exist?", in *Booklets on International Taxation (Hefte zur Internationalen Besteuerung)* (International Tax Institute – IIFS, University of Hamburg 2011). The most worrying aspect is that the sensitivity of the national courts towards the exchange of information vitiated at the time of their acquisition is not unanimous in believing their payment notices equally vitiated. *See* in Italian case

law, Court of Cassation, s. VI, April 28, 2015, Nos. 8605 and 8606, that established the use of the unlawfully acquired lists. Along the same lines, *see* Court of Cassation, s. V, August 19, 2015, Nos. 16950 and 16951. *See also* Court of Cassation, s. V, August 26, 2015. No. 17183; Court of Cassation, s. VI, September 1, 2016, No. 17503. In the event of a payment notice based on unlawfully collected data, news, evidence, the European orientation would seem to be in the sense of believing that, if the transit of information takes place through the tax authority designated, the information is validly acquired by the State which receives it and is therefore used in the assessment. (In Italy, a prior judgment to that effect is Court of Cassation, March 20, 2000, No. 3254). However, it is believed that the mere good functioning of the information exchange procedure cannot have a correctional function of the evidence obtained in violation of national legislation. International cooperation cannot serve as a correctional filter capable of removing the original and intrinsic defects of the data acquired in violation of the law in another system. The procedure for the exchange of information cannot be used by States to remedy the substantial defects of the way of acquiring evidence; in particular, the mere fact that authorities from different Member States were involved cannot justify violations committed during the investigation stage. Regarding unusability, *see* Cour de cassation française, January 7, 2011, No. 587; Rechtbank van Eerste Aanleg te Brussel, s. XXXIII, June 28, 2002, No. 02/23379; Tribunal d'Arrondissement Luxembourg, February 25, 2002, No. 196/020. Regarding usability, *see* Bundesverfassungsgericht, November 30, 2010; Supreme Court of the Netherlands, March 10, 2008. In Spain, regarding unusability when taking evidence that leads to a violation of any rights, *see* Tribunal Constitucional de España, s. II, November 29, 1984, 114/1984. Regarding unusability when taking evidence leads to a violation of the fundamental rights of the taxpayer, as the constitutional right to defense, the presumption of innocence, the inviolability of the home and the confidentiality of correspondence, communications, *see* Tribunal Constitucional de España, s. I, December 11, 1995, No. 181; Tribunal Constitucional de España, s. I, March 26, 1996, No. 54; Tribunal Constitucional de España, s. I, July 9, 1996, No. 127.

34 It chooses for the supremacy of tax interests, a rapid and efficient exchange of information with respect to the implementation of taxpayers' rights when those rights result in a slowing down of the information exchange mechanism. *See* among the many, J. M. Calderón, "Taxpayer Protection Within the Exchange of Information Procedure Between State Tax Administrations," *Intertax*, 462 *et seq.* (2000); R. Seer and I. Gabert, "European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements," *Bull. Int'l Tax'n*, 88 *et seq*. (2011).

35 P. Adonnino, "Lo scambio di informazioni tra le Amministrazioni finanziarie [The exchange of information between financial administrations]," *Dir. prat. trib.*, 707 *et seq.* (2008).

36 Directive 2011/16/EU (*see* S. Moreno González, "La cooperación administrativa entre Estados en el ámbito de la fiscalidad: la nueva Directiva 2011/16/UE [Administrative cooperation between States

in the field of taxation: the new Directive 2011/16 /EU]," in *Intercambio Internacional de Información Tributaria: Avances y Proyección Futura*, 221, 277 (M. A. Collado Yurrita ed., Navarra 2011)) was amended by the Directive dated December 9, 2014, No. 9, which extended the automatic exchange of information to a wider range of income according to the global standard published by the OECD Council in 2014. In addition, the directive was amended by Directive 2015/2376/EU. It is a measure in line with Action 5 of the OECD BEPS project.

37 F. Persano, *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria* [International cooperation in the exchange of information. The case of the exchange of tax information], 67 (Turin 2006).

38 It has been pointed out (P. Selicato, "Scambio di informazioni, contraddittorio e Statuto del contribuente [Information exchange, contradiction and taxpayer's statute]," *Rass. trib.* 321 *et seq.* (2012)) that it is not opportune to oblige the investigating office to inform the taxpayer before sending a request for information to an authority of another State, since, at this stage, it is not possible to determine whether the Administration receiving of the request will accept it, or define the content of the data that will be sent. At this stage, the taxpayer cannot assess whether, after the acquisition of the required data, there is a concrete need for protection. In addition, it is believed that prior notification could jeopardize the effectiveness of the investigation. The office must send the taxpayer a notice of initiation when the Administration receives an answer to their request and is preparing to evaluate it for the purposes of the assessment, and only in that moment is there the interest of the taxpayer to intervene in the proceedings in order to contribute to the proper reconstruction of the facts that could be relevant to the investigation.

39 *See* A. Buccisano, "Cooperazione amministrativa internazionale in materia fiscale [International administrative cooperation in tax matters]," *Riv. dir. trib.*, 694 *et seq.* (2012).

40 *See* Baker and Pistone, *supra* note 18, at 61, according to which the fact that the information is required during the investigation stage does not mean that the taxpayer has no rights at that stage, therefore, not agreeing with the conclusions of the judges in the *Sabou* judgment.

41 There are many critical issues of a merely indirect protection of the interests of the taxpayer, especially in a system, like the Italian one, in which the possibilities of defense (judicial) of the taxpayer under investigation by the tax authorities are linked to the adoption of a payment notice (challengeable), significantly limiting *de facto* the guarantees of the subject under investigation on behalf of a foreign tax authority.

42 *See Ravon* decision (ECtHR, February 21, 2008, *Ravon v. France*), dealing with the applicability the guarantees under Article 6 to tax investigation aimed at finding evidence in the homes of the persons concerned or the premises occupied by them. *See also* A. Marcheselli, "Accessi, verifiche fiscali e giusto processo: una importante sentenza della Corte europea dei diritti dell'uomo [Access, tax audits and

fair trial: an important ruling by the European Court of Human Rights]," *Riv. giur. trib.*, 743 *et seq.* (2008); S. Muleo, "La Corte europea dei diritti dell'uomo apre alle questioni tributarie in tema di sindacabilità giurisdizionale delle indagini domiciliari [The European Court of Human Rights opens up tax affairs on the judicial review of home-based investigations], *Dialoghi tributari*, 381 *et seq.* (2009); P. Baker, "Searches of Premises by Revenue Officers in Some Recent Decisions of the European Court of Human Rights," *Eur. Tax'n*, 596 *et seq.* (2009).

43 S. Frommel, "The European Court of Human Rights and the Rights of the Accused to Remain Silent: Can It Be Invoked by Taxpayers?", *Brit. Tax Rev.*, 598 *et seq.* (1994); C. Caumont Caimi, "Taxation and the European Convention on Human Rights in the Domestic Law of the Council of Europe Countries," *Eur. Tax'n*, 531 *et seq.* (2001). *See also Human Rights and Taxation in Europe and the World* (G. Kofler, M. Maduro and P. Pistone eds, IBFD Publications 2011), *passim*.

44 The Italian doctrine of the sector, almost unanimously, supports the implementation of the principles of Article 6 ECHR to all tax disputes. *See* F. Gallo, "Verso un 'giusto processo' tributario [Towards a 'fair trial' process]," *Rass. trib.*, 11 *et seq.* (2003); F. Tesauro, "Giusto processo e giusto processo tributario [Just trial and fair trial process]," *Rass. trib.*, 11 *et seq.* (2006); L. Del Federico, "I principi della Convenzione Europea dei Diritti dell'Uomo in materia tributaria [The principles of the European Convention on Human Rights in Taxation], *Riv. dir. fin. sc. fin.*, 218 *et seq.* (2010).

45 It is worth noting, even if this is not the place for a more detailed discussion, that the work of reconstruction and interpretation of the judges in Strasbourg has led to a trend towards extending the applicability of the Convention. Over time, the Court has, in fact, considered the changes in society, therefore highlighting an expansive *vis* of its case in the area of taxation. The European Court of Human Rights has recognized, in fact, the applicability of the ECHR: administrative tax surcharges, to disputes regarding tax benefits (ECtHR, March 26, 1992, *Editions Périscope v. France*), to disputes regarding the rights of first refusal of the tax authorities (ECtHR, March 26, 1992, *Editions Périscope v. France*), tax rebates (ECtHR, October 3, 2003, *Buffalo v. Italy*; ECtHR, October 22, 2003, *Cabinet Diot v. France*) and, finally, as noted above, tax audits. Thus, allowing the conventional guarantee system into the most authoritative administrative action, namely the administrative investigation. *See* Del Federico, *supra* note 44, at 218 *et seq.*

46 *See also* ECtHR, July 24, 2008, *André and others v. France*; ECtHR, September 18, 2008, *Kandler and others v. France*; ECtHR, October 16, 2008, *Maschino*; ECtHR, November 20, 2008, *Société IFB*; ECtHR, 10 Dec. 2009,, *Joubert*. On the existence of a core of procedural rights of the taxpayer, *see Chambaz c. Suisse* (April 5, 2012), in which the incompatibility is detected with Article 6 ECHR of burdensome administrative penalty tax imposed by the Swiss tax authorities against a taxpayer who had refused to produce a series of documents required during an investigation stage. In particular, the Court ruled on the taxpayer's right to remain silent during the investigation stage, because the right to silence

and the principle against self-incrimination are generally recognized international standards which lie at the basis of the notion of fair trial. Therefore, in line with its previous case law (ECtHR, February 8, 1996, *Murray v. United Kingdom*; ECtHR, February 25, 1993, *Funke v. France*), the Court found that the imposition of sanctions against the failure to produce the documents requested infringes the right to silence and it is a violation of Article 6, paragraph 1 ECHR. *See* P. Baker, "Recent Tax Cases of the European Court of Human Rights," *Eur. Tax'n*, 585 *et seq.* (2012). It is possible to observe that if the procedural rights must also be guaranteed in the presence of measures to achieve an essential interest of the international community as a whole (In this sense, *see* Court of Justice, September 3, 2008, Joined Cases C-402/05 and C-415/05, *Kadi*), it must be observed even more so in tax proceedings, in which the same elements of essentially personal proprietary are involved.

47 In a dissimilar sense, *see* ECtHR, December 6, 2012, *Michaud v. France*.

48 Court of Justice, April 8, 2014, Joined Cases C-293/12 and C-594/1211, *Digital Rights Ireland and Seitlinger and Others*.

49 The Directive does not allow to become aware of the content of electronic communications as such and requires providers of electronic communications compliance with certain principles of protection and data security.

50 It is worth reconsidering the judgment by the Court of Justice, *supra* note 48 (*Digital Rights Ireland and Seitlinger and Others*), which shows that the fight against serious crime is of paramount importance to ensure public safety, but that the objective of general interest may not in itself justify the fact that a conservation measure, such as that introduced by Directive 2006/24/EC, is considered necessary for the purpose of that fight, as this may result in a violation of the principle of proportionality.

51 Court of Justice, November 7, 2013, Case C-473/12, *IPI*.

52 *See* European Commission of Human Rights, December 7, 1982, *X (Hardy-Spirlet) v. Belgium*. In the same line, *see* ECtHR, February 25, 1993, *Funke v. France*. On the right of the taxpayer to ask for information that could be collected by a foreign State, *see* ECtHR, October 31, 2013, *Janyr v. the Czech Republic*. *See also* Court of Justice, October 22, 2013, Case C-276/12, *Sabou*.

53 Court of Justice, *supra* note 48 (*Digital Rights Ireland and Seitlinger and Others*); Court of Justice, May 13, 2014, Case C-131/12, *Google Spain*; Court of Justice, October 6, 2015, Case C-362/14, *Schrems*, which also states that, even if a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order, the third country must ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter.

54 *See also* recently Opinion of Advocate General Wathelet, delivered on January 10, 2017, Case C-682/15, *Berlioz*.

[55] *See* Buccisano, *supra* note 39, at 694 *et seq.*

[56] W. Schick, "Il procedimento nel diritto tributario [The procedure in the tax law]," in VV.AA. *Trattato di diritto tributario*, 929 *et seq.* (A. Amatucci coord., Padua 2001).

[57] *See* Opinion of Advocate General Geelhoed, delivered on March 13, 2003, Case C-17/01, *Sudholz*.

[58] The issue of the legal protection of taxpayers concerned with the exchange of information may arise with regard to each type of exchange (on exchange types, *see* Seer and Gabert, *supra* note 34, at 94 *et seq.*). However, in the case of the "automatic" exchange, specific problems arise from the fact that the data of an undefined number of taxpayers are transmitted. The application of different rules depending on the type of exchange of information is, therefore, a necessary consequence of the need to adapt the protection of the rights to the different contexts (P. Baker and P. Pistone, "BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations," *EC Tax Rev.*, 344 (2016)). In particular, in the case of exchange of information upon request, the requested State should inform the taxpayer after it receives the request for information and invite him to provide the necessary information to the requesting tax authority. This should also be done in the case of automatic exchange, since, in the latter case, a real-time exchange is not realized, but a periodic transfer of information in blocks. As pointed out (Baker and Pistone, *id.*), the tax authorities may determine appropriate intervals for taxpayers so that they can present their arguments before the information is shared with other states.

[59] In the same context, there is the Model Taxpayer Charter proposed by the AOTCA (Asia and Oceania Tax Consultants Association), the CFE (Confédération Fiscale Européenne) and the STEP (The Society of Trust and Estate Practitioners), a preliminary version of the model taxpayer charter on a worldwide basis, aiming to ensure greater fairness in the relations of the taxpayers with tax authorities in different countries and regulate the rights and obligations of the taxpayer against the tax authorities. In representing the reference framework for all the States concerned, it has fairness and transparency as key elements, which requires the adoption and implementation of simple and clear tax rules. *See* M. Cadesky, I. Hayes and D. Russell, *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (Amsterdam 2016), *passim*; P. Baker, "Taxpayers' Charters and a Taxpayers' Charter for Europe," in *Protection of Taxpayer's Rights*, 130 *et seq.* (W. Nykiel and M. Sek eds, 2009).

[60] T. Anamourlis and Nethercott, "Cayman Court Decision Raises Implications for the Effectiveness of TIEAs," *Tax Notes Int'l*, 1141 *et seq.* (June 23).

Topical News Briefing: The Final Frontier For Taxation?

by the Global Tax Weekly Editorial Team

As the OECD observed in the introduction to its BEPS Action 1 final report, the digital economy is fast becoming the economy itself, and it is well documented that the rapid digitalization of the global economy has left tax administrations trailing in its wake.

However, recent events suggest that governments are catching on to the idea that the very technology that makes taxation in the nebulous world of the digital economy so challenging can be used to help solve the problem.

Perhaps one of the most innovative developments in this regard, as reported in this week's issue of *Global Tax Weekly*, was the recent announcement by the Chinese Government that it intends to use blockchain technology to collect tax and issue electronic invoices, in a move that is expected to improve its ability to enforce tax on e-commerce firms.

In brief, a blockchain is a highly secure, virtual ledger of digital transactions that is available to view by all participants on the network.

So, in theory, the inherently transparent nature of blockchain technology, which currently underpins the virtual currency Bitcoin, could, by definition, increase tax transparency substantially, particularly with regards to value-added tax, transfer pricing, and other transactionally rich environments. What's more, the process is likely to be fully automated, vastly reducing compliance costs for both taxpayers and tax collectors.

But it must be stressed that this territory is on the outer frontier of the world of taxation. Adapting blockchain technology to the realm of tax administration is, at present, highly theoretical, and nobody knows for sure whether it would work in practice. Nevertheless, many tax experts are of the view that, potentially, the blockchain could revolutionize taxation.

For these reasons, the results of China's experiment in this area will be keenly awaited, and doubtless many other governments around the world have at least given consideration to this idea.

In a similar vein, the International Monetary Fund published a working paper earlier this month on the tax challenges associated with the peer-to-peer (P2P), or sharing, economy, which suggested that the sector's technological foundation holds the keys to solving tax compliance problems.

It was observed in the paper that P2P platforms, as online intermediaries, "record data on the myriad of transactions taking place in the virtual markets they oversee." Governments "can therefore cooperate with them to access this data, which would undoubtedly alleviate information constraints and strengthen enforcement and allow better quantification of activity that had previously been misreported or undocumented."

Indeed, this is a process that is already taking place, with online home rental site Airbnb now collecting and remitting tourism and accommodation taxes in hundreds of locations across the world.

While blockchain technology promises to completely transform the act of taxing economic activity, such an eventuality seems a long way down the track, if indeed it will happen at all. Nevertheless, increasingly, tax authorities are approaching the challenge of adapting taxation to the digital economy from a different angle, and one that views it as an opportunity, rather than an insurmountable problem.

UK Trust Register

by Janette Cattell, Withers

Patricia Milner and Robert McLean also contributed to this article.

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If you are a trustee of a UK resident trust or of a non-resident trust which has UK assets or UK source income, you may need to take action before October 5, 2017.

Background

As part of the fight against money-laundering, organized crime and terrorist financing, the EU's Fourth Anti-Money Laundering Directive ("4MLD") was sanctioned in 2015. It includes provisions designed to increase the transparency of companies, trusts and other structures with a requirement for each EU Member State to keep a register of trusts.

UK Regulations set out to implement the UK register of trusts were published in draft earlier in 2017 and came into force on June 26, 2017. Much of the details has been left unchanged; however, there are a small number of issues which have been changed and/or which require further clarification from HMRC, as set out below.

With possible civil and criminal penalties for non-compliance including a fine and up to two years in prison, it is important you understand what is required and by when.

Function Of The Register

The Register, which will be operated by HMRC, is to perform two functions, namely providing:

(1) A register of the beneficial ownership of relevant trusts as envisaged by 4MLD; and
(2) The means for trustees to register trusts with HMRC for the purposes of obtaining a Unique Tax Reference Number ("UTR") and delivering tax returns.

As a consequence, in May 2017, HMRC withdrew Form 41G, the paper form which trusts previously had to use in order to register themselves with HMRC for tax reporting purposes. HMRC has now launched a new online portal to replace Form 41G, which allows trustees to register their trusts for both of the purposes listed above (although the service is not yet operational for agents).

Who Can Access The Register?

At this stage the Register will be private. The Register may, however, be inspected by any "law enforcement authority," which includes HMRC, the Financial Conduct Authority, the National Crime Agency, the various UK police services, and the Serious Fraud Office.

The EU's Fifth Anti-Money Laundering Directive, which requires trust registers to be made public, is still being considered in the EU legislative process.

Who Has To Register And When?

All trusts (whether resident in the UK or not) with UK tax consequences will be required to register. A UK tax consequence will arise if the trust incurs UK liabilities for income tax ("IT"), capital gains tax ("CGT"), non-resident CGT, inheritance tax ("IHT"), stamp duty land tax ("SDLT"), or stamp duty reserve tax ("SDRT").

Generally, trustees of trusts with UK tax liabilities as mentioned above will be required to provide the necessary information on or before January 31, 2018, but see below for exceptions. **Note that registration is required even though the trustees have already submitted a Form 41G to HMRC and/or are already paying UK tax.** It is not clear whether HMRC intends to notify trustees of this requirement.

While trustees have continuing UK tax liabilities they will be required to notify HMRC of changes to the information contained in the Register (but not changes to asset values) by January 31, after the relevant tax year, or, if there are no changes, to confirm this.

More Detail On Registration Deadlines

The date by which a trust must register depends on that trust's particular circumstances and, in the case of trusts which become registrable in future, the deadline depends on the taxable event by virtue of which the obligation to register arises.

The table below sets out the potential scenarios and the applicable deadlines for registration in each case:

Taxable event	Scenario	Deadline for registration
IT, CGT	Trusts which were: (a) Only settled during the 2016/17 UK tax year or which only became liable for IT or CGT for the first time in that tax year; and (b) which had not previously registered with HMRC using Form 41G	October 5, 2017
IT, CGT, IHT, SDLT, and SDRT	Trusts which were: (a) Liable for relevant UK taxes in the 2016/17 and earlier tax years; and (b) Which had already registered with HMRC using Form 41G	January 31, 2017
IT, CGT	Trusts which become registrable for reasons of UK IT or CGT during 2017/18 or subsequent tax years	The Regulations suggest January 31, following the end of the UK tax year in which the trust became registrable, but the HMRC registration portal suggests it will be October 5, 2018 (or in the relevant tax year of establishment); this requires clarification

Table 1.

What Information Must Be Provided?

The trustees will need to provide information on the identities of the following individuals/ entities:

- Settlor(s)
- Trustees
- Beneficiaries
- All other natural or legal persons exercising effective control over the trust (*e.g.*, a protector who can veto trustee decisions), and the nature of their control; and
- All other persons identified as potential beneficiaries in a document or instrument relating to the trust, including a letter or memorandum of wishes.

The information must include the person's name, date of birth, National Insurance Number or UTR (or if none, residential address) and, if they are non-UK resident, their passport or ID number, country of issue, and expiry date.

If a trust has a class of beneficiaries, not all of whom have been determined, then it will not be necessary to report all of the above information. Instead, trustees will need to provide a description of the class of persons who are entitled to benefit from the trust. The same applies to persons who are referred to as a class in a letter of wishes.

Trustees will also be required to provide general information on the nature of the trust, namely:

- Its name;
- The date on which it was established;
- A statement of accounts describing the assets and the value of each category of assets;
- The country in which it is tax resident;
- The place where it is administered;
- A contact address; and
- The full name of any advisers who are paid to provide legal, financial or tax advice in relation to the trust.

For What Purpose Will The Information Be Used?

According to the UK Government, the information will be used to give "*law enforcement and compliance officers the tools they need to combat the misuse of trusts*." HMRC will also be able to compare the National Insurance Numbers or UTRs of the parties to a trust and factor these into its wide understanding of those persons' tax liabilities.

What Are The Penalties For Non-Compliance?

These are not finalized, but will include civil and criminal penalties, including a fine and up to two years in prison.

Record Keeping

Trustees who are not required to register may nevertheless be obliged to keep up-to-date written records of the information described above and to disclose it when entering into any transaction on behalf of the trust or when requested to do so by any law enforcement authority. Clarification is required on whether these requirements apply only to trustees acting in the course of a business.

Some FAQs

- **Does the requirement to register apply to a trustee of a UK resident trust which holds a life insurance policy or a property or other assets which does not generate income or gains?**

There is no requirement to register such a trust unless and until a UK tax liability arises, for example when the property is rented out or sold and generates income or capital gain. In the case of a life policy, the paying out of the policy proceeds will not usually trigger a tax event, but investment of the proceeds may give rise to a tax event in the future.

- **We are trustees of a non-resident trust which does not hold any UK assets or have any UK source income, but the settlor is UK resident and pays tax on the income and gains. Do we need to register?**
  The requirement is for the **trustees** to have a tax liability so you do not need to register in this circumstance, even though the settlor may be able to reclaim the tax from the trustees.
- **We are trustees of a non-resident trust which holds UK assets through a wholly owned non-UK resident company. Do we need to register?**
  It is thought that this will not in itself result in the trust being registrable, *i.e.*, only taxation at the trust level is relevant. Clarification is being sought from HMRC on whether this interpretation is accepted.
- **I am a trustee of a charity which is registered with the English Charity Commission. Do I need to register?**
  The regulations do not contain any specific exemption for charitable trusts, but as most charities will be exempt from IT, CGT, IHT and SDLT, it is likely that they will not have to register. Further clarification is required though.

Topical News Briefing: GCC VAT – Seeing Is Believing

by the Global Tax Weekly Editorial Team

As the saying goes, if something seems too good to be true, it probably is.

It is an expression that could aptly describe the tortuous route being taken towards the introduction of value-added tax (VAT) across the six member states of the Gulf Cooperation Council (Bahrain, Saudi Arabia, Qatar, Oman, the United Arab Emirates (UAE), and Kuwait), which has taken many years to come to fruition.

The GCC-wide VAT is intended to replace revenues lost from the elimination of tariffs and customs on internal GCC trade, as well as to widen the tax bases of countries largely dependent on hydrocarbon revenues.

Initially, the tax was supposed to have been in place by 2012, but certain member states have struggled to lay the technical and administrative foundations for the measure. Hence, the timetable slipped, and, unhelpfully from a taxpayer's perspective, only vague promises about the tax's introduction were made by member states until GCC finance ministers approved the VAT framework in June last year, and finally signed it this year.

Several positive developments with regards to the GCC VAT have taken place recently, including the announcement earlier this year by the UAE Government that it was on course to implement VAT next January simultaneously with the five other members of the GCC.

However, as reported in this week's issue of *Global Tax Weekly*, preparations are not going as smoothly as they could.

Earlier this month, it emerged that, while the UAE and Saudi Arabia will be ready to introduce VAT on time in January, the remaining member states may not have the necessary systems in place until later on in 2018. Indeed, the lack of administrative capacity in the smaller GCC economies has hampered the reforms from the start.

Not only this, there continue to be objections to the tax from certain quarters in the bloc, particularly in Kuwait.

Despite the recent approval by Kuwait's Cabinet of draft legislation to introduce VAT, several Kuwaiti lawmakers have vowed to obstruct its introduction. Several members of the country's National Assembly have expressed opposition to the underlying principle of the proposed VAT, and to the possibility that it will enrich companies and traders while "impoverishing" Kuwaiti citizens.

In some ways, the GCC VAT has parallels to India's recently introduced goods and services tax (GST), which required the cooperation of state governments before it could be launched. This resulted in a protracted legislative process lasting more than a decade, although political barriers to its entry into force were eventually overcome.

That India's GST is much more complex than the GCC VAT is likely to be suggests that the latter will not take nearly as long to put into place. However, this does not offset the ongoing uncertainty businesses in the region face as a result of the seemingly movable feast that is the effective date.

Indeed, while much of the focus has been on the VAT-preparedness of the GCC member states, taxpayers themselves are also facing a major challenge to be VAT compliant when the time comes for them to be so. And it doesn't help that there has been a paucity of detailed guidance on the matter.

In theory, taxpayers now have little more than four months to ensure they have the systems in place to meet several new requirements, such as VAT returns, invoicing, payment, and recovery. However, businesses will, understandably, be reluctant to spend money on attempting to attain compliance with rules that are yet to be completely finalized. As such, the preparations for GCC VAT are far from ideal, on all sides.

Use Of A Name Within A Corporate Group

by Dr Simone Wick, Dierkes Partner, independent member of Morison KSi

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Within international corporate groups, transfer pricing issues and determining the "right" price for goods and services is one of the most challenging issues within the tax world. One question within this wide field of taxation issues is whether companies of the group must pay for the right to use the name of the group.

In Germany, the Foreign Transaction Tax Act (*Aussensteuergesetz*; AStG) applies to the taxation of cross-border business relations. Based on this Act, the taxable domestic income can be increased in case of cross-border business relations between related parties with conditions that do not comply with the arm's length principle. Those business relations include among others the use of a name within a corporate group.

The Federal Ministry of Finance (*Bundesministerium der Finanzen*; BMF) recently provided guidance for this issue with its letter dated April 7, 2017 (IV B 5 – S 1341/16/10003).

With this circular, the BMF refers to the decision of the Federal Tax Court (*Bundesfinanzhof*; BFH) of January 21, 2016 (I R 22/14) on the application of paragraph 1 of the AStG regarding the use of a name within a corporate group. The Court explicitly states that it is important to distinguish between a "mere" use of a name and the permission to make use of trademark rights and other intangible assets that are directly connected with the use of the name (*e.g.*, know-how).

Conforming to the letter, a "mere" use of a name within a corporate group does not constitute a business relationship. In principle, it is not payable and therefore it does not justify the approach of a correction amount for income.

According to the BMF, this only applies if no economic advantages arise solely from the use of the name. Otherwise, it would be payable and remuneration would be required according to the arm's length principle.

The remuneration capability of the use of a name can be determined by examining whether the owner of the name has the permission or the possibility to exclude a third party from using the name of the company. If this is the case, the owner would charge a fee and the user would be willing to pay for it. But the amount of the potential fee depends on whether the user can achieve any economic benefits and to what extent, regardless of whether this advantage actually occurs (*ex ante* consideration). In case the expected benefit does not occur, third parties would negotiate again to agree on an adequate price.

If the use of the intangible assets ("name") takes place solely in connection with the sales activities of the company of the corporate group and the company exclusively sells their products, then the use of a company name is not of any independent meaning as the compensation for the use of these intangible assets is already included and compensated in the purchase price of the sales company. However, it is different if the company produces goods or provides services on the market for which an independent use of the intangible assets of the corporate group is important.

Dealing with the issues of the use of a name within an international group has not become easier, but there are at least some rules given by the German fiscal authorities.

Nevertheless, it is important to check these questions up-front in all countries involved.

China Must Make Its Tax System More Progressive: IMF

China should make its tax system more progressive and fairer for lower earners, the International Monetary Fund (IMF) has said.

The IMF said in its Article IV consultation report that China has "the highest levels of income inequality in the world, which, while easing slightly recently, is projected to increase without policy action."

It added that China's tax revenue is relatively low at 20 percent of GDP compared with the OECD average of 34 percent, "due primarily to low income and property tax receipts."

It suggested that one way of addressing this imbalance would be to introduce a recurrent property tax, with rates set by local governments within a centrally approved band.

The IMF said that the country should also reduce exemptions that result in about 80 percent of urban workers not having to pay income tax. Meanwhile, China should remove a minimum earnings measure for social contributions which leads to "prohibitively high effective tax rates for the working poor."

It said direct taxes on income and property should be increased, but added that "the process should be gradual and consistent with the broader tax reform strategy."

Elsewhere the IMF suggested that China could increase its revenues by "substantially raising taxes on fossil fuel and pollution."

China's authorities argued that adopting a carbon tax would negate the need for further increasing pollution tax rates or expanding the base.

The authorities also favored tax sharing as a means of financing spending of local governments, as opposed to giving them more revenue autonomy through a property tax and personal income tax surcharge, the IMF said.

China Commits To Further VAT Reforms

Chinese Premier Li Keqiang has said reform of the country's value-added tax (VAT) regime will continue.

China has now extended VAT to all areas of the economy, having first launched a pilot program in Shanghai in 2012, and has fully phased out business tax.

The regime was set out in a number of circulars, or Cai Shui, and Li said China will now cement these changes into laws and regulations.

In July, China reduced the number of tax rates from four to three, installing rates of 6, 11, and 17 percent, and reducing the tax rate for farm produce, tap water, and books from 13 to 11 percent.

Li said the Government would continue to fine-tune the system, in order to ensure it continues to provide benefits for businesses. "The VAT reform program is a strong measure of administration to boost proactive fiscal policies and supply-side structural reform," said Li. "One year on, the reform is paying off. Sectors across the board have seen their tax burden reduced."

Since its introduction, VAT has saved businesses an estimated CNY1.6 trillion (USD239.8bn), according to the Ministry of Finance.

Hong Kong Plans Tax Breaks For Innovation And Technology Sector

Hong Kong Chief Executive Carrie Lam is set to announce new tax incentives to boost the innovation and technology sector in her October Policy Address.

The news was announced by Secretary for Innovation and Technology Nicholas Yang, and confirmed in a government statement.

In addition, Hong Kong will launch a new Innovation and Technology Venture Fund.

"This fund will kick-start in September," said Yang. "Right now, we are just finalizing some of the legal details because it turns out that we need to sign a lot of legal documents with the venture capitalists and also the so-called investees – the people who will receive the funding," said Yang. "We need to make sure the agreement is done in a robust manner."

GCC-Wide VAT May Be Delayed

There may be a delay to the introduction of a value-added tax (VAT) across Gulf Cooperation Council (GCC) territories, according to media reports.

The 5 percent levy is proposed to be in place across all GCC states (Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman) from January 1, 2018. However, there are media reports that only the United Arab Emirates (UAE) and Saudi Arabia are ready to introduce the VAT on time.

Khalid Ali Al Bustani, Director-General of the UAE's Federal Tax Authority, was quoted by Reuters as confirming at a news conference that "[t]he UAE and Saudi Arabia will be implementing VAT starting January 2018, and the rest could implement until the end of 2018." He added that firms based in the UAE will be able to register for VAT from mid-September via the Federal Tax Authority website.

This follows the announcement that despite the recent approval by Kuwait's Cabinet of draft legislation to introduce VAT, several Kuwaiti lawmakers have vowed to block the introduction of the 5 percent levy.

Local media reported that objections have been expressed by several National Assembly members, both to the underlying principle of the levy and to the possibility that it will enrich companies and traders while "impoverishing" Kuwaiti citizens.

Other factors which could potentially delay the implementation of the levy on a GCC-wide basis include resistance to the passage of austerity measures, administrative difficulties, and the severing of diplomatic ties with Qatar by several GCC members.

Singapore Planning Digital GST Reform

Singaporean authorities are looking at ways to tax the digital economy to ensure a level playing field for online and offline retailers.

Senior Minister of State for Law and Finance Indranee Rajah, speaking at a conference on August 17, confirmed that the Republic is considering a change to its goods and service tax (GST) framework to ensure that foreign-owned digital businesses are subject to the same tax settings as domestic firms.

"Digitalization is now challenging conventional notions of taxation," the *Straits Times* reported her as saying. "Having a consistent set of international tax standards, which is respected and abided by all jurisdictions, helps encourage greater cross-border trade and investments."

The new tax regime will aim to offer tax certainty to businesses and ensure technology-neutral taxation, in line with emerging international best practices in this area.

Vietnam Proposes Wide-Ranging Tax Reforms

Vietnam's Ministry of Finance has proposed a number of changes to the country's tax regime, including a hike in value-added tax (VAT), a new tax on sugary drinks, higher duties on tobacco products, a reduced corporate income tax rate, and revised personal income tax rates.

VAT could be increased from 10 percent to 12 percent starting in 2019, with a possible further hike to 14 percent from 2021. Significant changes are expected to be made to reduce the number of goods and services subject to the 5 percent reduced rate of VAT or the zero rate.

Other proposed indirect tax changes include the introduction of a 10 or 20 percent levy on sugary drinks from 2019, and higher taxes on cigarettes and large vehicles.

Vietnam is also considering lower rates of corporate income tax for small and medium-sized firms.

In a further announcement made on August 17, the Ministry of Finance has also proposed reducing the number of income tax bands, with rates of 5 percent, 10 percent, 20 percent, 28 percent, and 35 percent reportedly proposed.

As NAFTA Talks Start, Border States Urge Compromise

Mayors from the border towns between the US and Mexico, and between the US and Canada, have called for a modernized North American Free Trade Agreement (NAFTA) to remain in place.

On August 16, San Diego Mayor Kevin Faulconer and Tijuana Mayor Juan Manuel Gastélum met with other border leaders to voice support for improvements to NAFTA, on the first day of talks towards its renegotiation.

"There has never been a more important time for San Diego to champion international trade," Faulconer said. "Trade, open dialogue and collaboration create jobs, and economic prosperity for Americans, Canadians, and Mexicans alike. That's why we are calling on federal leaders to preserve and modernize NAFTA for the benefit of future generations."

"The [NAFTA's] track record is one of economic growth and middle-class job creation," added Canadian Consul General James Villeneuve. "Nine million American jobs depend on trade and investment with Canada, and over one million of those are in California. Negotiations have begun today in Washington, and Canada welcomes the opportunity to modernize the NAFTA. This is an opportunity to better align NAFTA to new realities in trade and investment and keep North America competitive."

The leaders called for negotiators to embrace free trade and modernize the rules, ensuring that there are clear and straight-forward rules under which small and medium-sized businesses can thrive.

Earlier this month, Faulconer, Gastélum and 15 binational border mayors signed a formal resolution calling for continued efforts to engage and inform federal leaders about the benefits and importance of modernizing NAFTA.

NAFTA was negotiated in 1994 to remove barriers to the exchange of goods and services, spur economic growth, create jobs, and enhance North American competitiveness.

Trilateral negotiations between the US, Mexico and Canada began on August 16, and are expected to take place over several months. US President Donald Trump earlier said he would pull the US out of NAFTA if a substantial trade imbalance in favor of Canada and Mexico is not addressed.

UK Trying To Avoid Customs Border With Ireland

The UK Government has said it wants to avoid a return to a hard border between Northern

Ireland and the Republic of Ireland, and that trade and movement between the two must be protected in any post-Brexit deal.

In a new position paper on future customs arrangements with the EU, the UK Government said that trade across the land border between Northern Ireland and the Republic must be "as seamless and frictionless as possible." The Government welcomed the EU's commitment to working with the UK on finding "flexible and imaginative" solutions to this issue.

The position paper stated that, if a hard border is to be avoided, a new customs border must likewise be ruled out. It said: "We should avoid any approach that would create new barriers to doing business within the UK (including between Northern Ireland and Great Britain)."

The paper also set out two possible approaches the UK could take in negotiating its future customs arrangements with the EU.

In the first instance, the Government could seek a "highly streamlined customs arrangement" which would simplify existing arrangements, and put in place some new measures for reducing and removing barriers to trade. Alternatively, it could seek a wholly new customs partnership with the EU, "in a way that removes the need for a UK–EU customs border." This would involve the UK "mirroring the EU's requirements for imports from the rest of the world where their final destination is the EU."

The document added that the Government "believes a model of close association with the EU customs union for a time-limited interim period" could help avoid a cliff-edge scenario for businesses and individuals.

The Government will shortly publish an additional paper on issues relating specifically to Northern Ireland.

In a statement welcoming the publication, the Irish Prime Minister and the Foreign Affairs Minister said the paper was "timely and helpful." They said the Irish Government will analyze the paper in detail, and do likewise when the document on Northern Ireland and Ireland is released.

The ministers added that the Government is hopeful there will be sufficient progress on the key issues identified for phase one of the negotiations, "to allow the necessary parallel discussions on the future relationship between the EU and the UK, including in relation to customs, to commence."

This sentiment was echoed by the EU's chief Brexit negotiator, Michel Barnier. On Twitter, he said: "The quicker [the] UK & EU27 agree on citizens, settling accounts and Ireland, the quicker we can discuss customs & [the] future relationship."

UK Government Urged To Review Property Sector Taxation

Significant tax evasion among UK landlords has been uncovered as a result of a council in London disclosing information about landlords' activities, prompting calls for a nationwide review of enforcement efforts.

According to the Mayor of Newham, Robin Wales, up to 13,000 landlords in his London borough have made inaccurate tax declarations or failed to declare income from renting out property. He said that undeclared tax among these landlords is likely to have been worth up to GBP183.1m (USD235.3m) in 2014. This was made possible through the London Borough of Newham borough-wide private rented sector licensing scheme, which includes information sharing to assist the Exchequer in ensuring that landlords meet their financial obligations.

In a letter to the UK Chancellor, Wales said a review should be undertaken covering the remainder of London and the rest of the UK.

Recently, Transparency International UK released a report warning that London properties are being purchased through companies anonymously, with no policy changes on the horizon in the UK. An investigation by the organization found that over a third of properties sold in a new Kensington and Chelsea development were purchased via anonymous companies, many based in the British Virgin Islands.

The organization said the Government should require the disclosure of property ownership, to ensure tax collection and to ensure the funds used to acquire UK property are not from illicit sources.

Elsewhere, Camden Council (another London borough) has recently called for powers to levy higher Council Tax on privately owned unoccupied properties, given the housing shortage in the capital and soaring rental and house prices.

"To discourage these ghost homes, we have repeatedly proposed that the Government let us increase the Council Tax. We are allowed to charge on furnished properties left empty," said Councillor Theo Blackwell, Camden Council Cabinet member for Finance, Technology, and Growth. "Increasing charges 50 percent had an effect, but town halls need stronger tools."

Croatia To Delay New Property Tax

Croatian Prime Minister Andrej Plenkovic has announced that the introduction of a new property tax will be delayed, after a significant public backlash to the measure.

The local property tax was approved by parliament as part of a package of tax reform measures last year, and was due to be introduced in January 2018. It is intended to replace the existing system of communal fees collected by local authorities and be used to fund local government. The tax will be charged at varying rates calculated by municipalities.

The Government has decided, however, to postpone its introduction after an angry reaction from real estate owners, many of whom say they will pay considerably more in property tax under the new regime.

Plenkovic confirmed the delay during recent television interviews. It is unclear when the tax will now be introduced, with the Prime Minister saying only that the postponement will be in place for the "foreseeable" future while possible changes are considered.

Meantime, the Government has clarified that local governments will continue collecting information on properties for tax purposes.

"Regardless of the announcement on the delay in the application of the Law on Local Taxes … data on properties and their owners and users, collected on the basis of questionnaires and forms sent by municipalities and towns during the previous period to property owners in their area, will be of use for local government units for the collection of public fees within their jurisdiction," a tax authority statement explained.

China To Modernize Tax Collection With Blockchain

The Chinese Government plans to use blockchain technology to collect tax and issue electronic invoices, in a move that is expected to improve its ability to enforce tax on e-commerce firms.

The announcement was made by Miaocai Network, an electronic invoice and taxation operator licensed by China's State Administration of Taxation. The firm has launched an online tax platform through which it will collaborate with existing government affairs blockchain service "GACHAIN" to launch a blockchain-based system for tax collecting and electronic invoice issuance.

"China's tax collecting procedures feature slow tax reporting times and insufficient coordination," said Chairman of Miaocai Network, Jie Du. "By making use of the unrivaled advantages of blockchain technology, together with the GACHAIN team, we are integrating core finance and tax business."

The new technology could make it easier for the Government to tax online enterprises and e-commerce sites, many of which are not yet incorporated into its current taxation system.

In 2016, China's online retail trading volume reached approximately CNY5.16 trillion (USD773bn).

German Prosecutors Investigating Swiss Tax 'Spies'

German prosecutors have followed up the arrest of an individual accused of spying on the German tax authorities by reportedly opening an investigation into a further three individuals supposedly linked to the Swiss intelligence agency, the NDB.

Based on information obtained by *Süddeutsche Zeitung*, it has been widely reported in the German media that prosecutors have begun looking into allegations that three people in question are employed by the NDB, and have been "spying" on tax investigators at state level in Germany.

In April 2017, a man was arrested in Frankfurt, accused of spying on German tax agencies concerning their efforts to acquire and use stolen Swiss bank data.

It was alleged that the suspect had worked for the Swiss intelligence agency and was using his position in the German tax authorities to gather information on the investigators working on cases using data illegally obtained from Swiss banks.

IRS Penalties For Tax Mistakes Rise By 33 Percent

The number of US taxpayers penalized by the Internal Revenue Service (IRS) for making mistakes or underpayments at quarterly tax-filing intervals has increased by a third over the past decade.

The number of penalties levied by the IRS rose from around 7.2m in 2007 to around 10m in 2016 (*i.e.*, a rise of almost 33 percent), according to data analyzed from the IRS Data Book for 2015 and 2016 by the *Washingon Post*. Data from the IRS Data Book for 2015 and 2016 was also analyzed by *The Wall Street Journal*, which calculated a rise in the issuance of penalties by 40 percent over the period between 2010 and 2015.

It has been suggested that the increase in the number of penalties issued may have been due to the rise of the gig economy and of increased peer-to-peer trading, with a greater number of taxpayers unaware of the income that must be declared and subject to tax. It could also be a sign that US taxpayers are struggling to meet their financial obligations following the financial crisis.

OECD Publishes First Outcomes Of Beneficial Ownership Peer Review

The OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes has published the first ten outcomes of a new and enhanced peer review process for assessing compliance with international tax transparency standards.

The new round of peer reviews – launched in mid-2016 – assesses countries' compliance with requests for exchange of information by tax authorities in other jurisdictions. The reviews follow a six-year process during which the Global Forum has assessed the legal and regulatory framework for information exchange (Phase 1) and the actual practices and procedures (Phase 2) in 119 jurisdictions worldwide.

The peer review process combines the Phase 1 and Phase 2 elements into a single undertaking, with a new focus on an assessment of the availability of and access by tax authorities to beneficial ownership information of all legal entities and arrangements, in line with the Financial Action Task Force international standard, the OECD said.

The Global Forum reviewed exchange of information practices through combined peer review reports in ten jurisdictions. Three jurisdictions – Ireland, Mauritius, and Norway – received an overall rating of "Compliant." Six others – Australia, Bermuda, Canada, Cayman Islands, Germany, and Qatar were rated "Largely Compliant." Jamaica was rated "Partially Compliant," leading the Forum to launch a supplementary report on follow-up measures to ensure a higher level of compliance.

The Global Forum says its members are working together to monitor and review implementation of the international standard for the automatic exchange of financial account information under the Common Reporting Standard, which will start in September 2017. The monitoring and review process is intended to ensure the effective and timely delivery of commitments made and the confidentiality of information exchanged, and to identify areas where support is needed.

It is also assisting developing country members to ensure they can receive the benefits of the ongoing global move to automatic exchange of financial account information.

The Global Forum is the continuation of a forum which was created in the early 2000s in the context of the OECD's work to address the risks to tax compliance posed by non-cooperative jurisdictions. It now has 144 members on equal footing, and ensures the implementation of internationally agreed standards of transparency and exchange of information in the tax area.

UK Issues CbC XML Schema Guidance

UK tax authority HM Revenue & Customs (HMRC) has issued XML schema guidance for businesses on the preparation of country-by-country (CbC) reports.

The CbC report is one element of an OECD recommended three-tiered standardized approach to transfer pricing documentation under Action 13 of its BEPS project. The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations, 2016, which implement a CbC reporting obligation for multinational enterprise (MNE) groups in the UK, entered into force on March 18, 2016.

The CbC report is required if the MNE group has a total consolidated group revenue of EUR750m (USD877.8m) or more for an accounting period. The obligation to file a report will apply to accounting periods commencing on or after January 1, 2016. A report must be filed no later than 12 months after the end of the accounting period to which it relates.

The guidance, issued on August 15, sets out the format that must be used for UK reports. It also explains how to make corrections to data, and the error codes associated with certain data elements of the XML schema.

Taxpayers need to generate a valid XML file that conforms to the OECD schema and send it to HMRC using the reporting service, which will be available soon. However, taxpayers can start to prepare their XML file now, HMRC said.

Taiwan Announces BEPS-Aligned Transfer Pricing Reporting Regime

Taiwan on July 27 released draft amendments to its transfer pricing reporting rules for public consultation.

The proposed amendments to the existing "Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's Length Transfer Pricing" would bring Taiwan's regime into line with the OECD's BEPS Action 13 recommendations, providing for the introduction of a standardized three-tier reporting regime in transfer pricing matters.

The recommendations are that large multinational enterprise (MNE) groups would be required to provide a master file, a local file, and a country-by-country report, generally to provide tax authorities with a snapshot of their tax affairs and operations globally, and to support tax authorities in identifying and challenging transfer pricing manipulation.

In line with Action 13, the master file from Taiwanese firms must contain detailed information on the transfer pricing methodology employed and information about its transactions globally, the profits generated, and information on any advance pricing agreements in place, among other things.

The master file must be complete (in Chinese, with an English version acceptable only in very limited circumstances) at the time of the filing of the corporate tax return, and must be available to the tax authority within 12 months of the end of the fiscal year in question.

The proposed update to the transfer pricing legislation additionally requires, under the local file, significantly more information on a Taiwan-resident MNE group member's organizational structure (including how it fits within the wider group), business strategy, associated enterprises, advance pricing agreements, and the controlled transactions it undertakes.

The public consultation on the changes ends on September 25, 2017, with the new reporting requirements expected to be approved by the end of the year. The measures would be applicable from the 2017 fiscal year onwards.

Nigeria Signs BEPS Multilateral Convention

Nigeria has become the 71st jurisdiction to sign the OECD's Multilateral Convention to implement the tax treaty-related recommendations under BEPS Action 15.

The Convention, which is more commonly referred to as the multilateral instrument (MLI), was signed by Tunde Fowler, Executive Chairman, Federal Inland Revenue Service of Nigeria, on August 17, 2017, at the OECD Headquarters in Paris.

The MLI transposes BEPS recommendations into over 1,000 tax treaties worldwide. It seeks to strengthen provisions to resolve treaty disputes and prevent treaty shopping, and includes an option for jurisdictions to opt-in to providing mandatory binding arbitration.

Nigeria will include 19 of its existing bilateral tax treaties as being "covered" by the MLI. Nigeria has adopted Articles 4, 6, 7, 12, 13, and 16 of the Convention; and has registered reservations for Articles 8, 11, and 17.

The first modifications to bilateral tax treaties are expected to enter into effect in early 2018.

Diageo Reveals Tax Disputes In France, UK

Global beverages company Diageo has said it is in discussions with the French and British tax authorities over the deductibility of interest costs and a Diverted Profits Tax (DPT) liability.

The company disclosed in its latest annual results that the French tax authorities intend to deny tax relief for certain interest costs, which relate to periods from July 1, 2011, and that it will contest such a decision.

"Diageo believes that the interest costs are deductible and accordingly intends to challenge any such assessment from the French tax authorities," the company said.

However, at this stage of proceedings, the firm is unable to put a "meaningful" figure on the amount of back tax at stake.

The report also revealed that Diageo has "entered into a process of collaborative working" with UK tax authority HM Revenue & Customs (HMRC), in an attempt to clarify transfer pricing and related issues. These discussions "are ongoing," the company added.

According to Diageo, on June 2, 2017, HMRC issued the company with preliminary notices of assessment under the DPT regime, which came into effect in April 2015. These require the firm to pay total additional tax and interest of GBP107m (USD138m) for the financial years ended June 30, 2015, and June 30, 2016.

The company also intends to challenge this assessment, because it does not believe that it falls within the scope of the DPT regime.

Before it can appeal the UK DPT assessment, Diageo will have to pay the full amount at issue, although the company stressed that this payment is "not a reflection of Diageo's view on the merits of the case."

"Based on its current assessment, Diageo believes no provision is required in relation to Diverted Profits Tax," it added.

The DPT is intended to counter aggressive tax avoidance by multinational companies in the UK. It is charged at a rate of 25 percent (compared with the current corporate tax rate of 19 percent) on all profits "artificially" diverted from the UK.

EU, Switzerland To Link Emissions Trading Systems

The European Commission and the Swiss Federal Council have each approved proposals to link their emissions trading systems (ETSs), meaning formal signature of a new agreement could take place by the end of the year.

Once the agreement takes effect, participants in the EU ETS will be able to use units from the Swiss system for compliance, and vice versa.

Negotiations began in 2010. A linking agreement was initialed in January 2016, but the signature and conclusion of the agreement were put on hold following a Swiss referendum on the proposals. Negotiations resumed in April 2017.

The Commission's proposal for the signature of the agreement and for its ratification will now be discussed by the EU's Council of Ministers. Ratification must be approved by both the EU and Swiss parliaments.

The two sides are hopeful that the agreement could be signed before the end of the year. It would enter into force at the start of the year that follows ratification by both sides.

EU Climate Action and Energy Commissioner Miguel Arias Cañete said: "After much hard work on both sides, I am proud of the progress we have made with our Swiss colleagues. As the world's largest cap and trade system, we have always aimed to promote the growth of the international carbon market."

The EU's ETS operates in 31 countries – the EU member states, plus Iceland, Liechtenstein, and Norway (*i.e.*, the European Economic Area (EEA)). It covers around 45 percent of the EU's greenhouse gas emissions, and works on a cap and trade principle. A single, EU-wide cap applies, and auctioning is the default method for allocating allowances.

The Swiss ETS currently includes 54 major CO2 emitters. It is also based on the cap and trade principle. The cap is reduced by 1.74 percent every year, and will reach 4.91m tonnes in 2020.

Once the agreement enters into force, emissions generated by the aviation industry will be included in the Swiss system, as is currently the case under the EU rules. The Swiss Federal Council expects that only flights from Switzerland to other countries in the EEA and internal flights will be included.

E.ON Gets EUR2.85bn German Nuclear Tax Refund

E.ON, the energy utilities provider, has announced an improvement in its financial position as a result of a substantial refund of Germany's nuclear power tax, which was recently overturned by a court.

The company announced in its first-half results on August 9 that its operating cash flow was EUR4.9bn (USD5.8bn), which was EUR3.2bn more than a year earlier, an improvement it attributed partly to "the roughly EUR2.85bn refund of nuclear fuel taxes E.ON received in June 2017."

The company also said the nuclear tax refund helped it reduce its debt "substantially" in the first half of 2017.

RWE also reported recently that its financial position had improved as a result of "a significantly better financial result and the nuclear fuel tax refund."

The nuclear tax law introduced for the period from January 1, 2011, to December 31, 2016, was annulled retroactively by Germany's Constitutional Court in a decision published in June 2017.

ARMENIA - ISRAEL

Signature

Armenia and Israel signed a DTA on July 25, 2017.

CAMBODIA - BRUNEI

Signature

Cambodia and Brunei signed a DTA on July 27, 2017.

CAMBODIA - HONG KONG

Negotiations

According to preliminary media reports, Cambodia and Hong Kong have initiated negotiations towards concluding a DTA.

CANADA - GRENADA

Signature

Canada and Grenada signed a TIEA on July 14, 2017.

CROATIA - UNITED ARAB EMIRATES

Signature

Croatia and the United Arab Emirates signed a DTA on July 13, 2017.

GRENADA - CANADA

Signature

Grenada announced the signing of a TIEA with Canada on July 17, 2017.

HONG KONG - NEW ZEALAND

Signature

Hong Kong and New Zealand signed a DTA Protocol on June 28, 2017.

INDIA - PORTUGAL

Signature

India and Portugal signed a DTA Protocol on June 24, 2017.

MOLDOVA - UNITED ARAB EMIRATES

Signature

Moldova and the United Arab Emirates signed a DTA on July 10, 2017.

NEW ZEALAND - CHINA

Negotiations

New Zealand and China held a second round of DTA negotiations on August 14, 2017.

NEW ZEALAND - INDIA

Forwarded

New Zealand is taking the necessary steps to bring its new DTA Protocol with India into effect, the Government has announced.

NEW ZEALAND - VARIOUS

Effective

In a July 4, 2017, update, New Zealand's Inland Revenue confirmed that TIEAs with Anguilla, Bahamas, the British Virgin Islands, Saint Vincent and the Grenadines, the Turks and Caicos Islands, and Vanuatu have become effective.

SAUDI ARABIA - SWITZERLAND

Negotiations

Saudi Arabia and Switzerland discussed the possible signing of a DTA during two-day talks that ended on July 16, 2017.

SINGAPORE - NIGERIA

Signature

Singapore and Nigeria signed a DTA on August 2, 2017.

SWITZERLAND - LATVIA

Forwarded

Switzerland's Federal Council has asked Parliament to approve ratification of an amendment to the DTA with Latvia.

THAILAND - CAMBODIA

Negotiations

According to preliminary media reports, Thailand and Cambodia will speed up negotiations towards a DTA.

UNITED ARAB EMIRATES - CAMEROON

Signature

The United Arab Emirates and Cameroon signed a DTA on July 16, 2017.

ZIMBABWE - NAMIBIA

Negotiations

Zimbabwe and Namibia have begun negotiations to revise their DTA.

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

THE AMERICAS

71st Congress of the International Fiscal Association

8/27/2017 - 9/1/2017

IFA

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

Key speakers: TBC

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

International Tax Issues 2017

9/11/2017 - 9/11/2017

Practising Law Institute

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

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

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

STEP Wyoming Conference 2017

9/15/2017 - 9/16/2017

STEP

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

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

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

Basics of International Taxation 2017

9/18/2017 - 9/19/2017

Practising Law Institute

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

Chairs: Linda E. Carlisle (Miller & Chevalier Chartered), John L. Harrington (Dentons US LLP) http://www.pli.edu/Content/Seminar/Basics_of_International_Taxation_2017/_/N-4kZ1z10oie?ID=299003

2017 Tax and Accounting Conference

9/24/2017 - 9/27/2017

Investment Company Institute

Venue: JW Marriott San Antonio Hill Country, 23808 Resort Parkway, San Antonio, Texas 78261, USA

Chair: Jonathan G. Davis (Fidelity Investments)

https://www.ici.org/events/info/conf_17_tac_program

Energy Tax Conference: Maximizing Value

9/25/2017 - 9/26/2017

BNA

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

Key speakers: TBC

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

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

10/18/2017 - 10/20/2017

Practising Law Institute

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

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

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

The 24th World Offshore Convention Cuba 2017

10/25/2017 - 10/26/2017

Offshore Investment

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

Key speakers: TBC

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

110th Annual Conference on Taxation

11/9/2017 - 11/11/2017

National Tax Association

Venue: DoubleTree by Hilton, Philadelphia City Center, 237 South Broad Street, Philadelphia, Pennsylvania, 19107-5686, USA

Chair: Victoria Perry (National Tax Association)

https://www.ntanet.org/event/2017/05/110th-annual-conference-on-taxation-2/

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

11/15/2017 - 11/17/2017

Practising Law Institute

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

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

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

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

11/30/2017 - 12/1/2017

International Bar Association

Venue: International Bar Association TBC, Buenos Aires, Argentina

Key speakers: TBC

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

FATCA and CRS Boot Camp

12/4/2017 - 12/4/2017

Financial Research

Venue: The Harmonie Club, 4 E 60th St, New York, NY 10022, USA

Key Speakers: TBC

http://events.frallc.com/events/fatca-and-crs-boot-camp-b1064-/event-summary-5295ecd2e4384b04a418b935fe19d96f.aspx?dvce=1

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

12/6/2017 - 12/8/2017

Practising Law Institute

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

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

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

ASIA PACIFIC

8th IBFD International Tax Conference

9/22/2017 - 9/22/2017

IBFD

Venue: TBC, Beijing, China

Key speakers: TBC

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

STEP Asia Conference 2017

11/7/2017 - 11/8/2017

STEP

Venue: Marina Bay Sands Hotel, 10 Bayfront Avenue, Singapore

Chair: SeowChee Goh TEP (JP Morgan), Lionel Choi TEP (LGT Bank Ltd), Linda Wong TEP (Chair STEP Singapore), EeLin Chan TEP (Singapore Management University)

http://www.step.org/sites/default/files/Events/2017/Asia/Asia_Conference_Agenda_2017_160617.pdf

International Taxation Conference 2017

12/7/2017 - 12/9/2017

IBFD

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

Chair: Pascal Saint-Amans (OECD)

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

CENTRAL AND EASTERN EUROPE

8th Annual International Taxation in CEE, SEE & CIS

10/19/2017 - 10/20/2017

GCM Parker

Venue: TBC, Prague, Czech Republic

Key speakers: TBC

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

MIDDLE EAST AND AFRICA

IFRS Foundation Conference: Dubai 2017

10/4/2017 - 10/5/2017

Informa

Venue: Crowne Plaza Dubai, Sheikh Zayed Al Nahyan Road, P.O. 23215, Dubai, United Arab Emirates

Chair: Hans Hoogervorst (IASB)

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

WESTERN EUROPE

The 27th Offshore Investment Symposium Oxford 2017

9/3/2017 - 9/9/2017

Offshore Investment

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

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

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

International Tax Aspects of Permanent Establishments

9/5/2017 - 9/8/2017

IBFD

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

Key Speakers: Bart Kosters (IBFD)

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

STEP UK Annual Tax Conference 2017 – Newcastle

9/14/2017 - 9/14/2017

STEP

Venue: Marriott Hotel Gosforth Park, High Gosforth Park, B1318, Newcastle upon Tyne, NE3 5HN, UK

Key speakers: John Barnett TEP (Burges Salmon LLP), Emma Chamberlain OBE TEP (Pump Court Tax Chambers), Giles Clarke TEP (Giles Clarke International Limited), Andrew Hubbard (RSM), Robert Jamieson TEP MA FCA CTA (Fellow) (Mercer & Hole), Bob Trunchion MSc TEP FCA CTA (MacIntyre Hudson Advisory Services LLP), Chris Whitehouse TEP (5 Stone Buildings)

http://www.step.org/tax17

Complaw: State Aid and Taxation 2017

9/19/2017 - 9/19/2017

Comp Law

Venue: Hotel Le Plaza, Bld Adolphe Max, 118-126, 1000 Brussels, Belgium

Key Speakers: Max Lienemeyer (European Commission), Kelly Stricklin-Coutinho (Barrister, 39 Essex Chambers), Nicole Robins (Oxera), Jose Luis Buendia Sierra (Garrigues), François-Charles Laprévote (Cleary Gottlieb Steen & Hamilton LLP), Jan Weerth (Deutsche Bank AG), Hein Hobbelen (Bird and Bird)

https://law.knect365.com/state-aid/

STEP UK Annual Tax Conference 2017 – Manchester

9/21/2017 - 9/21/2017

STEP

Venue: Mercure Manchester Piccadilly Hotel, Portland St, Manchester, M1 4PH, UK

Key speakers: John Barnett TEP (Burges Salmon LLP), Emma Chamberlain OBE TEP (Pump Court Tax Chambers), Giles Clarke TEP (Giles Clarke International Limited), Andrew Hubbard (RSM), Robert Jamieson TEP MA FCA CTA (Fellow) (Mercer & Hole), Bob Trunchion MSc TEP FCA CTA (MacIntyre Hudson Advisory Services LLP), Chris Whitehouse TEP (5 Stone Buildings)

http://www.step.org/tax17

STEP Benelux Conference

9/25/2017 - 9/26/2017

STEP

Venue: Le Royal Hotels & Resorts Luxembourg, 12, Boulevard Royal - L - 2449, Luxembourg

Key Speakers: Xavier Bettel (Prime Minister of Luxembourg), H. E. Mr. John Marshall (British Ambassador to Luxembourg), Claude Marx TEP (Commission de Surveillance du Secteur Financier (CSSF)), Judge Christopher Vajda (Court of Justice of the EU), among numerous others

http://www.step.org/sites/default/files/Events/2017/Benelux/Documents/Benelux_2017_Programme_WEB_230617.PDF

STEP UK Annual Tax Conference 2017 – London

9/29/2017 - 9/29/2017

STEP

Venue: Westminster Park Plaza Hotel, 200 Westminster Bridge Rd, Lambeth, SE1 7UT, UK

Key speakers: John Barnett TEP (Burges Salmon LLP), Emma Chamberlain OBE TEP (Pump Court Tax Chambers), Giles Clarke TEP (Giles Clarke International Limited), Andrew Hubbard (RSM), Robert Jamieson TEP MA FCA CTA (Fellow) (Mercer & Hole), Bob Trunchion MSc TEP FCA CTA (MacIntyre Hudson Advisory Services LLP), Chris Whitehouse TEP (5 Stone Buildings)

http://www.step.org/tax17

Duets in International Taxation: Single Taxation?

10/5/2017 - 10/6/2017

IBFD

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

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

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

STEP UK Annual Tax Conference 2017 – Belfast

10/12/2017 - 10/12/2017

STEP

Venue: Stormont Hotel, Upper Newtownards Rd, Belfast, BT4 3LP, UK

Key speakers: John Barnett TEP (Burges Salmon LLP), Emma Chamberlain OBE TEP (Pump Court Tax Chambers), Giles Clarke TEP (Giles Clarke International Limited), Andrew Hubbard (RSM), Robert Jamieson TEP MA FCA CTA (Fellow) (Mercer & Hole), Bob Trunchion MSc TEP FCA CTA (MacIntyre Hudson Advisory Services LLP), Chris Whitehouse TEP (5 Stone Buildings)

http://www.step.org/tax17

STEP UK Annual Tax Conference 2017 – Bristol

10/18/2017 - 10/18/2017

STEP

Venue: Bristol Marriott Royal Hotel, College Green, Bristol, BS1 5TA, UK

Key speakers: John Barnett TEP (Burges Salmon LLP), Emma Chamberlain OBE TEP (Pump Court Tax Chambers), Giles Clarke TEP (Giles Clarke International Limited), Andrew Hubbard (RSM), Robert Jamieson TEP MA FCA CTA (Fellow) (Mercer & Hole), Bob Trunchion MSc TEP FCA CTA (MacIntyre Hudson Advisory Services LLP), Chris Whitehouse TEP (5 Stone Buildings)

http://www.step.org/tax17

BEPS Country Implementation

10/19/2017 - 10/20/2017

IBFD

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

Key speakers: Bart Kosters (IBFD), Tamás Kulcsár (IBFD), Emma Barrögård (IBFD)

https://www.ibfd.org/Training/BEPS-Country-Implementation

Principles of International Taxation

10/23/2017 - 10/27/2017

IBFD

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

Key speakers: Andreas Perdelwitz (IBFD's European Knowledge Group), Premkumar Baldewsing (IBFD), Ruxandra Vlasceanu (IBFD), Laura Ambagtsheer-Pakarinen (IBFD), among numerous others

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

OffshoreAlert Conference

11/13/2017 - 11/14/2017

OffshoreAlert

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

Chair: David Marchant (Founder & CEO, OffshoreAlert)

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

Meet the Experts

11/20/2017 - 11/21/2017

Informa

Venue: Grange Tower Bridge Hotel, 45 Prescott Street, London, E1 8GP, UK

Chair: Dave Walters (Accounting Consulting Services Group, PwC)

https://finance.knect365.com/meet-the-experts-conference/agenda/1

STEP Europe Conference

11/24/2017 - 11/25/2017

STEP

Venue: The Westin Excelsior Rome, Via Vittorio Veneto, 125, 00187 Roma RM, Italy

Chairs: Gregorio De Felice (Intesa Sanpaolo), Enrico Deluchi (Atandia Srl.)

http://www.step.org/sites/default/files/ItalyEurope_Conference/Europe_Rome_2017_Programme_7.pdf

7th Annual IBA Tax Conference

1/29/2018 - 1/30/2018

International Bar Association

Venue: etc.venues, 8 Fenchurch Pl, London, EC3M 4PB, UK

Speakers: TBC

https://www.ibanet.org/Conferences/conf856.aspx

THE AMERICAS

United States

The United States Court of Appeals for the Sixth Circuit has rejected a legal challenge brought by various parties against the Foreign Account Tax Compliance Act, including by Senator Rand Paul (R-KY).

Paul was joined by six overseas American taxpayers in bringing a legal challenge against FATCA in July 2015.

A listing of recent key international tax cases.

FATCA, enacted by the US Congress in 2010, requires all financial institutions (FIs) outside of the United States to submit regular information on financial accounts held by US persons to the IRS. Otherwise, certain payments of US-sourced income face a 30 percent withholding tax.

They had sought a preliminary injunction to stop the enforcement of both the intergovernmental agreements (IGAs) negotiated by the US Treasury Department under FATCA, typically providing for reciprocal information exchange with other foreign jurisictions, and also the account reporting requirements of FATCA and the Report of Foreign Bank and Financial Accounts (FBAR).

An FBAR must be filed with the Financial Crimes Enforcement Network (FinCEN) by American taxpayers who have one or more bank or financial accounts located outside the United States, or signature authority over such accounts, whose aggregate value exceeds USD10,000 at any time.

In the introduction to the case, it was stated that the FATCA and FBAR "laws and agreements impose unique and discriminatory burdens on US citizens living and working abroad," and that "the challenged provisions are unconstitutional and the defendants [the US Treasury, IRS, and FinCEN] should be enjoined from enforcing them."

The case calls IGAs unconstitutional, as they have not been submitted to the US Senate for its advice, consent, or approval, thereby violating the rights of Paul (and of all other senators). On the other hand, if they are meant to be considered as only executive agreements concluded by the US Administration, it is pointed out that President Obama had "lack[ed] any independent authority over such matters."

In addition, it was said the IGAs "nullify the right of individuals to refuse to waive foreign privacy laws that would otherwise prohibit their banks from disclosing their account information to the IRS. This second ground thus provides another independent reason that the IGAs are unconstitutional."

The information reporting provisions imposed on foreign FIs by FATCA also "permit the federal Government to conduct wide-ranging, indiscriminate searches of the private financial records of American citizens without providing any opportunity for judicial oversight. Such unbridled discretion to pry into the private financial information of American citizens violates the Fourth Amendment."

Furthermore, it is noted that the reporting requirements "require US citizens living abroad to report more detailed information about their local bank accounts than US citizens living in the United States."

Finally, it claimed that the 30 percent "tax" imposed by FATCA on payments to foreign FIs when they "choose not to help the IRS pry into the bank accounts of their US customers … is not a tax at all but rather a penalty designed to accomplish indirectly through financial coercion what the US government cannot mandate directly through regulation."

The Senator called FATCA "a sweeping financial surveillance program of unprecedented scope" and claimed that implementation has cost large banks around USD100m each to implement, and upwards of USD8bn system-wide.

The suit was dismissed by United States District Court for the Southern District of Ohio on April 26, 2016, after the judge ruled that the plaintiffs lacked standing to bring the claims, as none had been directly affected by FATCA.

On August 18, the US Court of Appeals for the Sixth Circuit upheld the District Court's decision. "No plaintiff can satisfy the Driehaus test for standing to bring a pre-enforcement challenge to FATCA because no plaintiff claims to hold enough foreign assets to be subject to the individual-reporting requirement," ruled Judge Danny Boggs.

https://www.courthousenews.com/wp-content/uploads/2017/08/SixthFATCA.pdf

US Court of Appeals For The Sixth Circuit: *Crawford, Paul, and others v. US Treasury and others (No. 16-3539)*

United States

The US Tax Court has ruled against the Internal Revenue Service's (IRS's) decision to cancel two advance pricing agreements (APAs) entered into with US electrical systems giant Eaton Corporation. This is thought to be the first judicial challenge to an IRS decision to withdraw or cancel an APA.

Eaton Corporation entered into two unilateral APAs (APA I and APA II) with the IRS, each covering five fiscal years. These established a transfer pricing methodology (TPM) – the Comparable Uncontrolled Price (CUP) method – for covered transactions between Eaton Corporation and its subsidiaries.

In 2011, the IRS determined that Eaton Corporation had not complied with the applicable terms of the revenue procedures and canceled both APAs with retrospective effect. As a result, the IRS determined that an adjustment was necessary to reflect an arm's length result for Eaton Corporation's inter-company transactions.

The IRS justified cancellation of the APAs stating that Eaton Corporation added favorable steps to its transfer pricing methodology (TPM) calculations that were not part of either APA, failed to promptly disclose mistakes in its TPM calculations, failed to keep adequate records, and failed to maintain adequate internal controls to ensure the integrity of its APA calculations. The IRS stressed that Eaton Corporation did not comply in good faith with the terms and conditions of either APA and failed to satisfy the APA annual reporting requirements.

Eaton Corporation however contended that it had merely made data and computational errors, which did not affect the validity of the TPM, and that it had corrected these errors on its amended tax returns. The company argued that there was no basis for cancellation of the APAs under the applicable revenue procedures.

Ruling in favor of Eaton Corporation, the Tax Court said that it was an abuse of discretion for the IRS to cancel the two APAs. The court ruled: "[The IRS] had many opportunities not to agree to APAs. During the APA negotiations [the IRS] never suggested a different TPM as an alternative, even though some on the APA teams thought another method would be a better method."

The court added: "[The IRS] entered into not one, but two APAs. [The IRS] had an opportunity not to renew APA I and enter into APA II if [it] wanted to change the TPMs. APA II provided an opportunity to look at the agreement *de novo*. After completing the APA II negotiations, [the IRS] should have had a clear understanding of [Eaton Corporation's] transactions and should not have entered into APA II if the APA II team was concerned that the company was omitting or misrepresenting information."

"[Eaton Corporation] made immaterial and inadvertent errors that do not fit the APA governing revenue procedures' definition of 'material.' [The IRS] should not be able to use these errors as grounds for switching to a TPM that was contemplated during the APA I and APA II negotiations," the court ruled.

It concluded: "An APA is a binding agreement and it should be canceled only according to the terms of the revenue procedures. It should not be canceled because of a desire to change the underlying methodology of a method that would result in a significantly different profit split. For these reasons, cancellation of the APAs was arbitrary and unreasonable. We do not sustain [the IRS's] determination to cancel APA I and APA II."

This judgment was released on July 26, 2017.

http://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=11336

US Tax Court: *Eaton Corporation v. IRS Commissioner (T.C. Memo. 2017-147)*

WESTERN EUROPE

France

An Advocate General to the European Court of Justice (ECJ) has opined that a French citizen cannot rely on the agreement between France and Switzerland on freedom of movement to avoid France's exit tax.

The case involves a French citizen, Mr. Picart, who held significant shareholdings in a number of French companies when he transferred his tax residence from France to Switzerland in 2002.

On transferring his tax residence, Picart, in accordance with French law, declared an unrealized capital gain on the shares and, in order to benefit from suspension of payment of the tax payable on that capital gain, appointed a tax representative in France and provided a bank guarantee to ensure recovery of the debt to the French Treasury.

In 2005, Picart transferred his shares, thereby bringing the suspension of taxation to an end. However, after examining his personal tax situation for the period January 1, 2002, until December 31, 2004, the French tax authorities reassessed the amount of the capital gain at issue and claimed additional payments of income tax.

Picart challenged the tax assessment, arguing that the relevant article of the French tax code was incompatible with the EU–Switzerland agreement on the free movement of people (the AFMP). He claimed that freedom of establishment was guaranteed by that agreement and that he could rely on it, as a self-employed person, since he had become established in Switzerland in order to pursue an economic activity consisting in managing his various direct or indirect shareholdings in a number of companies which he controlled.

Picart appealed the decision up to the Conseil d'État (Council of State, France), which referred the matter to the ECJ.

In his opinion, Advocate General Paolo Mengozzi found that the circumstances of the plaintiff did not fall under the scope of the terms of the AFMP. He observed that:

> "The right of establishment of a self-employed person, as laid down in [the AFMP], must be interpreted as meaning that it extends only to a natural person wishing to pursue, or pursuing, a self-employed activity on the territory of a Contracting Party other than that of which he is a national, and on which he must be treated in the same way as a national of that State, that is to say, any overt or covert discriminatory measure on grounds of nationality must be prohibited. On the basis of the information provided by the referring court, the plaintiff in the main proceedings does not appear to fall within the scope of those terms of the agreement."

The opinion was released on July 26, 2017.

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0355

European Court of Justice: *Picart v. French Ministry of Finance (Case C-355/16)*

Dateline August 24, 2017

The **sharing economy** is supposedly the latest digital revolution to come along and confound the staid world of taxation, giving birth to new business models that seemingly fall outside the traditional realms of tax law. However, perhaps this issue isn't as insoluble as is being made out. Maybe it's a simple matter of just paying your taxes.

Indeed, the message broadcast by tax authorities around the world in sharing economy guidance is for the most part quite basic: declare anything you earn, and pay tax on it.

For sure, there are many tax and legal **gray areas** in the sharing economy. The line between professional and non-professional (*i.e.*, non-taxable) income is a movable one. And with regard to ride-sourcing services in particular, the debate rages over whether these fall within the scope of existing sales tax and employment laws.

But, as a recent working paper by the International Monetary Fund (IMF) observed, many of the tax problems associated with the sharing economy (referred to in the paper as the peer-2-peer (P2P) economy), stem from plain **non-compliance** by individuals and companies concerned. In fact, it suggested that as far as tax authorities are concerned, there is little to be afraid of.

Services in the P2P economy are invariably shared via an **online platform**, and these can be the tax authority's friend. Because they are the perfect tool to collect and remit certain indirect taxes without the authorities having to lift a finger. Indeed, Airbnb seems to have become the *de facto* tourist tax collection agency in France. A case of keeping your friends close, but your enemies closer, you might say.

Nobody is suggesting that the sharing economy should be a tax-free one – a sort of **tax haven for the digital age** – but few jurisdictions seem to have done much to actually collaborate with the sharing economy, and help individuals and companies overcome tax problems.

We move on from new tax questions now to ones of an older provenance – **tax avoidance by multinational enterprises** – and from a tax point of view, Diageo's recently published annual report was revealing for a couple of reasons.

First, it showed how large multinational companies are more often than not embroiled in at least one **tax dispute** across the many jurisdictions in which they operate.

Second, in Diageo's case, one of these tax disputes concerned the **United Kingdom's Diverted Profits Tax** (DPT). And this development was interesting because this was one of the first times that the UK tax authority, HMRC, has assessed DPT against a company.

The next development of interest will be how this dispute unfolds. And doubtless other multinationals with potential exposure to this charge will be keenly watching, with a view to strengthening their own defenses against the tax.

However, they'll need a long attention span. Because under the DPT legislation, after a taxpayer is issued with a DPT payment notice (the DPT is a "pay first, argue later" tax), there is a **12-month review period** during which the charge may be adjusted. At the end of the review period the business has the opportunity to appeal against any resulting charge, potentially **prolonging the dispute** further, although the review period can be brought to a conclusion earlier with the agreement of both parties.

It is unsurprising that, given the sum of money at stake, Diageo has chosen to pursue an appeal here. However, some tax experts have wondered, given the wide scope of the DPT legislation, and the fact that the odds seem to be stacked in HMRC's favor, whether taxpayers would be prepared to defend their tax positions if relatively small sums were involved. Indeed, **HMRC's Accelerated Payment Notices** (APN), under which those accused of using aggressive tax avoidance schemes must also pay up before appealing, has turned out to be pretty successful, and you could say that with the DPT regime, the APN scheme has effectively been extended to large corporates.

It could be argued that the DPT and APNs load the dice too much in favor of the tax authority at the expense of potentially innocent taxpayers, that it presumes **guilt before innocence**. But hasn't it always been thus? Like governments and sin taxes, tax authorities often profit from your mistakes. Indeed, you could easily accuse them of having a vested interest in tax complexity, because the more complicated it is to complete your tax return, the more likely you are to make mistakes and be fined.

Yes, this judgment does come across as rather harsh and cynical, especially when so much effort is expended by politicians and legislators these days on attempting to **simplify tax codes** (albeit with little meaningful progress made towards this goal in many jurisdictions). But it can't be entirely a coincidence that as the **US tax code** gets more complicated by the day, more and more taxpayers are paying the price for filing incorrect tax returns, and I dare say that a substantial proportion of the errors are entirely unintentional.

According to Senate Finance Committee Chairman Orrin Hatch, in 1913 the 1040 Income Tax Form consisted of three pages, with one page of instructions. In 2016, that same form consisted of two pages with 106 pages of basic instruction and, depending on taxpayer circumstances, 13 separate schedules with more than 70,000 pages of instructions.

War And Peace is often used as a benchmark to measure the length of the US tax code, and according to Senator Hatch, the code is now **seven times the length** of Tolstoy's epic tome. And, I would add, infinitely less interesting.

At least life is a lot simpler for taxpayers in some parts of the world. Like **Hong Kong**. But I'm not sure what to make of Hong Kong's decision to proceed with a **lower rate of corporate tax for small businesses**.

On the one hand, this is obviously good news for the small businesses in question, and it's hard to knock a Government for lowering somebody's tax liability. On the other hand, this is Hong Kong's first major foray into the world of **progressive taxation**, and while many would argue this is a positive development – should a small firm pay the same tax rate as a multi-billion dollar multinational corporation? – there is a downside, and that is that multiple rates of tax tend to **increase tax complexity**.

True, Hong Kong already offers concessionary rates of tax on income from certain activities, such as fund management and intellectual property rights, but one of Hong Kong's main selling points is that its tax regime is **stable and largely simple**. It doesn't offer tax incentives as such, because they tend to add complexity to the tax system.

Singapore, usually Hong Kong's closest comparator, by contrast has created a vast array of different tax incentive schemes which are often difficult to keep track of. But then again, Hong Kong and Singapore are consistently rated as **two of the best places to do business** in the world because of their lack of taxes and other bureaucratic barriers. So, I suppose, perhaps, there's really nothing to be worried about.

The Jester