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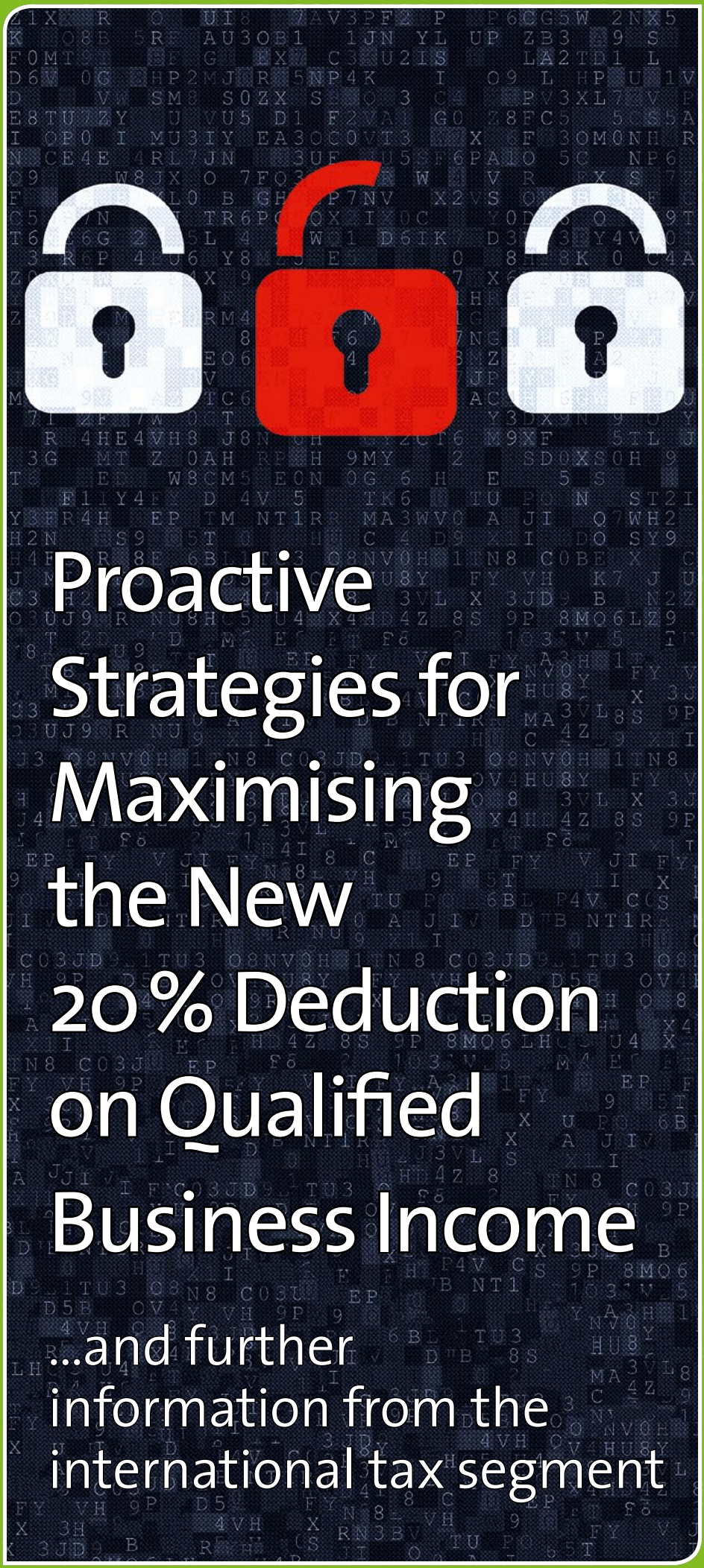

Proactive Strategies for Maximising the New 20% Deduction on Qualified Business Income

...and further information from the international tax segment

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Newsletter
No. 09 | Autumn 2018

Diary

Upcoming GGI International Taxation Practice Group (ITPG) meetings:

- **18 October 2018**
  ITPG Meeting at the GGI World Conference
  Buenos Aires, Argentina

- **01 December 2018**
  Combined Practice Group Meeting International Taxation & Indirect Taxes at the GGI Asia-Pacific Regional Conference
  Phuket, Thailand

- **24-27 February 2019**
  ITPG Global Tax Summit
  Tel Aviv, Israel

- **09 May 2019**
  ITPG Meeting at the GGI European Regional Conference
  Prague, Czech Republic

- **20 June 2019**
  ITPG Meeting at the GGI Pan-American Regional Conference
  Houston (TX), USA

- **12 September 2019** (TBC)
  ITPG Meeting at the GGI World Conference
  Marrakech, Morocco

- **29 November 2019**
  ITPG Meeting at the GGI Asia-Pacific Regional Conference
  Bali, Indonesia

Editorial

Dear Reader,

You may be surprised to see me returning as Editor of the International Taxation Practice Group (ITPG) newsletter. With great regret, I have to inform you that our Global Vice-Chairperson, Robert Worthington, has decided to move on to another firm.

Robert has supported me not only as Global Vice-Chairperson but also as the North American Regional Chairman of ITPG. He successfully organised and chaired ITPG meetings such as the Global Tax Summit 2018 in Spain, and also took over responsibility as Editor of this newsletter. I have experienced him as an always prudent, helpful and humorous interlocutor. We will certainly miss him. I wish Robert every success and satisfaction in his new job.

In this newsletter, you will find 15 articles from tax experts around the world. These were compiled by Robert prior to his resignation. Topics include the US tax reform, transfer pricing, tax authorities gathering information from social media platforms, making tax digital or segmenting firms, global monetisation of intellectual property, sales tax on online trading, tariffs, voluntary disclosure and automatic exchange of information programmes to tax credits for non-resident taxpayers. The wide mix shows how demanding and diverse our practice is. I would like to thank all authors for their efforts. Should you have questions about any of these articles, please feel free to contact the respective author directly.

Special thanks to Kutchins, Robbins & Diamond, Ltd. (KRD) for their continued support of this newsletter.

Oliver Biernat
Global Chairperson of the International Taxation Practice Group (ITPG)

Proactive Strategies for Maximising the New 20% Deduction on Qualified Business Income

By Rick J. Taylor

The 2017 Tax Cuts and Jobs Act is the most significant change in US tax law since 1986. Included is a new 20% deduction on qualified business income (QBI) for the owners of various pass-through business entities (which include S corporations, limited liability companies, partnerships, and sole proprietorships). The QBI deduction will significantly reduce business-related income tax resulting in a maximum effective tax rate of 29.6% (80% x 37%).

For tax years beginning after 31 December 2017, certain taxpayers other than corporations (individuals, trusts, and estates) are generally entitled to a deduction for each taxable year equal to 20% of QBI. For manufacturers who previously claimed the now defunct 9% Domestic Production Activities Deduction, the increase in deduction is not 20%, but rather just 11%.

QBI is the sum of:

1. taxable income or loss for each qualified 'trade or business', and
2. the total amount of the taxpayer's qualified REIT dividends and qualified publicly traded partnership income.

QBI is generally limited to 50% of W-2 wages paid to employees or, in the alternative, 25% of W-2 wages plus 2.5% of the unadjusted basis of all tangible property subject to depreciation. The deduction is further limited by 20% of the taxpayer's taxable income excluding capital gains and §1231 gain taxable as long- term capital gains.

Important:

- If W-2 wages of the pass-through entity are at least 40% of business income, the wage limit should not operate to limit the deduction. Partners cannot get W-2 wages from their partnerships. Partnership guaranteed payments do not qualify as W-2 wages.
- Real estate entities with zero W-2 wages can maximise their deduction by ensuring their cost basis in depreciable property is eight times their net rental income. That is a 12.5% rate of

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Rick J. Taylor, CPA has numerous years of experience specialising in S corporations, partnerships, and accounting methods; including 11 years at the senior manager and partner level in the Washington National Tax office of a Big Four accounting firm. Rick is a frequent speaker and author, and is an acknowledged expert who focuses on practical solutions for closely held businesses and high net worth individuals and families.

return, excluding the cost basis of land and any intangibles.

QBI generally includes all net income from a qualified trade or business other than investment income. QBI also includes only income that is effectively connected with the conduct of a US trade or business.

QBI generally excludes Specified Service Trade or Business Income (SSTB) except in the case of certain lower income taxpayers. SSTB includes any trade or business involving performance of services in health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, and brokerage services, or any trade or business the principal asset of which is the reputation or skill of one or more of its employees or owners. Proposed regulations greatly narrow the reputation or skill limitation to businesses that receive income from endorsing products or services, license, or receive income for the use of an individual's identity, or receive income for appearing at an event or in the media. Architects and engineers are specifically excluded from the definition of SSTB.

The SSTB limitation and the 50% of W-2 wages limitation is not applicable to taxpayers with income of USD 315,000 or less if married filing jointly (MFJ), or USD 157,500 if filing single (S). However, the limitations are applied on a 'percent-to-total' basis as income increases by USD 100,000 and USD 50,000 respectively above these amounts, until the limitations are fully effective when income levels equal or exceed USD 415,000 MFJ or USD 207,500 S.

In the new proposed regulations, the Treasury acknowledged that a single trade or business may be operated across multiple entities, so some grouping would be permitted so that taxpayers would not have to restructure solely for tax purposes.

The reduction of corporate tax rates from 35% to 21% is making taxpayers consider converting to regular C corporations.

Important:

- For a US resident, rarely will operating as a C corporation be more beneficial than operating as an LLC taxable as a partnership, especially if the LLC qualifies for the §199A deduction. Only in very unique situations will the C corporation form produce a better result.
- The proposed regulations permit the grouping of related businesses if certain tests are met. This should alleviate the need to restructure business operations solely for tax purposes and permit a wider availability of the 20% deduction.

Issued by Italian Minister of Economy and Finance

Guidelines for the Application of the Transfer Pricing Provisions

By Roberto M. Cagnazzo

On May 2018, the Italian Minister of Economy and Finance (MEF) issued a Decree containing the domestic guidelines on transfer pricing provisions and the arm's length principle. The guidelines are part of the process of adapting the Italian tax law and practice to the principles outlined in the OECD BEPS Project and already incorporated in the Guidelines 2017.

The Decree introduces the domestic definition of 'associated enterprises' and specifies that 'participation in management, control and capital' is the majority holding (more than 50%) in the capital, voting rights or profits of another company or the dominant influence over the commercial/financial decisions of another company.

The Decree provides that the valuation of a controlled transaction must be done with the most appropriate method according to the circumstances: in particular, it establishes the preference of the traditional transaction methods (i.e. CUP, RPM and CPM) over the transactional profit ones (i.e. TNMM and PSM).

The greatest novelty concerns the introduction of two specific provisions concerning the so-called low-value

adding services (Art. 7) and the appropriate documentation (Art. 8). In particular, the Decree introduces the simplified approach provided for low-value added services by the OECD Guidelines, according to which the taxpayer is entitled to determine the transfer price by aggregating all direct and indirect costs and adding a profit margin of 5%.

The Decree represents an important step in the alignment of the domestic tax law with the international best practices and recommendations on transfer pricing and with the results of the OECD's BEPS Project. The said principles will be subject to further interventions by the legislator and tax administration to better clarify their scope and concrete application procedures, with the aim of increasing certainty in a field that in recent years has represented, and will represent in the future, one of the main areas of debate between multinational groups and tax authorities.

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Roberto M. Cagnazzo, Founder and Partner, is a Chartered Accountant and Statutory Auditor with considerable expertise in domestic and international taxation acquired as Head of Tax in some of the leading listed Italian multinational groups and as Professor of Tax Law and International Tax Law at the University of Torino.

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Lessons from Chevron

By Tony Nunes

This is part two of a two-part series. Part one can be read here.

In the spring issue of the newsletter, we looked at the background and the independent subsidiary vs. the orphan theory of the Full Federal Court of Australia when handing down its judgment in the landmark transfer pricing dispute between Chevron and the Commissioner of Taxation.

Below, we follow up by describing how commercial reality affected the pricing and parental credit support, as well as the lessons learned by this case.

The role of commercial reality in determining price

The Court also endorsed the approach that the transfer pricing provisions give the Commissioner broad powers to substitute a more commercially realistic transaction when the actual transaction is considered to be one that could not occur in the open market. The Court found that the focus of the legislation is to bring 'commercial reality,' based on a hypothesis of the parties being independent of each other, and viewing the transaction in circumstances where that commercial reality has not been distorted by considerations that are due to a lack of arm's length dealings between the parties.

Based on the evidence of Chevron's bankers, the Court found that a loan such as that obtained by CAHPL would not have been available to a hypothetical company with CAHPL's credit worthiness as a standalone company. That is, as a standalone company, CAHPL could not have secured a loan of USD 2.5 billion at 1-2%. Furthermore, an independent borrower such as CAHPL, dealing at arm's length, could have given security and operational and financial covenants to acquire the loan, which would have resulted in a lower interest rate.

Parental credit support

If a parental guarantee supporting the borrowing entity is available, one would expect that the interest rate would be lower. As the three judges had a different opinion on this and the case was not decided on this issue, it remains unclear whether an explicit or implicit guarantee should be taken into account in determining the arm's length price.

Lessons for multi-nationals

Key lessons from this case include:

- in applying the arm's length principle, parties must look beyond the legal form of a transaction and determine pricing based on the actual conduct of the parties;
- aspects of the intercompany transaction can be replaced with features that would have happened at arm's length in the market;
- Related parties must take into account the commercial context of intercompany arrangements and ensure that the characteristics of the transactions are consistent with the substance and conduct of the parties before selecting and applying the most appropriate transfer pricing methodology.

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Tony Nunes has over 22 years' experience in providing tax advice.

Tony Nunes

He has extensive experience in advising clients on issues affecting cross border transactions, acquisitions and restructures and in all aspects of structuring the ownership and financing of corporations and their operations.

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LinkedIn Profile – A link for India to tax non-residents

By Anjali Kukreja

Amendment in Indian tax laws

The Indian Finance Act 2018 widens the scope of business connection under Indian tax laws, to include the business activity of a person who habitually plays a principal role leading to the conclusion of contracts by a non-resident in India.

Aim of introducing amendment

- This amendment has been introduced with a view to

preventing avoidance of payment of tax through the following:

1. **Commissionaire arrangements:** Sale made by the agent in substance but in legal form all sales documents are in the name of the non-resident (executed outside source country India); or
2. **Fragmentation of business activities:** Declaring agent's role as that of a preparatory & auxiliary activity.

- This amendment aligns Indian tax laws with the language of the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting ('multilateral instrument').

Information sources for Indian Tax authorities

- External Confirmations: In order to substantiate that the agent plays the principal role leading to the conclusion of contracts of the non-resident, Indian income tax authorities may seek third party confirmations (such as statements from the customers regarding the duties performed by the Indian agent on behalf of the non-resident).
- Social Media: Indian income tax authorities may attempt to gather information regarding the role and conduct of the agent from social media platforms such as LinkedIn, job portals, etc. Therefore, all the postings regarding the role and conduct of the agent should be carefully maintained whether it is on social media or on the official email records.

Word of Caution

In light of this amendment, non-residents doing business in India who have appointed agents to genuinely serve as a mere communication conduit with their Indian customer, should have substantiating evidence of the conduct of the agent such as documentary evidence or preserved official correspondence highlighting their role and conduct.

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Global Monetisation of Intellectual Property

US 2017 Tax Act Unsettles Tax Implications

By Tryn T. Stimart, Peter J. Ulrich, Jean E. Dassie, and Todd M. Kellert

The 2017 Tax Act encompasses the most wide-ranging changes to the US Internal Revenue Code since 1986. Significant changes applicable to intellectual property include a new tax on global intangible income earned by foreign subsidiaries (GILTI) and a new tax deduction for foreign-derived intangible income earned by US corporations (FDII). Multinational companies should consider GILTI and FDII when evaluating where their critical IP should reside.

GILTI effectively imposes a minimum tax on US shareholders who own at least 10% of a foreign subsidiary, to the extent the subsidiary has 'global intangible low-taxed income.' The provision provides a formula for calculating global intangible income, which exempts the deemed returns on tangible assets. The new law contains provisions that lower the burden of the GILTI tax for eligible corporations. FDII allows US corporations to take a deduction against 'foreign-derived intangible income,' that is, foreign income treated as attributable to IP and other intangible assets.

US multinational corporations with patents or other IP offshore should assess whether retaining the IP offshore or migrating it to the US produces a more favourable tax result from a global perspective. While GILTI taxes US shareholders on income derived from IP held by foreign subsidiaries, FDII incentivises US multinationals to retain their IP in the US while encouraging

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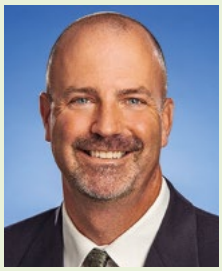
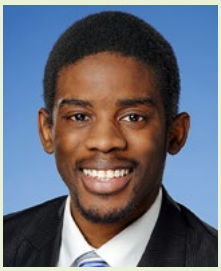


Tryn T. Stimart



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monetisation. FDII offers a reduction of the tax rate on income a US corporation earns when it exports goods or services that are performed overseas involving IP owned by the US Corporation. FDII is thus comparable to the patent box regimes employed by some other countries.

US corporations that perform IP-intensive services globally should carefully consider the implications of GILTI, FDII, and the tax laws of the applicable foreign jurisdiction in decisions to offshore or onshore their critical IP.

UK Moves Towards Making Tax Digital

By Julie Bryant

The UK is entering a period of great change. No, not Brexit, but a move toward a new technology-based way of dealing with HM Revenue & Customs (HMRC) called Making Tax Digital (MTD).

The immediate focus is MTD for VAT, which will be introduced in April 2019 for businesses with turnover above the VAT registration threshold (currently GBP 85,000). For all other businesses, MTD is deferred, but may be introduced as early as 2020.

The fundamental principle of MTD is that business records must be kept in digital form and quarterly updates must be submitted to HMRC. HMRC want businesses to use commercial software to keep their records digitally, which will allow the relevant information to be transmitted directly to HMRC, thus minimising the risk of errors. HMRC will accept that accounting records can be kept on spreadsheets but will require that an Application Programme Interface (API) or bridging software is used to transmit the data to HMRC.

Clients need to be aware of how they are affected and when so that they know what changes they need to make to be MTD compliant. Whilst most large companies and businesses will already be using sophisticated accounting software, many sole traders, partnerships, and owner managed companies may still be using spreadsheets or even handwritten cashbooks. These are the clients who will have the most to do to get ready for MTD.

The UK currently lags behind many other countries in digitisation. HMRC have made it clear that they consider the increased use of technology to aid tax compliance to be the key to providing greater efficiencies and to close the 'tax gap.' There is no doubt that businesses will need to embrace the digital world as MTD is brought in.

As with any change, there are likely to be bumps in the road as HMRC and businesses adjust to new ways of working. This provides an excellent opportunity for advisors to help their clients – if you haven't been discussing MTD with your clients with UK businesses, now is the time!

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Julie Bryant is an International Tax Partner at Haines Watts and has over 25 years' experience of both UK and international tax. She advises clients ranging from large corporates to owner managed businesses and individuals on a wide range of issues including mergers and acquisitions, exit strategies, company restructures, refinancing projects and employee share schemes. Her international work includes assisting with overseas expansion and reorganisation projects as well as transfer pricing matters.

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The new objective of tax audits

Segmentation of loss-making activities within a company

By Oliver Biernat

One of the common transfer pricing rules in German law is that German subsidiaries or permanent establishments of a foreign group are expected to make a reasonable profit that meets the arm's length principle. Losses or small profits that are far below the average profits of comparable companies will not be accepted, unless the company is still in the starting phase, which must not exceed 3-5 years, or faces a very difficult situation other comparable companies do not face. The logic behind this is that a third party would close down a loss-making entity after some years. Consequently, it is assumed that the reasons for continuing a loss-making subsidiary must originate in the relationship between the two parties and therefore transfer prices must be incorrect.

Adjustments by the tax authorities are then usually calculated by applying an average return on investment that represents the average yield of the business sector the company is doing business in, on the turnover. This may lead to substantial additional payments for a company, especially if applied retroactively for several years. Interest and fines will be on top.

In recent times, tax auditors have increasingly started to ask for a segmentation within the audited company. The background is that the economically independent loss-making activities will be qualified as hobby businesses and not regarded for the tax base. Another idea is that they don't accept loss-making segments and correct their transfer prices, although the company as a whole is profitable.

The German Federal Fiscal Court demonstrated that they follow that view within narrow limits in several fundamental decisions. In the event that you are affected by such actions of the German tax authorities, the disputes should be kept open with regard to an open revision at the German Federal Fiscal court no. AZ X R 27/16. Furthermore, you should keep an eye on the P&L situation of the various segments within your company.

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Oliver Biernat is Founder and Managing Partner of Benefitax. He is a German Chartered Accountant, Certified Tax Advisor and Specialist Advisor for International Taxation with more than 25 years of experience. Since 2008, he has chaired GGI's International Taxation Practice Group (ITPG), increasing its size to more than 550 experts from 90 countries in the process.

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Recent Transfer Pricing Developments in the US

By Julian A. Fortuna

Administrative

In January 2017, the Large Business and International (LB&I) division of the Internal Revenue Service described two transfer pricing issues it will target in a new audit strategy:

1) Inbound distributors – lack of profits on distribution of goods sourced from foreign-related parties, and
2) Related party transactions – transfer of funds from a corporation to related pass-through entities.

In January 2018, LB&I issued five directives to its personnel concerning transfer pricing issues:

1) Mandatory information document requests;
2) Application of Section 6662(e) penalties;
3) Evaluation of reasonably anticipated benefits in cost sharing arrangements;
4) Treatment of stock-based compensation in cost sharing arrangements;
5) Best method selection.

Case	Primary Issue	Status
Altera Corp, 145 TC No 3, 2015 | appeal pending	Cost-sharing expenses	Taxpayer win
Amazon.com, 148 TC No 8, 2017 | appeal pending	Cost-sharing 'buy-in'	Taxpayer win
The Coca-Cola Co, Dkt 31183-15 | briefing stage	Intangible licensing	Trial completed
Eaton Corp, TC Memo 2017-147	Cancellation of APA	Taxpayer win
Illinois Tool Works, TC Memo 2018-121 | appeal not yet due	Interco financing	Taxpayer win
Medtronic, Inc., TC Memo 2016-112 | appeal pending	Intangible licensing	Taxpayer win
TBL Licensing LLC, Dkt 021146-15	Outbound transfers	Discovery stage
Guidant LLC, Dkt 5501-12	Intangible licensing	Settlement pending
3M Co, Dkt 5816-13	Foreign legal restrictions	Awaiting decision

Legislative

The Tax Cuts and Jobs Act of 2017 transformed how US transfer pricing rules will be applied going forward. Relevant new or amended sections of the Internal Revenue Code are summarised on the right.

Code Section	Topic
59A	Base erosion and anti-abuse tax (BEAT)
250	Foreign-derived intangible income
367(d)(2)	Outbound intangible property transfers
482	Allocation of income and deductions
936(h)(3)(B)	Definition of 'Intangible Property'
951A	Global intangible low-taxed income (GILTI)

Judicial

The government has been litigating and losing transfer pricing cases in the US Tax Court as shown above.

For a detailed discussion of the transfer pricing issues in these cases, please review my article entitled, 'Transfer Pricing Cases Update,' published in November 2016 in the *Journal of International Taxation.*

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Julian A. Fortuna is a partner at Taylor English based in Atlanta, where he focuses his practice on domestic and international tax planning and tax controversy matters.

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Exclusion from new Tariffs on Chinese Goods

By Philip Land

Companies whose margins depend on the costs of importing goods are watching new tariffs closely.

On 29 May 2018 the White House released Steps to Protect Domestic Technology and Intellectual Property from China's Discriminatory and Burdensome Trade Practices, which stated, 'the United States will impose a 25 percent tariff on $50 billion of goods imported from China, containing industrially significant technology, including that related to the 'Made in China 2025' Program.'

The United States Trade Representative (USTR) subsequently published a list of goods to which this tariff applies. The list is organised by the Harmonized Tariff Schedule of the United States (HTSUS), a comprehensive list of 10-digit codes for any goods imported into the US.

These tariffs went into effect on 6 July 2018. If a company determines one or more of the goods it imports from China are on the list, the company can request exclusion from the tariff.

Both the form and substance of the exclusion request is critical for the request to be considered by USTR. In form, even seemingly minor deviations from USTR requirements can cause an application to be rejected without consideration of the underlying merits. In substance, the request must address 1) how the imposition of the tariff could create severe economic harm to US interests; 2) where else the product could be purchased; 3) whether the product is strategically important to the 'Made in China 2025' initiative; and 4) a number of other important considerations. USTR will reject applications, without consideration of the underlying merits, for omitting or including certain information.

Deadlines to apply for the exclusion are as early as 09 October 2018. Legal, tax and customs professionals can assist to ensure conformity with USTR standards and optimise the substance of the request in order to make a compelling argument for exclusion.

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Philip Land

Philip Land is a US business lawyer at Haynsworth Sinkler Boyd, P.A. who helps foreign and domestic companies acquire and sell assets, enter into commercial transactions, and structure tax incentives to facilitate new investment.

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Online traders without a physical presence are now liable for local sales tax in the US

By Brigitte Jakoby

On 21 June 2018 the US Supreme Court decided in the South Dakota versus Wayfair case that the physical presence rule (Quill Corp. versus North Dakota) is unsound and incorrect.

Until now, a company had to have a physical presence in a state before it could be held liable for the collection of sales and use taxes in that state. Because South Dakota has no state income tax, it depends upon the collection of sales and use taxes. However, the online traders ensured that they had as few physical nexuses as possible in states with a sales tax. Therefore, South Dakota was forced to introduce a new nexus for sales tax which is based on an economic presence.

In the above decision, the Supreme Court ruled in favour of South Dakota´s economic nexus legislation. The economic nexus is constitutional. The Court stated that the taxation of modern e-commerce cannot be based on physical presence. Otherwise, the competition between local sellers and remote sellers is distorted.

Most likely, many US states will adopt the South Dakota legislation and implement an economic nexus. Therefore, online traders will have to check if the US state of their sales applies the economic nexus legislation or not. This will not only affect retailers based in the US, but also foreign retailers from all over the world. As soon as the requirements are fulfilled, the traders will have to register in the relevant US State and pay sales taxes there without a physical presence.

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Will the new US tax law affect your business?

By James Debate

Taxation is consistently described as one of the biggest concerns for businesses that are looking to expand into the US. At 35%, the US used to have a corporate tax rate that was among the highest out of the world's developed economies. Add to that a complex tandem of federal and state regulation, and a system of global taxation on US-domiciled companies, and the result is that setting up a business in the US can be an onerous process.

This has led to the current environment, where companies doing business in the US are incentivised to characterise themselves to the largest extent possible as a non-US company. The Tax Cuts and Jobs Act of 2017 (TCJA) seeks to reduce the incentive for this type of practice through a series of substantial statutory changes. The headline feature is the reduction of the federal corporate tax rate from 35% to 21%. Of potentially greater consequence is the switch from a global system of taxation to a territorial system for corporate tax purposes. In essence, a US-domiciled company will no longer have to pay a US corporate tax rate of 35% on income generated in other lower-tax jurisdictions, but would instead pay the lower local tax rate on overseas income.

However, taxpayers will need to be aware of certain new limitations imposed by the TCJA. These include a minimum tax on 'global intangible low-taxed income' (GILTI) and the new 'base erosion anti-abuse tax' (BEAT). Measures such as these could, in theory, increase the effective tax rate of the US Corporation, especially if the US Corporation is the top holding company in the group structure.

The fundamental question remains the same: do the business arguments in favour of being domiciled in the US outweigh the burden of taxation as a US company? Under these new rules, that burden has been reduced, an act that will certainly shift the balance closer to the United States. However, that does not necessarily mean that the answer to this question has changed. As always, contact a tax advisor for guidance.

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James Debate is experienced in US tax & compliance services across a range of industries, including private equity & hedge funds. He covers a broad range of topics including FATCA compliance & transfer pricing. He has an LL.B in Law from The College of Law & is a qualified Enrolled Agent, currently advising European businesses.

US TAX
& FINANCIAL SERVICES

Offshore Voluntary Disclosure Programme Meets its Permanent End

By Kevin E. Thorn

The Offshore Voluntary Disclosure Programme (OVDP) was initiated by the US Internal Revenue Service (IRS) in 2009 as a method to compel US taxpayers with offshore bank accounts to disclose their foreign assets. OVDP is considered to have been a success, with over 56,000 total IRS voluntary disclosures being filed through the programme to date. During its run, the programme underwent periodic modifications as to ensure its effectiveness, however, this March the IRS announced that they would be permanently closing the OVDP portion of the programme on 28 September 2018. Their reasoning is that the programme is no longer being substantially utilised, as exemplified by the fact that only about 600 disclosures came through OVDP last year. Compared to the 18,000 disclosures that came through OVDP in 2011, this number shows that the programme is no longer needed. The IRS has attributed the dip in participation to their intensified efforts to fight offshore tax evasion and an increased awareness in the standards for compliance.

The closure of the IRS' Offshore Voluntary Disclosure Programme has left many US taxpayers wondering if there are other options for coming into compliance with US tax law. Thankfully, the answer is yes. While the IRS may no longer be offering the same protections given with OVDP, they will still provide other methods for coming into compliance, the most notable being Streamlined Filing Compliance Procedures. The Streamlined Filing Compliance Procedures is a viable option for taxpayers who can ascertain under oath that their nondisclosure was due to 'unwilful' behaviour or circumstances. While the penalty accrued through the IRS Streamline Procedures may be smaller, unlike OVDP these procedures do not provide the same protection from future audit or criminal investigation. Like the Offshore Voluntary Disclosure Programme, the parameters of the programme are complicated and require an experienced international tax attorney to help sort through the confusing rhetoric.

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Thorn Law Group is a leader in providing tax counsel and legal representation to clients throughout the US and globally. The firm is home to a team of highly strategic, solution-oriented tax attorneys led under the direction of former US Internal Revenue Service attorney and Managing Partner **Kevin E. Thorn** with over 20 years' experience. Mr Thorn and his team are effective international tax litigators and are skilled in resolving complex tax disputes. Located in Washington DC, the nation's capital, Thorn Law Group has a home field advantage when dealing with government agencies such as the US Internal Revenue Service, Department of Justice and US Tax Court.

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Hong Kong reduces profits tax rate to 8.25% for the first HKD 2 million of profits

By Ricky W. P. Wong

In order to promote economic development and to reduce the tax burden on enterprises, especially SMEs and start-up enterprises, a two-tiered profits tax rates regime was introduced by the Hong Kong Government in March 2018. The new regime will benefit all corporations irrespective of their size and the two-tiered profits tax rates will be applicable to the first year of assessment commencing on 1 April 2018. Under the regime, the profit tax rate for the first HKD 2 million of profits will be lowered to 8.25%. Profits above that amount will continue to be subject to the tax rate of 16.5%. A corporation taxpayer may save up to HKD 165,000 in profit tax for each year. To avoid abuse, the application of the two-tiered rates is restricted to only one enterprise nominated among connected entities.

A framework agreement was signed between the National Development and Reform Commission and the governments of Guangdong, Hong Kong, and Macau, in July 2017 with an initiative to transform the Pearl River Delta region into the 'Guangdong-Hong Kong-Macau Greater Bay Area.' The Great Bay Area will consist of nine cities in the Guangdong Province and two special administrative regions, Hong Kong and Macau. The decision is a national strategy to create a trans-provincial co-operation platform in the Pearl River Delta region and encourage Hong Kong to play an important role in advancing the region's development. Based on the plan, the Greater Bay Area will be transformed into a dynamic hub of innovation and services with a GDP of over USD 4.5 trillion by 2030.

With the proposed development of the Greater Bay Area and the introduction of the tax concession, it is expected that more and more overseas investors will choose Hong Kong as the regional base for businesses.

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Ricky W. P. Wong has been in public practice for over 30 years, and has extensive experience in tax consulting engagements in Hong Kong and China. He is a Vice Chairman of the ITPG for the Asia-Pacific region.

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Automatic Exchange of Information and Tax Disclosure in Switzerland

By Eduard Maibach

Swiss tax residents need to file an annual tax return and have to report all worldwide income and assets. If, for instance, assets abroad have not been declared in the past in the Swiss tax return, often by mistake simply because taxpayers are unaware of the Swiss reporting obligation, a penalty free tax disclosure may be applied.

This procedure is attractive and should encourage individuals to rectify their situation, as they come back into compliance without being fined.

For the disclosure, it is important that the authorities have no knowledge of the undeclared assets. This is because as soon as the authorities start asking questions, it is no longer possible to benefit from the penalty waiver, i.e., the legal penalty frame, ranging between 0.3 times the taxes up to 3 times the tax, may be levied. Furthermore, entries in the criminal register may not be excluded.

With the Automatic Exchange of Information (AEOI) that entered into force on 1 January 2018, Swiss authorities will receive information from foreign financial institutions. The systems will be ready by 30 September 2018. The information that will be shared includes account and tax identification numbers, as well as the names, addresses, and dates of birth of taxpayers abroad with an account in a country other than the country of domicile, as well as all types of income and account balances. Many tax authorities issued guidelines stating that from 30 September 2018 onwards, foreign bank data will be generally accessible, i.e. a penalty free disclosure will be not available any more from that date onwards in the event of unreported foreign income / assets.

The AEOI is in force in all EU countries as well as many other countries in the world. Some AEOI agreements have already entered into force; others will do so by 1 January 2019.

Considering the significant impact of the Swiss penalties, it is highly recommended that individuals' tax situation be cleaned up prior to 30 September 2018. In the event of undisclosed foreign income or assets, discussing the situation with a tax specialist in Switzerland is recommended in order to determine the correct procedure to apply and avoid potential double taxation issues that may arise internationally.

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Eduard Maibach is a certified tax expert and tax director at the Bern office. He has 13 years' tax experience and his main areas of expertise are national and international tax restructurings, procedural law as well as real estate transactions.

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New Dutch rules on tax credits in force as of 1 January 2019 for non-resident tax payers

By Marcel M. S. Bollen

For both wage tax, which is basically a withholding tax on employees' wages, and income tax, several tax credits can be applicable. These credits consist of a tax component and a social security component.

Wage tax

Up to and including 2018, both residents and non-residents whose income is subject to wage tax are entitled to the tax component of the wage tax credit. The wage tax credit itself can consist of several components. The most common ones are the general tax credit and the employed person's tax credit. The tax part of the general tax credit depends on the income and is capped at EUR 552 in 2018. The tax part of the employed person's tax credit is related to the salary, and can mount up to a sum of EUR 791 in 2018.

However, from January 2019 onwards, only residents are entitled to the tax component of the wage tax credit. An exception will be made for employees who are resident of another EU member state, Iceland, Norway, Liechtenstein, Switzerland, Bonaire, Sint Eustatius and Saba. They will be entitled to the tax component of the tax credit.

Thus, from 2019 onwards, the employer has to determine whether or not to apply for the tax part of the wage tax credit for the employee. In order to do so, the employer has to know the country of residence of the employee. The possible disadvantage can mount up to a sum of EUR 1.343 of extra wage tax to be withheld.

Income tax

Residents of Belgium and so-called qualifying non-resident taxpayers are entitled to the same tax credits as residents. A qualifying foreign taxpayer is a person whose worldwide income is taxed for at least 90% in The Netherlands (N.B.: this percentage may be reduced in the course of the next year). These foreign taxpayers can realise these tax credits afterwards by filing an income tax return.

From next year onwards, it is necessary to determine your client's rights in this respect!

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As borders are always close by in the South of the Netherlands, over the course of the years **Baat accountants & adviseurs** has built an extended accountancy, legal and tax consulting practice with a strong internationally orientated character. From our offices in Maastricht, Roermond, Sittard (NL) and Maasmechelen (B), over 100 professionals render services to clients from all over the world, and communicate in Dutch, German, English, French and Chinese.

Marcel Bollen is a tax partner and co-founder of Baat accountants & adviseurs (est. 1998) specialising in cross-border labour issues and company structuring, both for resident tax payers and non-residents.

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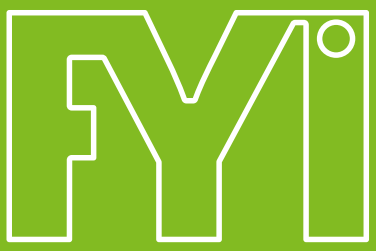

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