



THE GLOBAL TAX 50

TAX 2021

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Reform is coming

PLASTICS TAX

Litigation expectations

COVID-19

The M&A impact



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Passing the pandemic test

It is more than a year since COVID-19 was first reported in Wuhan, China. The greatest public health crisis in 100 years seems to have changed everything – including tax. This is why COVID-19 is a dominant theme throughout this year's Global Tax 50.

The pandemic has put governments and taxpayers to the test. Every crisis has winners and losers, but the results have not been predictable. No one thought Zoom would be valued more than the world's top airliners.

Although some people have found working remotely suits them, businesses have had to manage the corporate tax risks of employees working in other jurisdictions. Where exactly companies should pay tax, not so much whether they do pay tax, is the key issue.

Most businesses have had to change to meet the test and some companies have thrived. Technology companies are more powerful in global markets than they have ever been, while traditional industries have suffered the most. So the pandemic has accelerated the trend to digitalisation (see page 50).

However, revenue-stretched governments need money to fund the deficits created by the pandemic. The 2008 economic crisis led to the BEPS Action Plan. Although that project has



Josh White

barely settled, the OECD is racing ahead on BEPS 2.0, but disagreements over pillar one are the main obstacle to a final agreement (see page 98).

Governments worldwide are introducing digital services taxes (see page 48) as the OECD tries to get an international digital tax framework in place. Although, sustainable revenue-raising measures will have to come from somewhere else, such as environmental taxes (see page 52).

What the recovery will look like and who pays for it will be the next big question for governments around the world. Bond markets have allowed governments to borrow a huge amount of money, but these debts will have to be re-paid. The future may be defined by tax hikes and spending cuts.

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MEET THE TEAM



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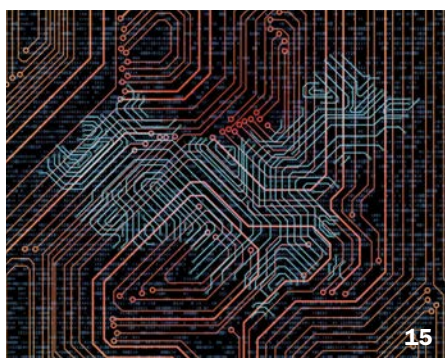
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Market insight

Andersen welcomes managing director to international tax practice in Dallas

Andersen, the US branch of international tax network Andersen Global, has appointed a managing director to its international tax practice in Dallas.

Brian Untermeyer joins the team from Deloitte, where he had been for more than 18 years. He brings with him more than 30 years of experience in the market, advising inbound and outbound multinational public and private companies on US domestic and international tax issues across various industry sectors.

Broseta adds nine-person tax practice to Valencia office



Spanish firm Broseta Abogados bolstered its tax credentials with the addition of a nine-person tax team to its practice in Valencia.



Led by **Enrique Vázquez**, who has joined as an equity partner and director, and **Miguel Ángel Galán**, who joined as a professional partner, the team all come from the Spanish branch of international tax network Andersen Global. The rest of the team is: **Jaime Escribano**, **Ramón Varanda**, **Mauro Sebastián**, **Anabel Naval**, **Elena Murillo**, **Aurora López** and **Isabel Vicente**.

Greenwoods appoints stamp duty partner in Melbourne

Australian firm Greenwood & Herbert Smith Freehills has appointed a leader for its indirect and specialist taxes group.

Zoe Chung, who joins the firm in early 2021 from a commercial law firm, will be a partner and brings with her more than 20 years' experience in the field.

Chung will be focused on state taxes, GST, transfer pricing and employment taxes and will work closely with the stamp duty team.

Andersen Global expands in Africa, South America, Europe and Central Asia

International tax network Andersen Global has announced the signing of several collaboration agreements across the world as it continues its programme of global expansion.

In Pointe-Noire, Congo, it linked up with Africa Tax & Legal Services, a team of 10 professionals led by office Managing Partner **Eric Tasi Ndjodo**. Its work has a strong focus on the IT, energy and oil and

gas sectors. In Guinea-Bissau Pinto Pereira & Associados joined the network, which was founded in 1985 by Managing Partner **Carlos Pinto Pereira** and two other lawyers.

In South America, the network signed an agreement with Maurice Solomon and Co. Located in Georgetown, Guyana, it has two partners and more than 25 other professionals who have a focus on the financial institutions, utilities and industrial operations sectors. It also joined with LEGA Abogados, one of the biggest firms in Venezuela, in a non-exclusive agreement.

The network announced three connections made in Europe. In Malta this was with Chetcuti Cauchi Advocates and the associated corporate services firm CCA Interserv, both based in Valletta. In Stockholm, it signed an agreement with Unum Tax, a firm run by Managing Partner **Lynda Ondrasek Olofsson** that provides tax services with a primary focus on large and medium-sized companies.

Finally, in Central Asia, the network added two new members. In Azerbaijan, this was MGB Law Offices, a 10-lawyer firm based in Baku and led by **Ismail Askerov**. In Kazakhstan, this was Unicase Law Firm, which has a presence in both Almaty and Nur-Sultan. Founded in 2010 and led by Managing Partner **Saniya Perzadayeva**, it serves domestic and international clients, including financial institutions and investment banks.

Step toe adds transfer pricing partner to DC office



US firm Steptoe & Johnson added a transfer pricing (TP) partner to its international tax group.

Based in Washington, DC, **Matt Frank** joined the team from KPMG, where he had been for more than three years and most recently served as a principal.

He brings with him more than 30 years of experience working in the sector, with a focus on TP, tax controversy, litigation, APAs, competent authority matters and transfer pricing risk management.

Loyens & Loeff appoints three partners in The Netherlands

Benelux law firm Loyens & Loeff has announced the addition of three tax partners to its team in Amsterdam as part of its latest round of elevations.

Charlotte Kiès, tax advisor, **Peter Moons**, attorney at law and tax advisor,

and Swiss certified tax expert **Fabian Sutter**, who is also an attorney at law and registered with the Zurich bar, were all promoted to the partnership as part of a group of seven across all practice areas.

Kiès specialises in advising international clients on Dutch and international taxation matters and is a member of the firm's Latin America and Spain and Portugal regional teams. Moons also advises on international cross-border matters, with a focus on private equity funds. Sutter is a specialist in Swiss and international tax advice, especially corporate reorganisations, M&A, transaction finance and TP.

Alston & Bird expands New York tax dispute capability

The New York office of international firm Alston & Bird has appointed a federal and international tax litigation partner to its team.

Laura Gavioli joined the firm from McDermott Will & Emery, where she had been for almost six years. Prior to that she had worked in the Dallas office of Dentons for almost seven years.

Gavioli's practice is predominantly focused on white-collar prosecutions and investigations, civil tax cases, IRS controversies and financial litigation.

Marks Paneth promotes seven practitioners to partner in the US

Accounting, tax and advisory firm Marks Paneth promoted seven of its practitioners to partner, six of which practice in the New York area.

Those elevated include **Steve Brodsky**, **Sherry Fan Grand** and **Eduard Suleymanov** from the real estate group in the firm's New York office. **Russell Ephraim** and **Joshua Hanover** were promoted from its private client services group in New York and Florida, respectively, while **Sujith Pushpakaran** from the commercial business group and **Alvin Yeung** from the real estate group, both located in the Long Island office were also raised to partner level.

Brown Butler appoints VAT director



Leeds-based accountancy firm Brown Butler appointed a VAT director to its team.

James Hurst joined from Mazars in Birmingham, where he had been for more than seven years. Prior to that he had spent almost five years with Grant Thornton.

Hurst brings more than 30 years of experience to the role, having previously worked with HMRC before pursuing a career as a chartered tax advisor in 1995.

Weaver adds international tax director to Houston office



US public accounting and advisory firm Weaver appointed a director of international tax services to its Texas team in Houston.

Craig Epstein joined the team from KPMG, where he had been for almost six and a half years and most recently served as a senior manager of tax services.

In his 12-year career he has worked at numerous firms in both Houston and Philadelphia and has developed experience advising on tax planning, compliance, provision reviews and audit support and cross-border restructuring.

Mayer Brown adds global co-lead of tax-energy group



International law firm Mayer Brown announced the addition of a new global co-leader of its tax-energy group in its tax transactions and consulting practice in Houston, US.

Greg Matlock joined the firm from EY, where he had been for more than 10 years and most recently served as its Americas energy and resources tax leader.

Matlock brings with him experience in US federal income tax planning and structuring for transactions involving partnerships and corporations, with a particular emphasis on energy-related investments.

Baker McKenzie welcomes experienced transfer pricing advisor to New York office



International firm Baker McKenzie welcomed an economist with decades of experience in the market to its transfer pricing practice in New York.

Steven Tseng took up the role of principal economist with the firm, having previously led the global value chain transformation tax network and the Asia Business Center at PwC. In more than 25 years working at Big Four firms PwC and KPMG, he served in senior roles in various US offices, Japan, Finland and China.

In that time across those diverse locations Tseng built up a deep experience in

various tax practice areas that covers a range of topics including business transformation, transfer pricing, IP planning, valuations, M&A and post-merger integration.

Schalast welcomes tax team in Hamburg

German firm Schalast announced the addition of a tax team to its Hamburg office as part of a wider programme of expansion.

A group, led by **Oliver von Schweinitz**, joined the firm from LPA-GGV. He is a New York-qualified attorney with a particular speciality in matters where US tax law and questions of banking tax law intersect.

In addition to Von Schweinitz, the team includes **Cordula Clarner**, who has more than 20 years' experience in the field including more than 17 with PwC, and **Katharina Stuth**.

Experienced tax partner joins team at Crowe Valente

Italian firm Crowe Valente, part of the international Crowe Global network of tax practitioners, has appointed a partner to its tax team in Milan.

Federico Baridon came to the firm from the Italian office of international firm CMS, where he had been for more than 13 years. Prior to that he had spent more than 14 years as a partner with Deloitte.

In his more than three decades working in the market he has built up extensive experience in tax litigation matters, most notable are those related to international and domestic acquisitions, financing and restructuring.

Baker McKenzie includes tax practitioners in latest round of partner promotions in North America

As part of its latest round of 19 partner promotions in North America, international law firm Baker McKenzie has elected four tax practitioners.

These are **Nicole Ford** in the New York office, **Elizabeth Lieb** in Palo Alto, **Patrick Renckly** in Houston and **Kent Stackhouse** in the District of Columbia.

DLA Piper strengthens Spanish transfer pricing offering with team from Big Four firm



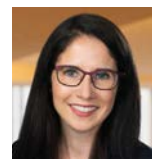
International firm DLA Piper announced the addition of a new team to its transfer pricing practice in Madrid, Spain.

The team, which joins the firm from KPMG, is led by partner **César Salagaray**. He was with the Big

Four firm for more than six years and had previously spent more than a decade at PwC in the Spanish capital and in Mexico. His work has a particular focus on the design of transfer pricing policies and tax-operating models for multinational companies.

Salagaray is joined at DLA by associates **Carlos Espinosa**, **Natalia Pérez** and **Alejandro Rodrigues**.

Morrison & Foerster announce the election of a tax partner in San Francisco



International firm Morrison & Foerster has elected a new partner in its San Francisco office.

Maureen Linch is a member of the tax

department and part of the US federal tax group and has been with the firm since 2011, having previously worked for Cleary Gottlieb Steen & Hamilton.

Linch's experience includes advising on transactional and structuring matters in both the US and internationally.

Binder Grösswang appoints tax partner



Austrian law firm Binder Grösswang elected a new partner to join its tax team.

Clemens Willvonseder will join

the partnership on February 1. He has been with the firm since 2016, having previously worked at Luxembourg law firm Arendt & Medernach.

Willvonseder's work includes advising on international tax, group tax, turnover tax, stamp duty and fiscal criminal matters in domestic and cross-border transactions, as well as assisting on restructurings and financing projects.

Andersen welcomes managing director to commercial practice in Houston

Andersen, the US branch of international tax network Andersen Global, has appointed a managing director to its commercial practice in Houston.

Robin Klinghagen joins the team from NGC Markets, where she had been for more than four and a half years. Prior to that she had held roles at a number of different firms, including more than 10 years with PwC.

Klinghagen brings with her more than 28 years of experience in the market, working across a range of practice areas including M&A, corporate restructuring, controversy and state planning.

From intern to global vice chair: Lessons learned from EY's Kate Barton

Kate Barton, EY global vice chair of tax, discusses the trends shaping the tax industry, and what this means for students and graduates starting their career today, having started as an EY intern herself.

New and emerging technologies, as well as the COVID-19 pandemic, are transforming the tax function and profession at an unprecedented pace. When Kate Barton started her career as an intern at EY, having qualifications in law and tax were a staple of a career in the professional services. However, fast forward three decades and these two qualification criteria make up only part of what many employers demand.

An understanding – and ideally practical experience – of digital reporting platforms, data cleansing and analyses, working with robotic process automation is becoming increasingly important for those joining the tax profession. To stand out from the crowd, gaining the knowledge on how the future may unfold with artificial intelligence, smart technology and pre-empting the progress tax authorities will make in their digital transformations will help those entering the workforce during a period of great change and uncertainty.

Tax directors, CFOs and advisors are now looking for individuals who offer transferable skills that allow the department to adapt to new requirements.

“The best tax person has the mixture of tax or finance and technology skills,” tax directors often tell *ITR* when they are recruiting. But, if forced to choose, in many cases they would choose the candidate who is good with technology and teach them tax in most cases. This means the traditional path of becoming a tax professional has been blurred and young tax professionals need to adapt.

This is where initiatives like the EY Young Tax Professional of the Year competition can help, because it fosters the next generation of tax leaders, knowing that the tax landscape is changing rapidly.

Here, Anjana Haines, managing editor of *ITR*, talks to Kate Barton, EY global vice chair of tax, about the changes and what this means for millennials, Generation Z, and those entering the workforce today.

Anjana Haines: You started your career at EY as an intern 35 years ago. How has the tax function and profession changed since then?

Kate Barton: When I joined EY as an intern 35 years ago, the tax profession was synonymous with paper documents and filing cabinets. Today, digital technologies seemingly undercut every aspect of the tax function and profession. Taxpayers now file tax



Anjana Haines

“The greatest trend we are seeing is the rate and pace of change spurred by new and emerging digital technologies”

returns remotely on their mobile phones, with tax authorities processing transactions in real-time. In recent years, blockchain, cryptocurrencies, the 'gig economy', and globalised mobile talent have all changed how taxation operates.

In such a dynamic marketplace, EY even launched its first direct-to-consumer personal tax filing service – TaxChat – to help individuals keep up with taxation and its constant evolution. More recently, during the COVID-19 pandemic, tax authorities have even expanded the remit of their traditional duties in some jurisdictions to engage in contact-tracing, largely because of the sheer scale of data they possess.

Looking back, taxes have always played an important role in everything from funding public services to incentivising organisational behaviour. At the policy level, it plays a big role in incentivising research and development programmes, such as more sustainable technologies, while also encouraging competition through tax rates in an increasingly globalised marketplace that is looking to secure foreign direct investment. In today's marketplace, it's an incredibly dynamic and exciting time to be a tax professional.

Anjana: What trends are defining the tax function and profession?

Kate: I think the greatest trend we are seeing is the rate and pace of change spurred by new and emerging digital technologies. Organisations are now reporting transactions in real-time, whereas digital technologies are driving increased transparency on tax matters, particularly when it comes to cross-border information sharing. From an operational point of view, there is now so much digital data that more than 100 of the largest multinational companies spend between 40%-70% of their time on data cleansing, according to the latest EY Tax Technology and Transformation Survey. Not surprisingly, compliance subsequently remains the greatest priority for many organisations and their tax functions, according to the latest EY Tax and Finance Operate (TFO) Survey.

Geopolitically, digital technologies have also created an incredibly sensitive global environment in which to operate. The world today is now far more interconnected and interdependent. It goes without saying that a ripple in some markets can spill over into other markets where there may not even be a substantial trading relationship. For multinationals operating cross-border, this can create an incredibly volatile regulatory environment when policies are changing all the time.

Anjana: How has the COVID-19 pandemic impacted the tax function and profession?

Kate: For starters, the COVID-19 pandemic has triggered an enormous swathe of regulatory change for multinationals to keep up with.

More than 138 jurisdictions to-date have amended their tax laws and regulations to tackle the economic impact of the pandemic. Tax filing deadlines have been pushed back, whereas tax rates have been cut for both individuals and industries hit hardest by the pandemic. All the while, tax authorities have played a pivotal role in ensuring solvency and liquidity, distributing stimulus to those who need it.

Globally, more than \$27 trillion has been issued in financial stimulus to-date – that's a staggering sum. Tax policy has been at the epicentre of government playbooks and their crisis management during the pandemic and will continue to remain so as governments look to recoup lost revenue and balance increasingly



Kate Barton of EY talks about how the tax profession continues to evolve

larger government deficits. As governments look to encourage mobility, tourism and investment in their local markets in the 'new normal', they are likely to also look to tax rates to encourage business investment.

Anjana: What does the tax function of the future look like?

Kate: Looking ahead, the future of tax is digital. Technology is rapidly changing how we operate, and why. Individuals should expect tax filing to become increasingly less complicated.

While organisations can expect more real-time reporting and cross-border information sharing, those organisations looking to keep-up with such a rapid pace of digital and legislative change, the solution will be to build what we call an 'intelligent tax function', one that operates alongside the C-suite, not behind it – communicating in real-time with other business units.

Today's tax function revolves around three key activities: tax software maintenance; process change; and tax data collection. In the near future this will change to revolving around intelligent data management; process change; and report development. Of those companies surveyed in the latest EY Global Tax Technology and Transformation Survey, 73% already plan to increase tax headcount with people who have data and technology management skills.

Anjana: What words of advice would you give to somebody starting their career today, regardless of industry?

Kate: While tax technical knowledge is vital, literacy in digital technologies is imperative. The tax function and profession of the future is constantly evolving, and so are the technologies driving its transformation. The world will continue to evolve rapidly, so a willingness to learn, think creatively and build relationships – whatever the forum, digital or otherwise – will be key.



THE BROCKMAN BRIEF

US tax reform

A new administration and remedy

Keith Brockman reviews what the Biden tax plan will mean in practice.

As the US and other countries are receiving promising vaccines to reverse the COVID-19 pandemic, the incoming Biden administration has announced tax reforms to partially reverse the Tax Cuts and Jobs Act (TCJA) and stimulate the economy.

Since the Georgia runoff election has granted the Democrats a slight majority in the US Senate, the Biden administration has a wish list of tax reforms to turn into legislation. A Republican majority would have been able to block legislation proposed by the US House of Representatives, but now the Democrats may have the power to make ideas into policy.

The pandemic has severely stagnated the US economy and tax reforms could help support a new stimulus. However, the economic stimulus will be the first aim and tax reform may be pursued at a slower and more focused pace.

Review of major proposals

There are a number of proposals expected over the next four years including tax rate increases and measures to improve the US economy for a post-COVID recovery. For example:

- 1) Increase federal income tax rate to 28% from 21%. Additionally, a net state income tax rate of approximately 2-3% would increase the total US tax rate to around 30%, similar to Germany, but higher than most other countries including Canada and China at 25%. A partial increase to the federal income tax rate by approximately 3-4% may be possible in years two or three of the administration, artfully combined with other proposals.
- 2) Revise the global low-taxed intangible income (GILTI) rules – Possibilities include raising the GILTI net rate of 10.5% to 21% as a minimum tax rate, equating to a loss of the Section 250 deduction. Additionally, the computation would be applied

Keith Brockman is the VP Global Tax at Manitowoc Foodservice. His previous role was international tax director at Mars. He is also a lecturer, frequent speaker and the author of the Strategizing Multinational Tax Risks blog. In his regular *ITR* column he provides a practical analysis of some of the more challenging recent developments for corporate taxpayers, looking at how in-house professionals can mitigate new risks and identify effective solutions in an evolving environment.

“Economic stimulus will be the first aim and tax reform may be pursued at a slower and more focused pace”



The pandemic has severely stagnated the US economy and tax reforms could help support a new stimulus

on a country-by-country basis, while eliminating the 10% exclusion for qualified business assets (QBAI) in the calculation.

This proposal is destined to become part of the discussion for the OECD's pillar two proposal for a global minimum tax regime. GILTI is the 'stick' of the TCJA, while foreign-derived intangible income (FDII) is the offsetting 'carrot'.

Since GILTI is only partially offset by foreign tax credits, the underlying separate country and/or QBAI computations may be somewhat receptive to change, while the dramatic increase in the tax rate seems less probable.

- 3) Impose the 'Made in America' 10% tax credit – This initiative would incentivise the creation of jobs lost in the pandemic to restart economic recovery. The credit would apply to revitalising closed facilities, expanding production capabilities, retooling factories for future competitiveness, reshoring call-centre jobs, and expanding payroll.

This initiative has strong possibilities, as the employee retention jobs credit programme is yet to be enhanced (with additional incentives previously passed by the House in the Heroes Act, but not adopted by the Senate). If these initiatives could be combined and legislated as a single proposal, this objective may be partially fulfilled.

- 4) Introduce more anti-inversion regulations, penalties and denial of deductions – These proposals include denying all deductions and expensing write-offs for moving jobs or production overseas. This measure would not likely achieve passage as envisaged, due to the inability of major multinationals to suddenly change global supply chains, for which the cost may significantly exceed the quantum of lost deductions.

- 5) Institute an offshoring penalty 10% surtax – This tax is meant to discourage offshore production of components with sales back to the US. This idea is interrelated with the 'Made in America' tax credit, and to the extent the credit mechanism is somewhat successful, this surtax may not be a near-term probability.

In addition to these proposals, President Biden has the authority to sign executive actions that will impact the US economy. These actions have become more common in recent years. Examples include the following:

- Direct federal procurement to buy critical goods produced in the US;
- Promote public infrastructure projects, using American steel, aluminum and other critical materials;
- Review the public procurement process to ensure American products are favoured;
- Expand the list of materials requiring US origin components, seeking to close loopholes for unfair foreign competition;
- Review the country-of-origin rules and impose identical labelling for products made in a foreign country, while also being receptive to Federal Trade Commission complaints; and
- Create a new 'Made in America' office with the White House Office of Management and Budget to manage American procurement policy. The public record of its activities will be transparent, while its mission will be to create higher-paying jobs across the US.

The deeply divided election process will likely delay legislative changes in 2021. However, the trend will shift the federal government's focus to infrastructure projects and procurement efforts.

Most importantly, the Biden administration is looking to restore the position of the US in the international community. President Biden has already issued Executive Orders to rejoin the Paris Climate Agreement and the World Health Organisation (WHO).

The OECD, and the EU are looking forward to proactive discussions surrounding pillar one, pillar two, and similar initiatives going forward, viewing the US as a strong advocate of its policies while also being receptive to global tax reform.

In summary, the new administration has a different tax focus and its own ideas. Its legislative wish list will likely not be met in the near term. But the tone at the top will certainly permeate proposed tax legislation in the US and globally.

Biden administration has positive outlook on digital tax negotiations

Danish Mehboob

Secretary of the Treasury Janet Yellen will likely restart US negotiations with the OECD and other countries on finalising a multilateral tax approach to the digital economy in the coming weeks.

On January 22, Yellen was voted-in unanimously by the US Senate Finance Committee to replace Steven Mnuchin, who suspended OECD-led talks with other countries on the two-pillar digital tax proposal in June 2020. Corporate confidence is high on Yellen restarting negotiations after she stressed that efficient taxation of multinational companies was a priority.

“Working in the context of the OECD negotiations on global taxation, we have much greater leverage to keep our American firms competitive if we avoid a race to the bottom in corporate taxation more globally,” said Yellen at the US Senate on January 19, showing her support for pillar two regarding a global minimum tax.

However, delayed negotiations on pillar one about real-locating profits from intangible assets to market jurisdictions have exacerbated transatlantic trade tensions over controversial digital service taxes (DSTs). Most recently, the US Trade Representative (USTR) suspended tariffs on French goods in the first week of January, even as the EU finalised its latest proposal for a bloc-wide digital levy. However, the USTR warned that such DSTs under its investigation warranted retaliation.

“I am certainly aware of the concerns US companies have raised about DSTs,” said Yellen at one Senate Finance Committee meeting. “While the details of DSTs differ across jurisdictions, many have



Corporate confidence is high on Yellen restarting digital tax negotiations

been designed in a way that unfairly singles out a few large US digital platform companies. I look forward to consulting with the USTR and the Congress on these issues.”

Earlier pushback from the US on OECD-led negotiations was a key reason for delayed political agreement and more DSTs, and many in-house tax directors and advisors do not think a consensus on a multilateral solution from the OECD is likely by mid-2021 without significant technical changes.

For example, taxpayers said they were concerned about the interaction between the global intangible low-taxed income (GILTI) rules and global anti-base erosion proposal (GloBE) under pillar two without a safe-harbour. The OECD is working on simplifying its multilateral tax approach for the digital economy, which includes political and technical negotiations on scope, segmentation, nexus, and the allocation of losses.

“Early and sustained involvement of the Biden administration will play a key role in shaping these proposals,” said one head of tax at a pharmaceutical company. “The

responses identified significant concerns in relation to the complexity, administrative burden, and in some cases the practical workability of the proposals,” she added about the OECD’s consultation on its two-pillar solution on January 14-15.

Cooperation from the US looks likely on both pillars, and most finance ministers prefer not to decouple pillars one and two for political purposes since they may lead to different winners and losers across countries. The big question is whether Yellen will endorse technical simplifications to the solution, including suggestions from Microsoft and other large businesses to ring-fence Amount A under pillar one.

Pascal Saint-Amans, director of the Centre of Tax Policy and Administration at the OECD, said there was still uncertainty, but the Biden administration pointed to “good factors” for a coming deal.

First steps from the Treasury

It may still take some time to advance negotiations on digital tax since Yellen added that her biggest priority is working on additional stimulus measures under the latest Coronavirus Response and Relief Supplemental Appropriations Act of 2021 before addressing other tax concerns.

In-house tax directors at large multinational businesses have been monitoring trade tensions over digital levies, but many are also keen to see stimulus and tax breaks from the US. Democratic majorities in the Senate and House of Representatives pave the way for the Biden administration to more easily enact tax law and spending legislation without a single Republican vote.

As a result, a potential \$1.9 trillion federal stimulus package may offer regulations and implementations for extending state aid, such as changes to net operating losses and 163(j) rules on inbound financing. The latest \$900 billion stimulus package finalised in December 2020 has extensions on payroll tax deferrals and federal business loan programmes.

“We did see some great gives to the taxpayers here... but... we need to be careful to make sure that we’re not causing ourselves another tax problem,” said Sara Beugelmans, managing director at Brookfield Asset Management, who recommends more in-house tax modelling to limit the risk of hidden costs from opting into certain government incentives.

“The US is experiencing its highest government-to-debt ratio since World War II,” said Kate Barton, global vice chair of tax at EY. “While countries are looking to sustain economic activity by keeping tax rates low, eventually, high debts and near-zero interest payments will see governments pivot from low rate, pro-growth policies to those that are revenue-raising.”

The most important changes to come from a Biden administration on cross-border tax planning are an increase in the corporate tax rate from 21% to 28%, a minimum tax of 15% on businesses with book income in excess of \$100 million, a 10% surtax on corporations that move manufacturing or service jobs offshore to sell goods back into the US market, and an increase in the GILTI tax rate from 10.5% to 21%.

However, in terms of the digital tax agenda that will set long-term in-house tax strategies, the Biden administration needs to act quickly to appease other OECD countries. Many have only temporarily suspended their DST charges until mid-2021. With just six months left to reach a multilateral agreement, the next step to negotiations is the G20/Inclusive Framework meeting on January 27.

UK opts out of DAC6 to follow OECD rules after Brexit

Danish Mehboob

The UK tax authority, HM Revenue and Customs (HMRC), has removed many EU mandatory disclosure requirements ahead of the January 30 filing deadline, and announced plans to adopt the OECD's mandatory disclosure rules to replace DAC6.

HMRC has confirmed that mandatory automatic exchange of information of cross-border arrangements under the European Council Directive (EU) 2018/822 (DAC6) will not be implemented in its entirety following the conclusion of the free trade agreement (FTA) with the EU. The revised legislation on the transparency regime received parliamentary approval in December 2020.

One head of tax at an asset management company based in the UK said this finally clarifies the tax authority's position on DAC6 as the FTA summary was silent about it.

Under the terms of the agreement, the UK must not reduce the level of protection in its legislation below that contained in the OECD's mandatory disclosure rules. Although HMRC confirmed in December that reporting under DAC6 will still be required for a limited time, the OECD's mandatory disclosure rules will replace those reporting requirements in 2021.

"This is a clear sign of the way forward post Brexit," said Gary Ashford, vice president of the Chartered Institute of Taxation. "There will be many UK tax advisors very pleased to see this change, as the complexities of DAC6 were such that there was a fear many UK advisors with little international tax compliance experience might struggle to determine whether matters were reportable or not," he added.

Until the OECD's mandatory disclosure rules are finalised, only cross-border arrangements in Category D of Part II under DAC6 with the effect of circumventing the common reporting standard (CRS) or obscuring beneficial ownership need to be reported in the UK. The first disclosures are due by January 30, and will focus on arrangements designed to undermine tax disclosures under the CRS.

"Whilst that may seem like good news, it is actually a mixed blessing," said Philip Harle, partner at Hogan Lowells. "In many cases it will mean that reports which were ready to be made in the UK will need to be reworked and submitted in another EU jurisdiction."

Removing significant parts of DAC6 in the UK at this late stage will create more work for businesses that have been preparing for the disclosure regime. The changes send large businesses back to their advisors, and other intermediaries, with questions on how to manage disclosures within a reporting chain that still involves stakeholders in multiple EU jurisdictions.

Over-reporting may put taxpayers at risk

While the UK changes significantly reduce the number of

tax arrangements that need to be reported to HMRC under international reporting standards, some intermediaries are more likely to over-report than large taxpayers to remain compliant in other EU jurisdictions with minimal reporting oversight. Mismatched reporting may build friction between taxpayers and their intermediaries within the UK, since both would be more cautious about the penalties and challenges from authorities scrutinising their reports.

"One of the concerns is that some intermediaries are prone to over-report transactions," said Margriet Lukken, partner at Loyens & Loeff, regarding the possibility of tax disputes stemming from mismatched reporting in the long-term. Intermediaries can include accountants, tax advisors, banks, lawyers, and wealth managers who help to facilitate cross-border transactions.

At least 22% of taxpayers at ITR's Women in Tax Forum in Europe in September 2020 said they had experienced disagreement with intermediaries about how to interpret the DAC6 guidelines, especially what arrangements are relevant to disclose under the directive's hallmarks.

The full DAC6 guidelines for EU member states require

intermediaries to report certain cross-border tax arrangements with an EU nexus, which tax authorities are required to regularly collect and share. Large businesses that are part of such cross-border arrangements are increasingly focusing on practical implications of the reporting obligations because DAC6 provisions are starting to appear in inter-company contracts.

Catalysing better in-house data management has been one benefit to the drawbacks of dealing with hard-to-interpret hallmarks within DAC6 legislation and guidance across the EU. Many businesses saw fast-paced digitalisation of operations in 2020, and some of those taxpayers have been improving data governance and in-house structures amid the changes to prepare for more burdensome reporting obligations in the long-term, not just for DAC6.

"It is increasingly important to focus on a consistent story by getting the data right," said one in-house tax director at a mining company. "You have to make sure the foundation is good before you build the house on top of it."

The number of cases involving inter-company transactions is rising in courts across the US and Europe, particularly on valuing transactions involving certain intangible property. The DAC6 rules target some of these potentially aggressive tax arrangements, and represents a layer of transparency between tax authorities that will likely trigger targeted tax audits based on multiple disclosures, especially across the EU.

The first tax changes in a post-Brexit environment signal the UK government's intent to move to international standards instead of EU standards on tax transparency. However, over-reporting across jurisdictions involves sharing details of cross-border transactions and tax arrangements with the UK that may still put large businesses and intermediaries at risk of challenges from the authorities.



UK's split from the EU DAC6 rules is a "mixed blessing", say advisors

Facebook's decision to shift IP to US reflects industry tax concerns

Josh White

Facebook's decision to dismantle three of its Irish holding companies and repatriate its intellectual property (IP) licences back to the US may be a sign of growing unease in the technology industry.

After a decade of doing business in Ireland, Facebook shut down three Irish structures it used to hold its IP in the country. The social media company is facing allegations from the US Internal Revenue Service (IRS) that its IP is undervalued and the Irish arrangements allow it to avoid higher taxes in the US.

Technology companies are facing more tax controversy, more unilateral action and new forms of pressure from governments around the world. This includes more digital services taxes (DSTs), but also new antitrust claims.

Facebook's comments after deciding to move its IP to the US suggested that increasing government scrutiny on how technology companies operate and pay taxes informed its decision.

In an official statement, Facebook said: "This change, which has been effective since July [2020], best aligns corporate structure with where we expect to have most of our activities and people. We believe it is consistent with upcoming tax law changes that policy makers are advocating around the world."

Although Facebook was not specific about what it sees on the horizon, companies like Facebook are targets for governments implementing unilateral measures. France, Italy and Spain are just three countries that have introduced a DST to try and shore up their tax base using the profits of digital companies.

Meanwhile, the European Commission has floated the idea of an EU-wide DST and Ireland is one EU member state that would lose out from such a proposal. The impact would be felt significantly by US companies operating across the EU via Ireland. But there are barriers to such a plan coming to fruition.

The Commission will have to reform unanimous voting to secure such a plan across the European Union. Many US technology companies are hoping the Biden administration will be able to secure more concessions from the EU and the OECD on digital tax.

"The next administration will be more engaging with the OECD. We'll see a much greater level of diplomacy generally, but this will include tax," said one tax director at a US technology company.

"In recent years, we've been boxed into a space where there is no international respect for the US," the director added.

The next few months will be pivotal in deciding what the final reform package looks like. Social media companies may be looking to safeguard their tax positions before the situation either gets worse or reaches a conclusion in the form of an OECD agreement.

Challenges at home and abroad

Facebook's immediate concerns might be more to do

with the US tax case over its Irish arrangements. The company has stressed the international context of changing tax laws for its IP changes, but the dispute over its intellectual property is an important part of the picture.

The IRS took Facebook to the US Tax Court in February 2020 over the valuation of its intangible assets. The IRS alleged the company had undervalued its IP and owed more than \$9 billion in taxes.

In 2010, Facebook moved its IP to Ireland and the social media company valued the assets at \$6.5 billion. However, this was before Facebook went public in 2012. The IRS argues that the true value was \$21 billion and that the company owes more than \$9 billion in taxes. Facebook stands by its 2010 valuation.

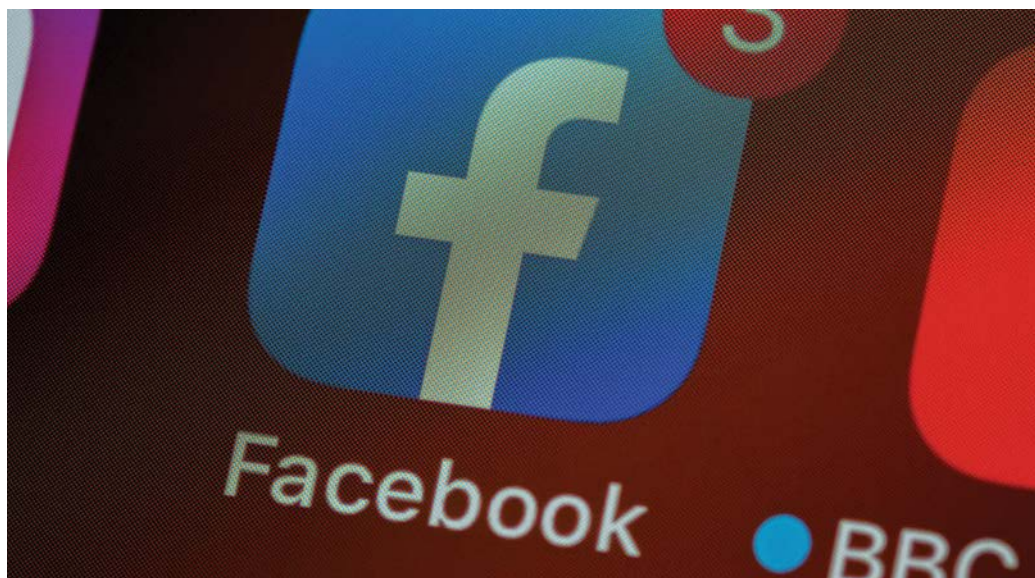
The US Tax Court is yet to issue its judgment. The case will have widespread implications for taxpayers with comparable arrangements.

At the same time, the social media company is facing an antitrust case in the US where the Federal Trade Commission (FTC) is suing Facebook for alleged anti-competitive practices with the backing of 48 state attorney generals. The FTC may even seek to break up the company.

Tax directors at a number of technology companies told *ITR* they expect more disputes over antitrust concerns. Companies like Amazon and Facebook are facing accusations of anti-competitive behaviour.

"There is increased pressure more from a monopoly and antitrust perspective. It can't bleed into the tax arena," said one head of tax at a US app company. "Tech companies will have to find a balancing act between their competitive position and their tax position. Countries and companies alike will pick their battles."

Some technology companies may be 'too big' for their own good, attracting more suspicion from the revenue services and competition authorities. And the real struggle may just be starting.



Facebook is moving on

Improved clarity on IR35 changes proving useful for UK MNEs

Alice Jones

Taxpayers have welcomed the certainty gained on IR35 ahead of the April 2021 effective date, but tax professionals continue to argue that the employment tax system is fundamentally unfit for purpose and needs reforming.

Tax professionals are in a stronger position now than they were in April 2020, which was the original effective date of the IR35 changes until COVID-19 precipitated a year-long postponement. Amid the chaos of the pandemic, the delay was welcomed by many multinational enterprises (MNEs), and it also allowed the legislation to receive Royal Assent. Tax teams can therefore be confident that any further changes to the legislation will be minimal, but with complex rules and flaws in the UK revenue authority's check employment status tool (CEST), compliance is not easy.

From April 6 2021, "all public authorities and medium and large sized clients will be responsible for deciding the employment status of workers (sometimes known as contractors)," HM Revenue and Customs (HMRC) has stated.

This means the responsibility for determining a contractor's status will shift from the intermediary to the medium and large-sized companies that use their services. This will bring the private sector in line with the public sector, in which clients have been operating under similar rules since April 2017.

"No one's really happy with the end result, but the certainty's there," said Christina Reilly, an in-house employment tax accountant.

Reilly's comment reflects a wider dissatisfaction with the IR35 changes, which have attracted criticism for their

complexity. More widely, tax professionals argue that the employment tax infrastructure in the UK is unfit for purpose and requires a comprehensive overhaul.

HMRC has historically had problems trying to enforce IR35 rules. Ian Goodwin, director at Mazars UK, said that the revenue authority sees IR35 as a big area of non-compliance, but has not historically had the resource to challenge arrangements successfully.

The rule changes are an attempt, according to Goodwin, to collect more pay-as-you-earn (PAYE) and national insurance contributions (NIC) revenue, as was the case in 2017 when the rules changed for the public sector. However, Goodwin noted that HMRC is also keen to improve compliance by "passing the obligations to the bigger player [the end user] who is likely to take a more reasoned and responsible approach to managing risk".

Concerns for MNEs

Some MNEs are concerned about the practical implications of the changes: will it be more difficult or costly to access independent contractors with a particular area of expertise? Reilly suggested that there is a risk of contractors avoiding companies that take a hard-line approach to the rules and "take their business elsewhere to someone who is potentially less risk-averse or even less compliant, and who is therefore willing to pay them gross".

However, the major concern for MNEs is one of compliance; trying to determine which contractors are caught by the rules and which are not. HMRC's CEST, intended to help businesses with this problem, has attracted criticism in

the past for being overly simplistic and failing to account for considerations such as mutuality of obligation.

Data released by HMRC in December 2020 did little to assuage tax professionals' fears. The results showed that, between November 2019 and November 2020, the tool failed to definitively answer 19% of queries. This means that 188,719 cases were not confirmed to be either inside or outside of IR35.

Seb Maley, CEO of IR35 specialist advisory firm Qdos, called the figures "damning" and is calling for the failings of the CEST to be addressed before the IR35 changes come into effect in April 2021. He said: "This data is gathered from the latest version of CEST, which as we approach IR35 reform clearly isn't up to scratch. Aside from being indecisive, the tool isn't aligned with IR35 case law and has even been dismissed in court."

Maley suggested that, as using the CEST is not mandatory, businesses should consider alternative ways to assess statuses that will provide a well-informed answer 100% of the time.

Flaws in the system

The criticism of CEST and the IR35 changes plays into a wider concern that the employment tax infrastructure in the UK is simply not fit for purpose. In Reilly's words, the changes amount to little more than a "sticking plaster" for the issues that undermine the complex system.

Judith Freedman, professor of taxation law at the University of Oxford, suggested a complete departure from the way things are done. "A simpler way... would be to reform the national insurance

system, to bring the amount that you pay closer together, regardless of whether you're an employee or self-employed," she said.

In conversations with *ITR*, many tax professionals mentioned the so-called Taylor Review, a 2017 report called "Good Work" that was commissioned by the government and led by Matthew Taylor, chief executive of the Royal Society of the Arts. The review included suggestions for structuring the employment law landscape to make life easier for self-employed contractors and end users alike. Tax professionals think the ideas in the review could be useful for resolving the fundamental issues in the system.

In the meantime, MNEs must work with the legislation as it stands. The advice from tax professionals is to use the CEST with caution, or at least a healthy dose of scepticism. The other option is to avoid the CEST altogether and, if needed, hire the services of an independent advisory firm.

Some companies may also be considering blanket reclassifications to bring all of their contractors onto the payroll as employees. However, advisors warn against this because the legislation requires "reasonable care" to be taken when determining the employment status of contractors and employees. Blanket reclassifications do not meet this requirement.

Whatever the course of action, MNEs should exercise caution. HMRC has historically been fairly unsuccessful in combating IR35 non-compliance in the courts; Goodwin estimated that the revenue authority loses more dispute cases than it wins. However, the UK government's insistence on pushing ahead with the changes despite considerable opposition from the business community indicates its determination to enforce revenue collection.

"We're going to see even more litigation around what the definition is of someone who comes within IR35," said Freedman. "We've got a lot of case law coming up."

News in brief

The most important tax news from around the world.

AMERICAS

Argentina signs agreement with the US

The Argentine government has signed a competent authority agreement with the US. The agreement allows the two countries to exchange country-by-country (CbC) reports covering key aspects of the tax affairs of multinational companies.

Brazil's fiscal woes may halt tax reform

Brazilian President Jair Bolsonaro has never been one to hold back his words. "Brazil is broke. There is nothing I can do," he told the press. The Bolsonaro government turned to stimulus spending in 2020 to try and prevent an economic downturn from the impact of the coronavirus pandemic.

This may thwart Bolsonaro's plans for a radical restructuring of Brazil's formulaic tax system. It certainly means tax cuts are not high up on the agenda.

Paraguay extends WHT to digital services

The Paraguayan government has extended its withholding tax (WHT) to digital services provided by non-resident companies. Effective from January 1, Paraguay has joined the growing list of countries enacting unilateral measures to tax online services.

US tax reform on the cards

The US is on course for yet more tax reform following the 2020 presidential election. However, the Biden administration has to address the pandemic before it does anything else. In the meantime, the tensions over digital tax continue.

The Office of the US Trade Representative (USTR) has issued its findings on DSTs adopted by Austria, India, Italy, Spain, the UK and Turkey. The USTR found that "each of the DSTs discriminates against US companies, is inconsistent with prevailing principles of international taxation, and burden or restricts US commerce".



Brazilian President Jair Bolsonaro says "Brazil is broke. There is nothing I can do"

ASIA-PACIFIC

The Glencore case

Commodities group Glencore won a partial victory on November 6 2020 against the Australian Taxation Office (ATO) in a landmark case. The Full Federal Court of Australia has ruled in favour of the taxpayer in the case on November 6 2020 after the ATO waged its appeal. It looks like this case might finally be over after many years in the courts.

South Korea postpones digital currency tax

The Korean government has postponed the digital currency tax law until January 2022. The levy was supposed to come into force in October 2021 with a rate of 20% on profits earned from digital currencies above KRW 2.5 million (\$2,300).

Taiwan release clarification for foreign businesses with no PE

Taiwan's National Taxation Bureau of the Southern Area and Ministry of Finance have confirmed in a statement that a foreign profit-seeking enterprise that does not have a fixed place of business or a business agent in the Republic of China may "apply for the adoption of net profit ratio and onshore profit contribution ratio to the competent authority before receiving the payment of remuneration for services or business profit to calculate its taxable income".

Malaysia considers GST return

Companies operating in Malaysia may be facing another tax struggle if the government re-introduces a goods and services tax (GST). The Finance Ministry set up a committee to study various revenue-raising measures to assist the post-COVID economic recovery, which includes a GST, carbon tax and digital tax, as well as streamlining tax incentives, as well as other measures. However, after the news broke, Deputy Finance Minister II Mohd Shahar Abdullah said the government has no intention of reintroducing a GST in the near future.

Japan signs DTAs and customs agreements

Japan signed a customs mutual assistance agreement (CMAA) with Uruguay on January 7. Meanwhile its CMAA with the UK and Northern Ireland has entered into force.

Japan's agreement for the avoidance of double taxation with Peru will enter into

force on January 29 2021. It will apply, in most cases, to taxable years beginning on or after January 1 2022.

Case to watch: Cairn

The Permanent Court of Arbitration in The Hague has ruled against the Income Tax Department in its bid to claim back taxes from Cairn. The Indian government has since made it clear it will be appealing the decision.

EUROPE, MIDDLE EAST AND AFRICA

East Africa goes after the digital economy

The East African Community (EAC) held talks between six national tax authorities on November 11 to develop a joint strategy for taxing the digital economy. Tax commissioners from Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda agreed to implement a digital tax policy across the economic bloc.

Saudi Arabia considers July VAT cut

The Saudi government may be considering its options to cut the VAT rate in a bid to stimulate growth once the pandemic is over. Acting Saudi Information Minister Majid bin Abdullah Al Qasabi suggested a review could come up in July 2021. Saudi Arabia raised the VAT rate from 5% to 15% in 2020 to bolster tax revenues.

Rwanda meets OECD TP standards

The Rwandan government introduced transfer pricing rules based on OECD TP guidelines on December 11 2020. As part of this, the Rwandan government has granted the Rwandan Revenue Authority the power to issue tax adjustments.

Brexit deal comes into force

The trade and cooperation agreement (TCA) came into force on January 1 and the UK has officially left the European Union. Multinational enterprises (MNEs) say they are dealing with widespread uncertainty caused by the TCA's rules of origin, a shortage of customs brokers, and changes at the Irish sea border and UK land bridge.

Oman implements VAT

The Omani government is pushing ahead with plans to establish a VAT system in the country by April 16 2021. Oman is one of the last Arab Gulf countries to implement a VAT system.

China strengthens litigation framework through increased use of APAs and MAPs

Xiaoyue Wang and Choon Beng Teoh of KPMG China explain how recent developments affirm the programmes' effectiveness in providing certainty to transfer pricing arrangements in China.

China's advance pricing agreement (APA) regime has come a long way since its trial roll-out in 1998 followed by formal introduction in 2002. The latest statistics published by the Chinese State Taxation Administration (STA) show encouraging trends with the number of signed APAs hitting a record high in 2019.

China has also made good progress in resolving the backlog of mutual agreement procedure (MAP) cases even as it is seeing increasing applications by taxpayers. This is not least to make good on its commitment to the minimum standards agreed in the finalised G20/OECD's BEPS Action 14 report (Make Dispute Resolution Mechanisms More Effective).

The efforts put in by China to provide a swift response to international tax disputes is crucial to its pledge to implement China's opening-up policy. The STA has successfully eliminated or avoided double taxation of CNY 3.1 billion (approximately \$478.7 million) through bilateral dispute resolution processes in 2019.

In this article, the authors examine the latest trends with APA and MAP cases in China and the latest initiatives by the STA to make the APA and MAP programmes more accessible and attractive to taxpayers.

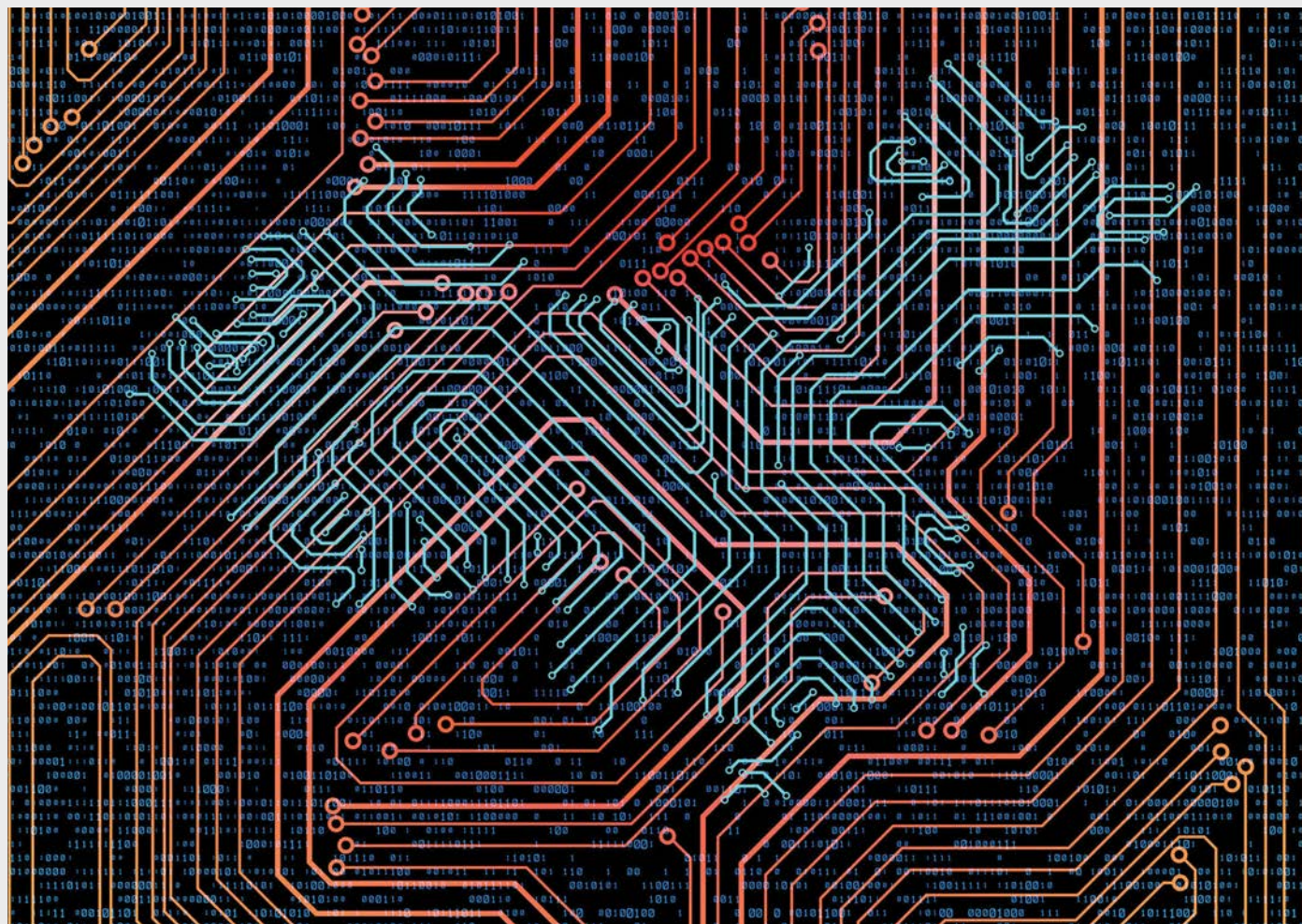
Advance pricing agreements

The STA publishes the China APA Annual Report on an annual basis as part of its effort to inform taxpayers of the development of the APA programme. The annual report provides insights into the latest statistics and offers information on relevant tax policies, implementation procedures and development of China's APA programme.

The latest 2019 APA Annual Report released in October 2020, as previously, recapitulates the progress of the APA programme. According to the statistics contained in the report, the STA achieved a notable milestone, signing 21 newly concluded APAs in 2019, comprising 12 unilateral APAs and nine bilateral APAs. These numbers are the highest reported in the STA's APA statistics, which date back to 2005.

Another encouraging development noted in the annual report is the time taken to conclude an APA. In general, the STA aims to conclude unilateral and bilateral APAs within 12 and 24 months of the acceptance of the respective formal applications. Most unilateral APAs (89%) and bilateral APAs (62%) signed between 2005 and 2019 were concluded within two years of the acceptance of formal applications. It is worth noting that five of the nine newly signed bilateral APAs in 2019 were concluded within just one year of the acceptance of formal applications.

Additionally, there are matters of particular note for taxpayers concerning the use of transfer pricing (TP) methods in APA applications. Five of the newly signed APAs in 2019 were concluded with the adoption of the profit split method, a paradigm shift compared to past years. The 2019 APA cases that use the profit split method are, in fact, equal to the total number of APAs adopting that method over the past 14 years from 2005 to 2018.



The STA has been advocating the application of more complex TP methods and the need to reflect the location specific factors in the pricing of inter-company transactions. The latest development demonstrates that the Chinese tax authorities are more assertive by moving away from the commonly applied transactional net margin method to the profit split method when the cases warrant such application. These include cases where both parties to the transactions make significant contributions to value creation or cases involving location specific advantages.

Of the total APAs signed between 2005 and 2019, 141 APAs were related to the manufacturing industry, accounting for 80% of the total. Taxpayers in the manufacturing industry have always formed a substantial majority of the APA tally due to the historic nature of inbound investment into China. Interestingly, however, there are an increasing number of enterprises signing APAs in the last two years which operate in the wholesale and retail industry, i.e. 19 or 10% of the signed APAs between 2005 and 2019. With the diversification of China's economy and further opening-up of the market, the number of APAs involving the service industry and other types of industries will unquestionably increase further in the future.

The annual report also provides a breakdown by transaction type. Between 2005 and 2019, 148 signed APAs related to the transfer of the right to use or the ownership of tangible assets,

accounting for 61% of all transaction types. An upward trend is seen in the number of signed APAs that involve services transactions and the transfer of the right to use or ownership of intangible assets, accounting for 39% of the total. The promulgation of the Announcement of the STA on the Administrative Measures on Special Tax Investigations, Adjustments and Mutual Agreement Procedures [2017] No. 6 (Announcement 6) requires taxpayers to place emphasis on the analysis of transactions related to services and intangible assets. This has prompted the Chinese tax authorities to further tighten the scrutiny on these related-party transactions which, in turn, encourages taxpayers to apply for APAs to secure tax certainty on these medium to high-risk transactions.

Overall, the 2019 APA Annual Report affirms the determination of the STA to steadily promote the APA programme and to improve the quality of tax authorities' services to taxpayers. The APA teams in the STA have grown steadily over the past few years to cater to the growing demand of multinational enterprise (MNE) taxpayers to access the APA programme to gain tax certainty and avoid costly and time-consuming TP audits. The demand will certainly continue to grow in light of the uncertain global tax environment, incentivised by the relatively speedy resolution of APA cases as seen in the annual report, as well as a



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Xiaoyue Wang is the transfer pricing (TP) national leader of KPMG China.

Xiaoyue joined the team in November 2016, and previously had a long and distinguished career at the State Taxation Administration (STA) of China, rising to the position of deputy director general of the international taxation department. She was the top TP official at the STA for many years, and represented the Chinese government in international negotiations on tax policy and administration.

Xiaoyue led the development, drafting and implementation of all major TP, advance pricing agreement (APA) and anti-avoidance initiatives, both in terms of legislation and tax administration, and developed a highly effective national structure for TP matters and anti-avoidance administration within the STA.

Since joining KPMG, Xiaoyue has led many large TP engagements, including bilateral APAs, MAPs, TP defence, BEPS documentation and global value chain restructuring, etc. Her work has involved companies all over the globe and in a wide range of industries, including electronics, automobiles and finance.

Xiaoyue has a PhD in economics from Renmin University of China and an LLM in taxation from Golden Gate University in the US.



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Choon Beng Teoh is a director with the global TP team of KPMG China and is based in Shanghai.

Choon Beng has experience in multi-jurisdictional planning studies, dispute resolution, value chain analysis and restructuring of operating models, as well as leading and managing global TP documentation projects. His client portfolio includes top-tier multinational companies across a variety of industries, including pharmaceutical, automotive and retail. He also occasionally co-authors articles on China-related TP topics for publications.

Choon Beng graduated with a law degree from the London School of Economics and is a chartered accountant with the Institute of Chartered Accountants in England and Wales. Prior to joining KPMG China, he practised in another leading accounting firm in London in the area of international tax and TP matters.

more structured APA programme, e.g. the introduction of the six-stage processes for handling APA applications as provided for in the Announcement of the STA on Matters Regarding Enhancing the Administration of Advance Pricing Arrangements [2016] No. 64 (Announcement 64).

Taxpayer APA strategies: Pathways to access the programme

To make the APA programme more attractive, the STA has come up with innovative initiatives that not only speed up the APA process but also resolve other non-TP issues that may arise from TP arrangements.

A common grouse of taxpayers is that the APA process takes a long time. This deters many from applying for APAs, particularly some taxpayers with less complex TP arrangements which are subjected to the same full APA review process. The Shenzhen tax authorities piloted an initiative which led to the successful conclusion of a case through a simplified APA process. The pilot case

involves a unilateral APA application by a taxpayer as with simple and clear related-party transactions and functional profile. This enabled the Shenzhen tax bureau to conclude its assessment quickly and an APA agreement was reached within a year of application. The successful pilot case opened the door to the conclusion of several more cases by the Shenzhen tax bureau under the simplified APA approach. The STA is now conducting research on the feasibility of implementing the simplified APA process in the rest of the country.

In another novel initiative, the STA agreed to coordinate with the Chinese customs authorities to negotiate and arrive at a jointly acceptable position from both tax and customs perspectives through an APA-like process. TP arrangements agreed through an APA or a TP audit can bring about adverse Chinese customs implications for taxpayers, and vice-versa.

In a pilot scheme, also in Shenzhen, a case is under progress where the STA and the customs authorities have entered into joint

negotiations to resolve the double taxation of corporate income and import pricing under an APA/joint-ruling framework. Substantial progress has been achieved and a successful conclusion of this case will be a major step towards finding a solution to balance the competing interests of the tax and customs authorities.

Mutual agreement procedures

In approving the 2015 BEPS Action 14 report, the Inclusive Framework countries agreed to a minimum standard to resolve treaty-related disputes in a timely, effective, and efficient manner. Furthermore, the Inclusive Framework countries committed to timely and complete reporting of MAP statistics according to an agreed reporting framework.

In this regard, the OECD, in November 2020, released the 2019 MAP statistics under a new reporting framework covering 105 jurisdictions and almost all MAP cases worldwide. Unsurprisingly, the statistics showed that there was an increase in the number of MAP cases initiated in 2019 but at the same time there was an increase in the number of MAP cases closed.

Focusing on TP cases, the following observations can be gathered from the OECD report:

- The number of TP cases keeps increasing. Approximately slightly more than three TP MAP cases were started every day in 2019. This amounts to about 1,200 new TP cases in 2019 alone compared to 930 in 2018.
- The number of cases closed is increasing as well. Competent authorities were able to close more cases in 2019 than in 2018, but the increase in cases closed in 2019 could not keep up with the increase in new cases in the same period, resulting in growth in the closing inventory.
- Outcomes of the closed MAP cases are generally positive. Around 85% of the MAPs concluded for TP cases in 2019 resolved the issues one way or another, which reflects the collaborative approach taken by competent authorities.
- Cases still take a long time to be resolved. On average, 2019 MAP TP cases took approximately 31 months to close.

Specifically in relation to China, the total closing TP case inventory (for cases pre- and post-January 1 2016) reduced from 59 in 2018 to 54 in 2019. More emphasis is placed on clearing the backlog of the pre-January 1 2016 cases with nine cases closed in 2019. In contrast, six cases started after January 1 2016 were closed in 2019. There were 10 newly started TP cases in 2019.

Generally, China took 28.8 months to close cases started after January 1 2016. While this is higher than the 24 months' timeframe as agreed under the BEPS Action 14 report, the timeframe is well under the global average of approximately 31 months.

“In view of the disruption created by the global pandemic, certainty is increasingly valued in the world of business”

Of the cases closed in 2019, 67% achieve some form of positive outcome (60% of the cases attained full or partial elimination of double taxation while 7% were resolved via domestic remedy).

China's MAP programme has also stood up to international peer review. The peer review process involves an evaluation of China's implementation of Action 14 minimum standard through an analysis of its legal and administrative framework relating to the MAP, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance and the practical application of that framework.

The review process is a desk review and is conducted through a specific questionnaire completed by China, its peers and taxpayers. In the MAP Peer Review Report (Stage 1) published in November 2019, the OECD noted that China was considered to meet most elements of the Action 14 minimum standard including:

- 1) MAP is accessible to eligible taxpayers;
- 2) Its regulations contain clear and comprehensive guidance on the availability of MAP and how China applies this procedure in practice;
- 3) China's competent authority operates fully independently from the audit function of the tax authorities and the performance indicators used are appropriate to perform the MAP function; and
- 4) China monitors the implementation of MAP agreements and no issues have surfaced throughout the peer review process.

Areas for improvement and recommendations noted in the peer review report include:

- 1) To update one tax treaty to be compliant with the requirements under the Action 14 minimum standard through the multilateral instrument;
- 2) To ratify the Multilateral Instrument it signed in 2017 as quickly as possible;
- 3) To have in place a documented bilateral consultation or notification process for situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified; and
- 4) To include contact details of China's competent authority in the MAP guidance.

The authors understand the STA took note of these recommendations and any progress will be reported in the stage two report, which details the monitoring of the follow-up of any recommendations resulting from the stage one peer review report.

Looking ahead

The uncertainty in the global economy and the challenges of trade liberalisation are prompting governments around the world to increasingly compete for tax revenues. In view of the disruption created by the global pandemic, certainty is increasingly valued in the world of business. Taxpayers yearn for an environment that provides fair and certain tax administration to facilitate cross-border investments.

In this regard, the Chinese tax authorities continue to fulfil their commitment to improve the business environment and promote unimpeded trade and investments in China. Taking note of the new initiatives and pilot schemes introduced by the STA and the local tax authorities, taxpayers should fully assess the advantages the APA and MAP programmes would bring to their management of tax and TP risks.

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AUSTRALIA

DLA Piper



Jock McCormack

ATO announces guidance on withholding tax concessions and updates APA procedures

Concessionally taxed managed investment trust income of foreign investors

The Australian Taxation Office (ATO) recently released Law Companion Ruling LCR 2020/2 on the withholding tax concession for foreign residents, with respect to fund payments made by eligible managed investment trusts (MITs). Generally, the rate of MIT withholding tax is limited to 15% unless the fund payment is attributable to non-concessional MIT income (NCMI).

Subject to certain transitional rules, NCMI includes MIT cross-staple arrangement income, trading trust income, agricultural income or residential housing income. Where applicable, a transitional rule applies until July 1 2026, or with respect to an eligible 'economic infrastructure facility' until July 1 2034.

The ATO guidance provided in this ruling is of critical interest to foreign investors that hold interests in eligible MITs that principally invest in Australian infrastructure, real estate and related assets. The differing withholding tax rates applicable (i.e. 15% or 30%) have and continue to be of great interest to foreign investors.

Certain key exceptions are available including the third party rent exception, and the approved economic infrastructure facility exception.

Much interest has been focused on the ATO's views on what is a 'facility', particularly where an existing facility, e.g. toll road, is expanded and/or altered to enhance and naturally develop the relevant asset.

The relevant amending legislation was passed into law in 2019 (Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Act 2019) and is generally applicable to fund payments made on or after July 1 2019.

Advance pricing arrangements

The ATO issued an updated version of its Practice Statement Law Administration PSLA 2015/4 on December 3 2020,

which covers the ATO's practices and procedures in dealing with advanced pricing arrangements (APAs), i.e. cross-border transfer pricing and related arrangements.

The updated APA guidance to ATO staff principally refines the APA decision-making processes with improved governance and greater flexibility in approach.

Generally, the approach to analysis and evaluation of the APA application of taxpayers is more prescriptive, as is the role of the APA team leader and the competent authority in negotiating the terms of the relevant APA.

Collateral issues including the general anti-avoidance provision, part IV A, the Multinational Anti-Avoidance Law (MAAL), diverted profits tax (DPT) and anti-hybrid mismatch rules may be considered and dealt with as a part of the APA process.

The ATO has a long and comprehensive history in successfully negotiating APAs and many multinationals have pursued Australian APAs as a favourable option in properly managing and mitigating transfer pricing and related tax risks.

Continuing ATO reviews

The ATO Top 1,000 Tax Performance Program has recently been refocused and escalated following the redeployment of many ATO staff, who have been seconded to the Economic Stimulus Branch and related Australian government initiatives, throughout 2020. We expect these reviews covering both income tax and goods and services tax (GST) to be very active and comprehensive through 2021.

Recent government reform measures allowing temporary full depreciating asset expensing, limited tax loss carry back, and related initiatives are expected to be the subject of comprehensive taxpayer reviews by the ATO. Furthermore, the ATO is expected to pursue the perceived misuse of legal professional privilege during these reviews and tax audits.

Freezing orders to prevent removal of Australian assets

On November 27 2020 in *Deputy Commissioner of Taxation v Wang (2020) FCA 1711*, Abraham J allowed freezing orders sought by the ATO to prevent two taxpayers (husband and wife) from removing assets from Australia, or otherwise diminishing the value of their Australian assets as there was a real risk of dissipation of these assets.

Following a tax audit of each taxpayer/respondent, amended assessments in the amount of AU\$63.5 million (\$47.2 million) were issued covering the years ending on June 30 from 2008 to 2019. Abraham J was satisfied that the balance of convenience favoured the making of

the freezing orders sought and noted that the taxpayers' position was protected by the ATO's undertakings as to damages.

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CHINA

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Lewis Lu

FDI restrictions continue to be relaxed

Foreign direct investment (FDI) has long played a crucial role in driving the development of China's economy. China continues to be one of the world's most attractive investment destinations, being the second largest FDI recipient for the past several years.

It is estimated that in 2020, even against the backdrop of a challenging global economic environment, China hit a new record of more than \$140 billion in FDI, up more than 6% on the year. The Chinese authorities have recently made a whole series of regulatory changes to support the continuation of this trend.

To promote FDI, China's new foreign investment law came into effect from January 2020. This was followed in June 2020 with updated nationwide and free trade zone (FTZ) 'negative lists' for foreign investment, which reduced the industries for which foreign investment is restricted or prohibited. This was followed in December 2020 by an update to the 'negative list for market entry', which governs the sectors in which private enterprise (both domestic and foreign) can invest – this needs to be read in parallel with the foreign investment lists. Under this, just 123 sectors are now off limits to private capital – down from 328 in 2016.

In December 2020, a new Catalogue of Encouraged Industries for Foreign Investment was released, applicable from January 2021. Enterprises in business sectors designated as 'encouraged' may be granted a range of tax, customs and other support, such as preferential awards of land use rights, by local governments. Encouraged sectors have been increased from 1108 to 1234, relative to the 2019 catalogue. These include advanced manufacturing (e.g. new materials, environmental protection), modern services (e.g.

research and development, cross-border e-commerce, online education and medical) as well as food processing, tourism, medical devices, and shipping. Some of these sectors are nationally encouraged and others are encouraged for the less developed western region of China, for the old industrial north east, and for the key development focus area of Hainan island.

From February 2021, there is also a new 'negative list' for the Hainan free trade port (FTP), which is even more permissive than the existing national and FTZ lists. This drops the remaining restrictions for mining and auto manufacturing and further reduces those on telecommunications, education and legal services.

In parallel to all this, the newly agreed China-EU Bilateral Investment Treaty (BIT) (announced in December 2020) also commits China to further open up the manufacturing, automotive, financial services, medical, cloud services, shipping and air transport sectors to European investment.

China is also undertaking measures to facilitate outbound investment, including recent rule changes made by China's central bank and foreign exchange administration in January 2021 to permit Chinese enterprises to lend more to their overseas subsidiaries.

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HONG KONG SAR

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Lewis Lu and John Timpany

IRD issues guidance on ship leasing tax concessions

The Inland Revenue Department (IRD) issued an updated guidance, Departmental Interpretation & Practice Notes No. 62 (DIPN), setting out its views on the concessionary tax treatment for: (i) qualifying ship lessors; and (ii) qualifying ship leasing managers in Hong Kong SAR.

Lease vs ship operator

One of the biggest concerns of the new rules was that the envisaged segregation of the activities of ship owners into 'pure leasing' and 'ship operating' is not as clear. Many ship owners engage in a range of

activities, seeking to maximise the return on their vessels in whatever ways they can, according to the nature of the market at different points in time. The nature of the market in recent years has tended to require greater flexibility on the part of ship owners to consider short-term charters or taking on greater operational risk.

The legislation sought to impose an all-or-nothing test, posing problems for more complex businesses. The DIPN reiterates that ship operators are not eligible for the exemption and that to be eligible, a lessor must be acting as a standalone corporation engaging solely in ship leasing activities. It makes clear that the provisions can apply to both wet and dry leases.

Although not addressed in the DIPN, the IRD has indicated in correspondence with concerned parties that some leasing arrangements may continue to fall within section 23B. In particular, the IRD has stated that where a ship operator generates income from leasing a ship on a voyage charter or a time charter fully equipped, crewed and supplied, this will be treated as income of the ship operator's ship operations. Income from bare boat charters, which are an incidental or ancillary activity of the ship operator, may continue to be assessed in accordance with section 23B.

The test set out in the IRD's correspondence is not straightforward and leaves room for interpretation. Nevertheless, it does appear that the IRD has accepted that there is a need for flexibility in the application of the two sets of rules in order to avoid the situation where a taxpayer ends up paying tax despite conducting business which is supposed to fall entirely outside the tax net. The exact application of the rules and how best to apply them is likely to vary from business to business, and ship owners should pay careful attention to this. The best way to obtain certainty is to apply for a ruling.

Substance requirements

It is a condition of the concession that central management and control be exercised in Hong Kong SAR. The DIPN stresses the role of day-to-day work by the directors in Hong Kong SAR. Given the wider substance requirements, it is not clear why this should be an area of focus, and the IRD's comments seem to go beyond what is often considered necessary for demonstrating a place of effective management.

Anyone claiming the concession is required to have substance in Hong Kong SAR. This consists of at least two full-time employees in Hong Kong SAR with appropriate qualifications (one employee for ship leasing management) and at least \$7.8 million of operating expenditure in

Hong Kong SAR (\$1 million for ship leasing management). In addition, the number of employees and the amount of the expenditure must be adequate in the opinion of the assessor and they must undertake the business's core income generating activities (CIGAs) in Hong Kong SAR.

The CIGAs for ship leasing activities include agreeing funding terms, identifying or acquiring ships to be leased, setting the lease terms and duration, monitoring or revising any funding agreements and managing any risks associated with leases.

The IRD helpfully notes that a wide range of expenditure will be regarded as operating expenditure including staff costs, rental and admin costs. It also includes any finance costs directly related to the acquisition of a ship for use in the leasing business. Importantly, provided the loan is taken out for the purpose of acquiring a ship for use in a Hong Kong SAR ship leasing business, the IRD will accept that it is incurred in Hong Kong SAR even if it is borrowed from an overseas financial institution.

The IRD has said that it will not allow depreciation on the vessel to be included as operating expenditure on the basis that the ship is used for earning lease payments but not for carrying out CIGAs. It is a little hard to follow the logic here, given that they have accepted that interest payments on loans taken out to acquire the vessel can be included. Nevertheless, it is unlikely many lessors will need to rely on depreciation to meet the threshold, provided they have incurred sufficient interest expense.

The comments on the adequacy test are concerning. The Commissioner will view each case on its facts and circumstances, taking into account a range of factors and would deny any tax benefit that seems disproportionately large relative to the number of employees employed and the amount of operating expenditure incurred in Hong Kong SAR.

KPMG observations

The IRD has provided some clarifications on its interpretation of the legislation, although a number of uncertainties remain. Given the complexity of the arrangements and the IRD's form on applying concessionary rates, taxpayers should review their business models to ensure compliance and consider seeking a ruling to ensure their proposals are in line with the IRD's view.

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INDIA

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Tax treaty overrides dividend distribution tax, rules Delhi Tax Tribunal

The Delhi Tax Tribunal made a landmark judgment in the case of *Giesecke & Devrient (India) Pvt Ltd.* The judgment held that dividend distribution tax (DDT) on dividends distributed to foreign shareholders would be circumscribed by the tax rate mentioned in the tax treaty applicable to the foreign shareholders.

Background

In order to understand the ruling of the Tax Tribunal and its far-reaching impact, it is important to note the background of dividends taxation in India.

Prior to 1997, dividends were taxable in the hands of the shareholder. In 1997, for administrative convenience, the Indian tax laws were amended to provide for a levy of DDT at the rate of 15% (plus

applicable surcharge and cess) on the company distributing the dividends. This meant that the brunt of the tax was shifted to the companies declaring dividends and that dividends were exempt from such taxation in the hands of the shareholders.

The DDT was discharged by Indian companies at the said rate irrespective of whether the shareholders were residents or non-residents. The shareholders who were tax residents of countries with which India had entered into a tax treaty were not given the benefit of the tax rate prescribed under the relevant tax treaty at the time of levying the DDT on the dividends distributed by Indian companies. While most of the tax treaties entered into by India provide for a lower tax rate for a beneficial owner of dividend income (as compared to the DDT), it was generally believed and accepted that a tax treaty would not override the DDT provisions.

Tax Tribunal's ruling

An Indian company had paid dividends to its German parent and shareholder in FY 2012-13 and discharged DDT at 15% plus the applicable surcharge and cess (disregarding the dividend tax rate of 10% under the India-Germany tax treaty). The Indian company subsequently raised an additional ground (for the

first time) before the Tax Tribunal that it should be entitled to a refund of the DDT paid in excess of the tax rate stipulated by the tax treaty.

The Tax Tribunal, while allowing the ground to be admitted, held, on the merits of the case, that the DDT paid by the Indian company to its German shareholder (parent) would be subject to taxation under the relevant tax treaty (i.e. 10% under the India-Germany tax treaty in the present case) for the following reasons:

- The definition of 'income' under Indian tax laws includes dividends and the definition of 'tax' includes additional income tax (i.e. DDT). This implies that DDT is a tax on such dividends. In other words, DDT is a tax on the 'income' earned by the shareholder that is payable by the Indian company;
- Having regard to the rationale for the introduction of the DDT regime and subsequent amendments over the years, we note that DDT was introduced to recover tax on dividends from Indian companies for administrative convenience;
- The India-Germany tax treaty predates the introduction of DDT; and
- The beneficial provision in the tax treaty would override the provisions of the Indian tax laws for the purpose of



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determining the rate to be applied at the time of levying the DDT.

One aspect that should be highlighted with respect to this ruling is that the tax treaty with Germany was signed before the introduction of the DDT and this played a significant role in the conclusion reached by the Tax Tribunal. The Tax Tribunal held that a domestic tax law provision (i.e. the introduction of the DDT) cannot override what had been agreed in the tax treaty between two sovereign nations.

While the Tax Tribunal has held that the beneficial tax rate provided under the tax treaty prevails over the DDT rate to be applied when a company distributes dividends, the Tax Tribunal has restored the matter to the lower tax authorities, which are now tasked with the limited verification of the existence of the German shareholder's permanent establishment (PE) in India. If the PE does indeed exist, the lower tax authorities will then determine whether the dividends are effectively connected with such a PE.

The way forward

The ruling of the Tax Tribunal is the first to have ruled on the merits of the issue (i.e. whether DDT on dividends distributed to foreign shareholders should be circumscribed by the tax rate mentioned in the tax treaty). The ruling will now pave the way for several Indian companies with significant foreign parentage (with tax treaty benefits) to make claims for refunds of excess DDT paid over the years.

While the tribunal makes a specific reference to the fact that the India-Germany tax treaty was entered into prior to the introduction of the DDT, in our view, that would not be material in other cases as the Tax Tribunal itself has rightly observed that a domestic tax provision cannot override the provisions of a tax treaty. Accordingly, even where the relevant tax treaty has been entered into after the introduction of the DDT, the Indian company is still eligible to make a claim for a refund by applying the tax rate mentioned in the relevant tax treaty.

Before making the claim for the refund of the DDT, the Indian company will need to determine the strategy with respect to the forum before which the claim should be made. Also, the mode through which the claim for the DDT refund should be made would need to be evaluated based on the facts of each case and certain recent amendments with respect to the form/manner of making the claim for tax refunds.

In addition to the above, the Indian company making the claim for a refund should be able to substantiate that the foreign shareholder:

- Is the beneficial owner of the dividend income;
- Does not have a PE in India to which the dividend can be said to be effectively connected; and
- Is a tax resident of the country whose tax treaty is being sought to be applied to restrict the DDT rate (i.e. a tax residency certificate should be obtained).

The Tax Tribunal's ruling is not likely to be the final word on the matter and the Indian revenue authorities are likely to contest it before higher courts. In the meantime, the Indian companies that are assessing whether to make a refund claim should do so after careful evaluation of the facts. Matters to examine include the applicability of the most favoured nation (MFN) clause in the relevant tax treaty, the years for which the claim can be made, and the mode/manner of making the claim.

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Interest rate changes for penalties wrap up a busy 2020

Calculating interest rates for penalties and compensation

Following the issuance of the omnibus law, the calculation of interest penalty and interest compensation are changing.

On November 26 2020, the Ministry of Finance (MoF), issued Decision No.

540.KMK.010/2020 regarding the use of interest rates as the basis for calculating administrative penalty and interest compensation. These interest rates are applicable for the period from November 2 to November 30 2020.

The monthly interest rate are as listed in Tables 1 and 2.

The authority to determine monthly interest as the basis for calculating administrative penalties of interest and interest compensation for subsequent periods is delegated as a mandate to the head of the Fiscal Policy Agency, for and on behalf of the minister of finance.

Taxing the import of COVID-19 vaccines

On November 26 2020, the MoF issued Regulation No. PMK-188/PMK.04/2020 (PMK-188), which acts as the Directorate General of Customs and Excise's (DGCE) tax position for handling the COVID-19 pandemic. The main points of PMK-188 are summarised in Table 3.

The 'vaccine' refers to a vaccine, vaccine raw materials and equipment needed in vaccine production, as well as equipment for the implementation of vaccinations in the context of handling the pandemic.

The facilities can be used only for:

- 1) Central government;
- 2) Regional governments; and
- 3) Legal entities or non-legal entities that receive an assignment or appointment from the Ministry of Health.

This regulation became effective on November 26 2020.

Stamp duty law

On October 26 2020, the Law of the Republic of Indonesia No. 10 of 2020 concerning stamp duty was promulgated. Previously, on September 29 2020, the House of Representatives approved the draft bill on stamp duty as an amendment.

Table 1: Administrative penalties

No	Clauses in law of general provisions and tax procedures	Monthly interest rate
1	Article 19 paragraph 1, Article 19 paragraph 2, and Article 19 paragraph 3	0.57%
2	Article 8 paragraph 2, Article 8 paragraph 2a, Article 9 paragraph 2a, Article 9 paragraph 2b, and Article 14 paragraph 3	0.99%
3	Article 8 paragraph 5	1.40%
4	Article 13 paragraph 2 and Article 13 paragraph 2a	1.82%

Table 2: Interest compensation

Clauses in law of general provisions and tax procedures	Monthly interest rate
Article 11 paragraph 3, Article 17B paragraph 3, Article 17B paragraph 4, and Article 27B paragraph 4	0.57%

Table 3

No	Granting of facilities	Import (bonded logistics centre)	Outgoing (Other places within the customs area)
1	Exemption from import duty and/or excise;	✓	✓
2	Excluded from obligation to pay taxes in the context of import		✓
3	VAT or VAT and sales tax on luxury goods is not collected	✓	
4	Excluded from the obligation to settle VAT or VAT and sales tax on luxury goods		✓
5	Exempted from collection of Article 22 income tax on imports	✓	✓

- 1) Stamp duty rate will be a single rate of IDR 10,000 (approximately \$0.72);
- 2) Stamp duty payable will expire after a period of five years from the time it is payable; and
- 3) Law No. 10 of 2020 will become effective on January 1 2021.

Taxing luxury goods

On October 16 2020, the Indonesian government issued Regulation No. 61 of 2020 regarding taxable goods classified as luxury goods, other than motorised vehicles that are subject to sales tax on luxury goods.

Tariffs and objects of taxable luxury goods other than motor vehicles subject to sales tax on luxury goods are as follows:

- The rate is set at 20% for the following objects:
 - 1) Luxury home;
 - 2) Apartment;
 - 3) Condo; and
 - 4) Town houses and similar buildings.
- The rate is set at 40% for the following objects:
 - 1) Groups of air balloons and air balloons that can be steered, other aircraft without propulsion; and
 - 2) Groups of firearms, bullets and other firearms, except for state purposes.
- The rate is set at 50% for the following objects:
 - 1) Groups of aircraft other than those referred to above, except for state needs or commercial air transportation; and
 - 2) Groups of firearms and other firearms, except for state purposes.
- The rate is set at 75% for the following objects:
 - 1) Cruise ships, excursion boats and similar vessels principally designed for the transport of persons, ferries of all types, except for the benefit of the state or public transport; and
 - 2) Yachts, except for state purposes, public transportation, or tourism businesses.

Regulation No. 61 of 2020 will become effective 60 days after its enactment date, i.e. on December 14 2020.

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NEW ZEALAND

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IRD considers application of WHT rules to negative interest payments

Inland Revenue has recently released draft guidance concluding that negative interest on an advance of money or a loan will not be subject to New Zealand withholding tax (WHT). The draft guidance is timely as banks and financial institutions are considering the necessary processes that would need to be put in place to allow for the payment of negative interest.

Negative interest rates as a monetary policy measure

The Reserve Bank of New Zealand sets the official cash rate (OCR) and historically the OCR has had a significant influence on market (including retail) interest rates. The OCR is currently 0.25%, the lowest it has been since its introduction in 1999. In light of the economic fallout from COVID-19, the Reserve Bank indicated on November 11 2020 (when the OCR was last reviewed) that a “lower or negative OCR” remains under consideration, and that the “banking system is on track

to be operationally ready for negative interest rates by year end”.

Payment of negative interest is akin to a payment for holding money and not interest

Whether resident withholding tax or non-resident withholding tax will apply to negative interest turns on whether the negative interest amount is a payment of “interest” as defined. Domestic law generally defines “interest”, for withholding tax purposes, as “a payment made to [a] person by another person for money lent to any person, whether or not the payment is periodical and however it is described or calculated”, but excluding “a repayment of money lent”. The obligation to withhold is generally triggered when interest is paid, although in some cases (involving related-party interest) withholding may be triggered on an accrual basis.

In its draft guidance, Inland Revenue confirms that the word “for” (in the context of the requirement that interest be a payment “for” money lent) “requires or implies the giving of interest in exchange – and countervailing with – the money lent...”. As a payment of negative interest would be from the lender to the borrower, Inland Revenue concludes that such a payment would not be “for” money lent, but is more akin to a payment to the borrower for “receiving, acceptance or holding of the money”.

Also of importance to banks and financial institutions is Inland Revenue’s conclusion that the reporting requirements for interest do not apply to negative interest payments.

The conclusion that Inland Revenue reaches in its draft guidance (as described above) is as expected, and appears to be consistent with the practice of other countries that have addressed the issue. Her Majesty’s Revenue and Customs, for instance, has commented (in HMRC’s Savings and Investment Manual, at SAIM2060) that negative interest “does not meet the definitions of interest” but is “akin to a fee paid to the debtor to hold the creditor’s money”.

Inland Revenue’s draft guidance notes that “[n]egative interest payments will still be subject to income tax but there is no withholding requirement on such payment”. This reflects the fact that the definition of interest referred to above applies for withholding tax purposes, whereas the question of whether an amount derived from or under a debt instrument or other financial arrangement is taxable is determined under New Zealand’s financial arrangements rules.

The financial arrangements rules bring to tax, on an accrual basis, all income,

gains, expenditure and losses arising from consideration payable for or under a financial arrangement, and with limited exceptions override the distinction between capital and revenue that otherwise applies under New Zealand's income tax law.

Accordingly, a borrower receiving negative interest would generally be required to recognise such negative interest as income.

Submissions on the draft guidance close on January 15 2021.

Russell McVeagh

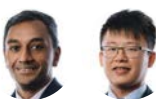
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SINGAPORE

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Siva Saravan and Kinnmeng Liew

Non-budget amendments from the Income Tax Amendment Bill 2020

The Income Tax Amendment Bill 2020 (the bill) was introduced to Members of Parliament for first reading on October 5 2020. The bill proposes legislative amendments to effect changes to the Income Tax Act (ITA).

While many of the proposed legislative amendments are to effect the tax changes announced in the 2020 budget, such as the corporate income tax rebate and the enhanced loss carry-back relief scheme for the Year of Assessment (YA) 2020, there are also non-budget amendments proposed in the bill.

This article looks at a few of those proposed non-budget amendments to the ITA.

Surcharge for tax avoidance arrangements

Under section 33 of the ITA, the Comptroller of Income Tax (the Comptroller) can disregard or vary an arrangement and make relevant tax adjustments as he considers appropriate to counteract any tax advantage obtained or obtainable by a person from or under that arrangement if the Comptroller is satisfied that the purpose or effect of that arrangement is directly or indirectly to:

- Alter the incidence of any tax which is payable by or which would otherwise have been payable by the person;
- Relieve the person from any liability to pay tax or to make a return under the ITA; or

- Reduce or avoid any liability imposed or which would otherwise have been imposed on the person by the ITA.

The general anti-avoidance rules under section 33 of the ITA do not apply to an arrangement that was carried out for *bona fide* commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

The effect of any adjustments under section 33 of the ITA is to restore the taxpayers' tax position as though the tax avoidance arrangement had not been entered into. However, the ITA does not provide for the imposition of a surcharge with respect to the tax adjustments made by the Comptroller under section 33 of the ITA.

Under the proposed amendment to the ITA, the Comptroller can impose a 50% surcharge on any income tax or additional income tax resulting from the adjustments made under section 33 to counteract tax avoidance arrangements for the year of assessment 2023 and subsequent years of assessment. It should be noted that the surcharge is payable within one month after the date a written notice of the surcharge is served, regardless of whether the taxpayer is appealing or objecting to the adjustment.

It has also been proposed to introduce a similar surcharge of 50% in the Stamp Duties Act (SDA) and the Goods and Services Tax Act (GSTA) to be imposed on any additional stamp duties or GST, as the case may be, resulting from adjustments made to counteract tax avoidance. The SDA and the GSTA contain anti-avoidance provisions that are similar to section 33 of the ITA.

The proposed surcharge under the SDA will apply to any additional stamp duties resulting from adjustments made to instruments or deemed instruments executed or deemed executed on or after the date the Amendment Act is published in the Official Gazette. The proposed surcharge under the GSTA will apply to any additional tax resulting from adjustments made to GST accounting periods starting on or after January 1 2021.

Car-related expenses and capital allowances on cars used in the business of providing chauffeur services

Expenses incurred directly, or in the form of reimbursement, on using private hire cars or private cars are not tax-deductible, even if the private cars were used for business purposes. Capital allowances are also not allowed in respect of private cars.

However, there are a few exceptions. For example, private hire car expenses and hiring charges are tax-deductible to a person who is carrying on the business of hiring out cars and the private hire car is used by the person principally for hiring. Similarly, capital

allowances can be claimed on a private hire car acquired by a person who carries on the business of hiring out cars and which is used by the person principally for hiring.

The bill proposes that the deduction of car-related expenses and capital allowances on cars used in the business of providing chauffeur services be allowed to any person from any business of providing chauffeur services using motor cars, provided certain conditions are met. This is in recognition of the fact that chauffeur services may no longer be provided as incidental to the main business of renting out cars. The proposed change is to be effective from YA 2021.

Non-owners of immovable properties to be excluded from the provisions of section 10E

Section 10E of the ITA prescribes how the income of a company or trustee of a property trust derived from any business of the making of investments should be ascertained. "Business of making investments" refers to the holding of investments to derive investment income as a trade but not to trade in those investments.

Under section 10E, the deduction of any allowable expenses and capital allowances are restricted to the income derived from investments which produce income. Any expenses and capital allowances that cannot be set off against such investment income in that year will be disregarded.

The proposed amendment under the bill clarifies that section 10E does not apply to taxpayers who:

- Are not legal owners of the immovable properties; and
- Are not in a position to receive any consideration from the disposal of the immovable properties or from the novation of leases relating to these immovable properties.

New exception to the Official Secrecy provisions

Under section 6 of the ITA, every person having any official duty or being employed in the administration of the ITA must regard and deal with all documents, information, returns, assessment lists and copies of such lists relating to the income or items of the income of any person, as secret and confidential. However, there are certain exceptions provided for in section 6.

For the purposes of Singapore's participation in multilateral tax compliance programmes, the bill proposes a new exception to the section 6 official secrecy provisions to facilitate the disclosure of information concerning a taxpayer to foreign tax authorities. Such a disclosure can be made if the taxpayer provides express written consent and the disclosure is for a purpose, and satisfies the conditions, that

will be specified in rules prescribed by the Minister for Finance.

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THAILAND

HLB Thailand



Andrew Jackomos and Rohit Sharma

A closer look at the updates to CbCR

The Thai Revenue Department (TRD) has recently released draft rules for country-by-country reporting (CbCR) for public consultation.

These rules propose making the CbC report effective in Thailand for accounting periods commencing on or after January 1 2020, so taxpayers need to familiarise themselves with the proposal.

The changes have come about as part of Thailand's commitment to implement the OECD/G20 BEPS project outcomes. This is a significant development for Thailand, which informs the world that it is serious about tackling BEPS.

The draft rules spell out the definitions as provided by the 2017 OECD Transfer Pricing Guidelines for enterprise groups, multinational enterprise (MNE) groups, constituent entities (CE), ultimate parent entities (UPE), and surrogate parent entities (SPE).

Taxpayers are provided guidance on matters, such as who will be impacted by this law, what the filing obligations are, the format of CbCR, means of filing the CbC report and the timelines.

Which entities are subject to CbCR?

Any entity that satisfies one of the following criteria, and has consolidated group revenues of no less than THB 28 billion (\$925.6 million approximately) in the immediately preceding accounting period, is obligated to prepare and submit a CbC report.

If the accounting period of the preceding year is less than 12 months, the revenue threshold will be calculated proportionally to such accounting year. For example, if the accounting period of the immediately preceding year was from January 1 2020 – June 30 2020, the revenue threshold would be THB 13,923.50 million (THB 28 billion × 182/366 days).

General cases

- A Thai headquartered (HQ) MNE group – an entity registered under Thai law and is the UPE of the group, or the SPE as appointed by the UPE to file the CbC report in its tax jurisdiction, as required.
- The SPE registered under Thai law – as appointed by the group to file the CbC report on behalf of the group.

Specific case

An entity that does not satisfy conditions one and two of the general cases, but is carrying on business in Thailand (foreign MNE subsidiaries) and meets one of the following conditions:

- A foreign UPE of the MNE group (located outside of Thailand) that does not require the UPE to file a CbC report in its tax jurisdiction and the UPE does not appoint the SPE in the jurisdiction that requires surrogate parent filing of the CbC report;
- If the foreign UPE of the MNE group or SPE, located outside of Thailand, does not have a qualified competent authority agreement (QCAA) with Thailand, or such QCAA is not yet effective at the last day of the CbC report submission period; or

- The TRD has been notified of the systematic failure from the residence jurisdiction of the UPE or SPE.

Reporting deadline

If the above threshold and conditions are met, the Thai-based UPE or SPE must prepare and submit the CbC report within 12 months (in a general case) of the last day of the financial reporting year. For a specific case, the report must be filed within 60 days of being requested by the TRD.

Reporting format

The CbC report should be in English and filed electronically. It should follow the CbC report XML Schema as prescribed by the OECD. The currency used when preparing the CbC report would be the functional currency of the UPE.

Figure 1 is an illustrative chart that assumes the reporting entity has a December 31 year-end, summarising the CbC report timelines.

Assessing the impact of the draft rules

It can be argued that the most significant impact will be felt by Thai HQ MNE groups which will be required to prepare and file a CbC report for the first time as a result of the new rules. The draft rules are mostly in-line with the OECD.

For the MNE groups with UPEs located outside of Thailand, but operating within Thailand, the new rules provide flexibility and allow for CbC reports (FY2020 and onwards) to be filed in Thailand.

Although Thailand has signed the multilateral competent authority agreement (MCAA), it is yet to activate any exchange relationships with other tax jurisdictions. Nevertheless, it is expected that these will be activated to enable the exchange of data/information with other tax jurisdictions automatically.

There are still many unanswered questions, such as whether a local filing is required for previous years (in case the Thai group was subject to CbCR in other countries), notification requirements, or how to address different year ends to arrive at a consolidated group revenue.

It is expected that the TRD will release formal guidance on areas discussed above to implement the rules effectively.

It is an opportune time for MNEs to evaluate their transfer pricing risks and ensure that their policies properly allocate profits to the various jurisdictions in which they operate.

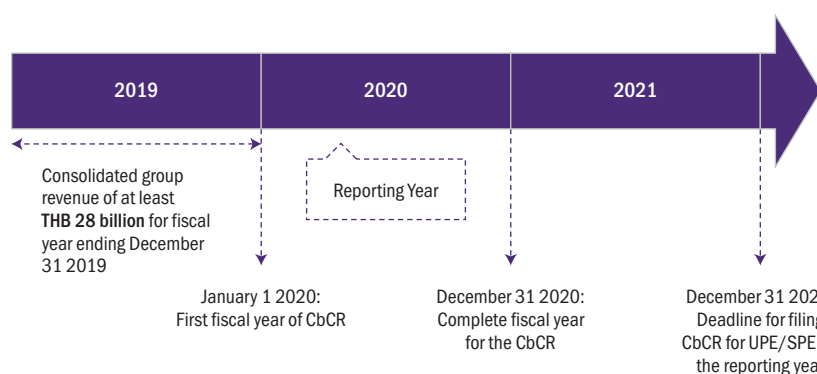
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Figure 1: CbC reporting timelines



Indian court confirms Redington's use of foreign subsidiaries avoided tax

Sanjeev Sharma, principal director of income tax at the [India Income Tax Department](#), explains why the Madras High Court decided Redington India's use of foreign subsidiaries to transfer shares offshore was an attempt to avoid capital gains tax and transfer pricing rules in India.

The Madras High Court delivered a judgment on tax avoidance in the case of *Redington India Limited* (company) on December 10 2020. The company had transferred its entire holding in an overseas company to another newly incorporated step-down overseas subsidiary without consideration. It claimed the transaction as a gift and, thus, non-taxable under domestic tax law.

The case before the Madras High Court mainly involved whether the transaction was a valid gift as per domestic laws, and hence out of the scope of capital gains tax, and the applicability of transfer pricing laws to the transaction.



Sanjeev Sharma

Facts of the case

Headquartered in Chennai, India, Redington provides global end-to-end supply chain solutions for all IT, telecom, lifestyle, healthcare, and solar products.

Redington's business operations in the Middle East and Africa region were carried through wholly-owned subsidiary Redington Gulf FZE (RG) incorporated in the United Arab Emirates Jebel Ali Free Zone since 2004. RG, in turn, had subsidiaries located in different countries across the region. Redington's total investment in RG was INR 2.14 billion (\$29.3 million) as of March 31 2008 (see Figure 1).

The group intended to raise capital overseas to expand its business. To meet the requirement of a prospective investor, which was a Cayman Islands headquartered private equity fund, the company also incorporated a wholly-owned subsidiary in Mauritius, known as Redington International Mauritius Limited (RM) in July 2008, which in turn held another newly incorporated company in the Cayman Islands, known as Redington International (Holdings) Limited (RC).

On November 13 2008, the company transferred without consideration its entire shareholding in RG to RC. RC only held investments in RG after its transfer of shares, and it did not have any other assets or income. The company in the UAE free trade zone (RG) became a direct subsidiary of RC and a step-down subsidiary of the company indirectly held through the Mauritius and Cayman Islands companies.

The value of RC increased after RG transferred its shares to the Cayman Islands entity. On November 18 2008, the private equity fund purchased 27.17% equity of RC for \$65 million. On that date, RG's value was stated to be \$239 million (see Figure 2).

The arrangement allowed the private equity fund in the Cayman Islands (the investor) to purchase the shares held by RC in the Middle East and Africa business. This arrangement, therefore, enabled Redington India to raise capital through the future sale of shares without them being taxable in India or in the Cayman Islands (the Cayman Islands did not have corporate tax).

Subsequently, during the year 2011-2012, the private equity fund in the Cayman Islands exited the RC by selling its shares to RM. This transaction occurred because the Redington group could not fulfil the conditions of the share purchase agreement including the listing of RG at a recognised stock exchange.

Figure 1: Redington India's business operations in the Middle East and Africa region as of March 31 2008

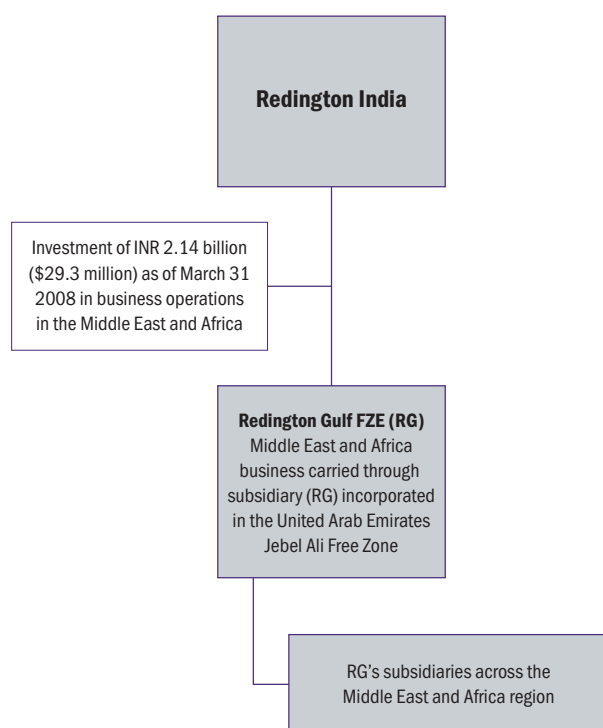
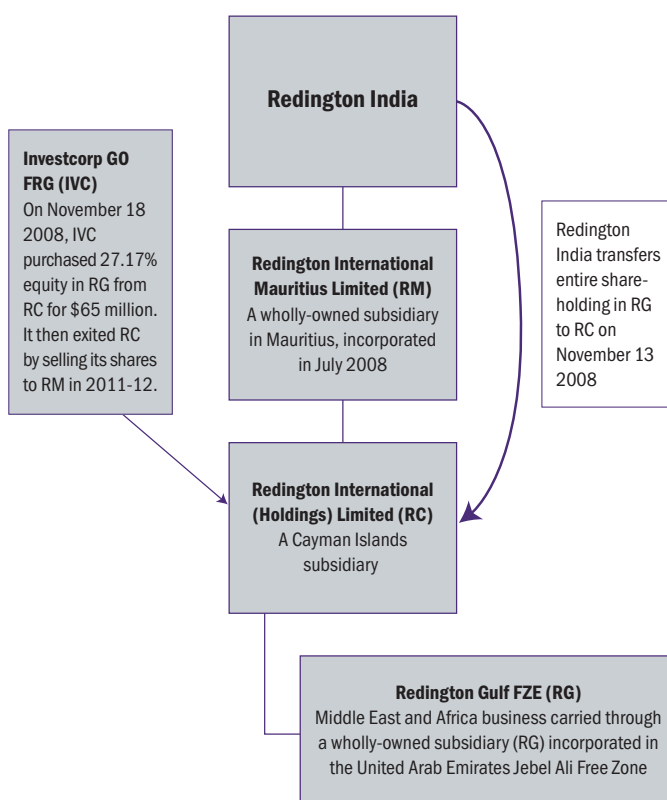


Figure 2: Redington India's transfer of shares



Concerning the taxation of the transfer of shares, Remington India claimed that the transfer was a gift which was not taxable as a capital gain under section 47(iii) of India's Income Tax Act, 1961. The company claimed that a share transfer is not a disposal of investment and the company continues to have effective control over all the subsidiaries and all the economic benefits which accrue to it.

The revenue authority's view

Upon review, the assessing Indian tax officer held that incorporating RM and RC just before the share transfer was a means to avoid capital gains tax, and these two entities did not have any commercial substance on their own and were used as a conduit to avoid tax.

The transfer pricing officer also denied the claim of characterisation of the sale of shares as a gift and the transfer of shares was held to be a taxable transaction. The transaction was also determined to be an international transaction, and the arm's-length price was determined.

The tax officer also held that by transferring the shares, the company shifted income from any future alienation of the asset to a country outside India and dividend income to a country outside India and this arrangement led to shifting the tax base out of India.

The first appellate authority (Dispute Resolution Panel) confirmed the decision of the tax officer.

However, the Income Tax Appellate Tribunal, the second level appellate body, accepted the taxpayer's contentions, treating the transfer of shares as a valid gift and approved the non-taxability of the transaction for capital gains under section 47 (iii) of the Income Tax Act. The share transfer was also held as not being an international transaction subject to transfer pricing law.

Aggrieved with the tribunal order, the revenue authority took the matter to the High Court. Before the court, the revenue authority, among other points, contended that the transaction was done only as a restructuring of the assessee and the transaction as a gift was never in the company's mind when the board's approval was taken.

The company contested the assessing tax officer's decision on various grounds including that RM and RC were set up for commercial reasons, transfer pricing provisions apply only when there is income, the gift of shares are exempt from the definition of a transfer, and the transfer of shares as a gift had a commercial purpose.

The High Court's view

The High Court considered contemporaneous documents like minutes of a board meeting, the share transfer deeds, chief financial officer statements, correspondence with the Central Bank, and domestic law dealing with property transfer and various judicial pronouncements and reversed the tribunal's order. The court held that the transaction did not satisfy any of the tests of

a valid gift as required by section 125 of the Transfer of Property Act, such as being voluntary, without consideration and acceptance by the donee.

The High Court also considered the title of the document, substance and intention behind the transaction, the events which occurred before the board approving the share transfer and executing the share transfer deeds.

The High Court referred to the decision of the Supreme Court in the case of *Mc Dowell & Co. Limited*, where the court said tax planning may be legitimate, provided it is within the framework of the law. The court held that tax authorities are required to examine whether the taxpayer had adopted any ingenious methods to avoid taxation and they are entitled to go behind the veil to examine the real intention of the parties.

“Thus, if the chain of events is considered, it is evidently clear that the incorporation of the company in Mauritius and Cayman Islands just before the transfer of shares is undoubtedly a means to avoid taxation in India and the said two companies had been used as conduits to avoid income tax,” observed the court.

The incorporation by the company of two overseas subsidiaries and transfer of shares favouring a third-party investor within a short span of less than a week for a stake sale of more than 27% and surrounding circumstances categorise the transaction as a capital asset transfer. The High Court said the two companies incorporated as a subsidiary and step-down subsidiary were to create a conduit to avoid tax.

The transaction relates to 2008, and during that year, India’s general anti-avoidance rule (GAAR) was not applicable. The court went by the substance of the transaction and events leading to the transaction.

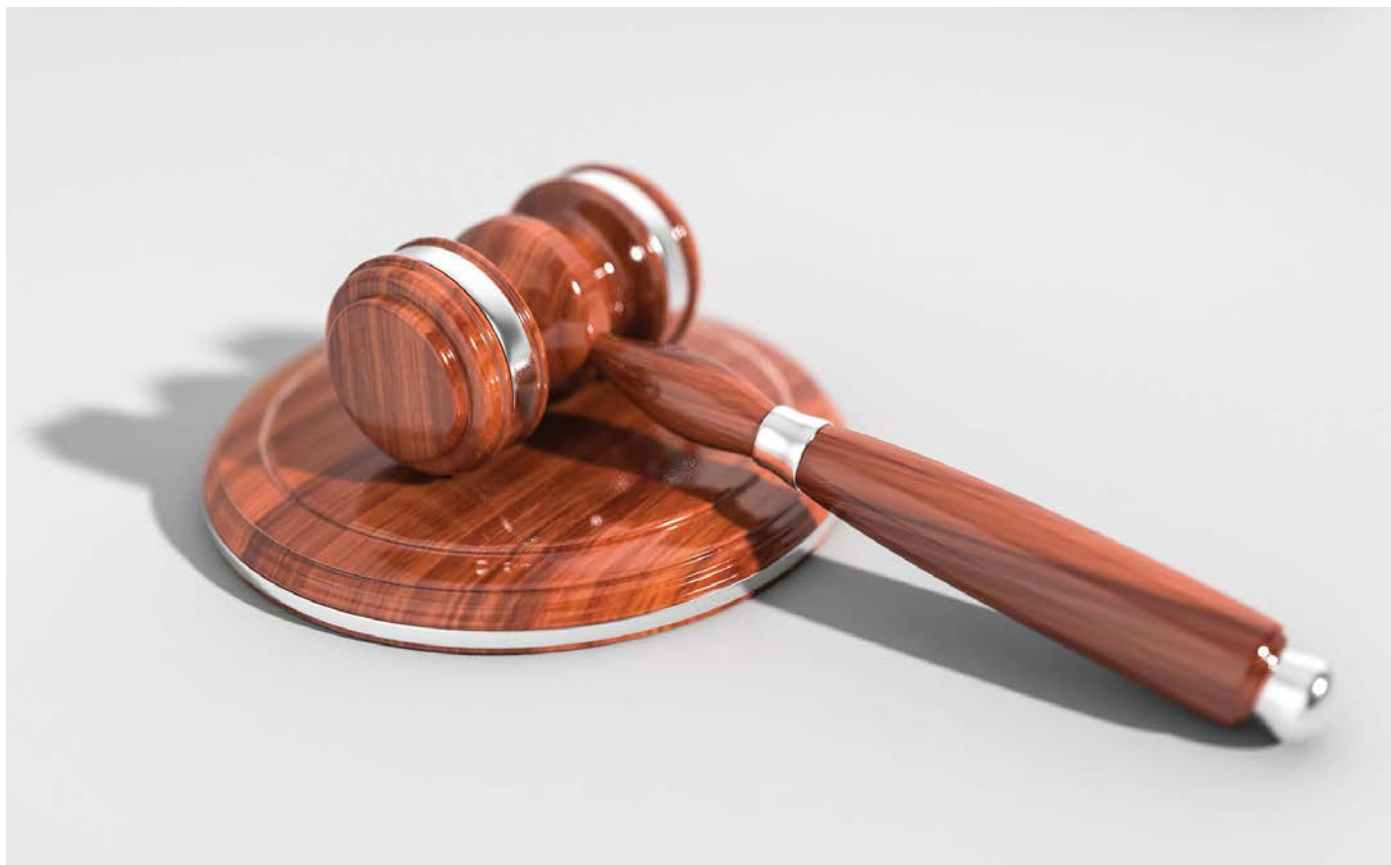
It may be noted that India and the UAE amended their tax treaty with effect from April 1 2008, through a protocol signed on March 26 2007. The amended treaty provided that the gains from the disposal of shares in a company may be taxed in its country of residence. The taxation of the transaction as per provisions of the tax treaty was neither considered by the tax officer nor claimed by the taxpayer.

It could have been challenging to prove that RG was a tax resident of the UAE and capital gains were taxable in the UAE (though the UAE did not impose tax) because for a company to be resident in a country, it must be incorporated in that country, and its control and management should also be in that country.

Key takeaways

The court laid great emphasis on the documents, the intention of the taxpayer at the time of the transaction, and chain of events leading to the investment by a private equity investor. The decision suggests that the principle of substance over form continues to be a guiding principle for the courts.

A taxpayer would be advised to prepare and maintain contemporaneous documentation to support any claim of a tax benefit or characterisation of a transaction. The tax administration is more likely to challenge the unsupported claims by a taxpayer.



A taxpayer's intentions at the time of a transaction will significantly influence a court's opinion

Taxation of plastics could trigger a litigation wave

As the environmental impact of non-recyclable plastic waste becomes an area of tax policy focus, tax professionals foresee that this will become a new area for litigation.

The Great Pacific Garbage Patch is a plastic ‘island’ that spans from the west coast of North America to Japan. Despite its name, it is not one giant mass of plastic, nor is it a floating island. Barely 1% of marine plastics are found floating at or near the ocean surface.

However, there is, on average, an estimated 70 kilograms of plastic in each square kilometre of seafloor, according to Oceana – the largest non-profit international advocacy organisation focused solely on ocean conservation. This huge problem has arisen from the production, use and disposal of plastics that would take around 1,000 years to biodegrade. And it only continues to grow.

“The real solution would be to simply prohibit the use of non-recyclable plastics. Of course, an alternative can be an excessively high tax on non-recyclable plastics, but to me this is economically equal to a prohibition,” says an oil company head of indirect tax.

The rising public awareness over plastics has catalysed the conversation about how to manage plastic, ranging from outright bans of non-recyclable plastic to introducing a plastic tax to discourage the demand for single-use products.

“Make it more costly, glass bottles exist and are not used sufficiently,” says one assistant VP of Europe tax at a bank.

The potential for litigation

The impact of taxes on plastics will depend on the exact scope and on how each jurisdiction implements the provisions. Tax professionals have noted that legislation surrounding taxation of plastics could be ripe with litigation, particularly as the proposals have not included the level of detail they would like to see.

Taxpayers need clarification on which entity in the supply chain will be responsible for ensuring that non-recyclable plastics are not being used or they are within the set limits, as well as who will be the final taxpayer.

For example, is it the manufacturer of the non-recyclable plastic, the company using the non-recyclable plastic as part of its product offering or the final seller of the non-recyclable plastic to an end-consumer? This quickly presents a number of uncertainties which could result in disputes.

There must also be considerations over how to measure the level of non-recyclable plastics and which entity is responsible for doing so, particularly in the movement of plastic across borders. This may require certification for trading and tax teams will have to deal with the additional obligations of requesting the documentation and checking it is not fraudulent.

There is also potential for litigation in those countries or regions where there are local interventions conflicting with supra-national jurisdictions. At an EU level, a simple argument that can be made is that a high tax on plastics in a certain municipality or region, or even country, may render a certain product unsuitable for sale, hence hindering the free circulation of goods.



Mattias Cruz Cano



Taxation of plastics raise uncertainties that could lead to litigation

UK announces draft legislation

HMRC published draft legislation on November 12 for a plastic tax on packaging containing less than 30% recycled content. It would come into force in the UK in April 2022 and would be set at £200 (\$273) a tonne. UK Chancellor Rishi Sunak has said the move would help tackle the “scourge” of plastics pollution and boost the use of recycled plastics by 40%.

“Recycled plastic has a carbon footprint that can be up to four times lower than that of virgin plastic. The policy may also help to divert plastics from landfill or incineration, and drive recycling technologies within the UK,” said HMRC in its policy paper.

The key features of the tax include:

- Liability will fall on UK manufacturers of plastic packaging, with considerations for joint or several liability in certain circumstances;
- In case of imports, the taxable person will be the person on whose behalf the plastic packaging is first commercially exploited in the UK, to avoid burdening customs intermediaries; and
- An exemption for businesses which manufacture and/or import less than 10 tonnes of plastic packaging in a 12-month period.

The tax will not be applied to plastic packaging which:

- Has 30% or more recycled plastic content;
- Is made of multiple materials of which plastic is not proportionately the heaviest when measured by weight;
- Is manufactured or imported for use as immediate packaging of licensed human medicines;
- Is in use as transport packaging to import products into the UK; or
- Is exported, filled or unfilled, unless it is in use as transport packaging to export products out of the UK.

The tax is expected to impact an estimated 20,000 UK producers and importers of plastic packaging. One-off costs include familiarisation with the new rules, training for staff, registration with HMRC, and developing the required reporting framework to complete tax returns.

Ongoing costs could include completing, filing and paying tax returns, keeping appropriate records, and amending returns.

Different approaches

In July 2020, the EU agreed on the recovery package to counteract the impact of COVID-19. The agreement included a “plastic tax”. This measure states that the EU will start collecting tax on non-recyclable plastic to discourage non-recyclable plastic consumption and encourage the reuse of plastic.

The tax is expected to come into effect on January 1 2021 and will be calculated on the basis of the weight of non-recyclable plastic packaging waste at an expected rate of €0.80 (\$0.97) per kilogram.

While many details of the plans have yet to be announced, initial calculations estimate that the plastic tax should provide the EU with between €6 billion and €8 billion of additional revenue per year and member states will have to collect the tax but the revenue will be remitted to the EU.

Countries will have to transfer the amount calculated by the Commission to the central budget regardless of whether they have set up a national system to collect the tax, which could itself lead to some disagreements.

EU member states will have freedom as to how they implement the measures to collect the tax revenue. This will likely be a red flag for businesses in the EU, as various schemes have shown that EU jurisdictions end up asking for much of the same information from taxpayers, but in different formats, which leads to more resources and time necessary to be compliant.

However, the decision to create a tax needs to be ratified by all EU member state parliaments, which needs to be completed by the end of December 2020 so that the new system can start operating from January 2021. This has not been done.

Furthermore, it is unclear how this tax will impact trade by businesses moving goods across EU borders. The EU’s measure will mean producers will be charged per gram of unrecyclable plastic they use, in contrast to the minimum content regulations as proposed in the UK.

Tackling plastic pollution will only gain more impetus. Taxation will play its part to reduce production and consumption. As with any novel taxes, governments must be careful and provide sufficient time and certainty for taxpayers to comply. That, or a wave of disputes will soon follow.



THE GLOBAL TAX 50

ITR's Global Tax 50 highlights the most influential figures and events in fiscal policy over the past year, while keeping in mind who and what will be particularly important in 2021. Deputy Editor Josh White introduces the 10th edition of the Global Tax 50.

Methodology

There are two main criteria for being included in the Global Tax 50: 1) the influence the individual, company or event has had on tax affairs, whether it be national or international policy, over the past year, and; 2) the likelihood the individual, company or event will still be influential over tax policy in the coming year.

Breaking down the entire 50 individually according to the impact they had over the last 12 months would be too granular an approach, so ITR has listed the entries in alphabetical order. The top 10 influencers are listed online at www.ITRInsight.com.

The Global Tax 50 was first launched in 2011, before the OECD agreed the BEPS project and anyone had discussed a digital services tax (DST). Instead, the world was reeling from the 2008 financial crisis and the idea of a financial transactions tax (FTT) was the big issue. Ten years later, the FTT is still an idea in most countries.

There were some familiar faces in 2011, including Pascal Saint-Amans, who was just about to take over from Jeffrey Owens as director of the OECD's Centre for Tax Policy and Administration.

The last decade has seen the OECD and national governments embrace ideas that were once considered 'radical' – country-by-country reporting (CbCR), automatic exchange of information (AEOI) and even formulary apportionment. Two topics dominate the conversation for professionals this year – the impact of COVID-19 and the taxation of the digital economy.

This is why the top influencers of 2020-21 are either people who have worked on ways to manage the fiscal impact of the pandemic or on how to tax the digital economy. Some policymakers profiled in the Global Tax 50 have even worked on both areas. However, it is not all about deadly viruses and online platforms.

ITR keeps its eyes on what taxpayers are concerned about most, whether it is a landmark court case like Apple's state aid battle, the complications of Brexit, the sudden fall of oil prices or the outcomes of the US election.

Here, **Anjana Haines**, **Josh White**, **Danish Mehboob**, **Mattias Cruz Cano** and **Alice Jones**, provide a comprehensive look at the most important tax influencers and events in 2020.



Josh White

The Apple state aid case

The Apple case set a precedent for multinational enterprises doing business in European Union member states, like Ireland, but the case is yet to conclude.

The European General Court (EGC) delivered a serious blow to the European Commission and its attempt to force Ireland to claw back billions of euros from Apple. The EGC's July 15 2020 ruling overturned the EU's controversial 2016 decision. As a result, the Irish government does not have to recoup €13 billion (\$15.8 billion) from Apple, plus more than €1.2 billion in interest, following an investigation.

The EGC annulled the decision, stating that "the Commission did not succeed in showing to the requisite legal standard that there was an advantage" for the purposes of Article 107(1) of the Treaty of the Functioning of the European Union (TFEU). However, the Commission was quick to defend its findings in the state aid investigation into Apple's Irish tax structure.

"The General Court confirmed that, while member states have exclusive competence in determining their laws concerning direct taxation, they must do so in respect of EU law, including state aid rules," said Margrethe Vestager, executive vice president at the Commission, in response to the court's judgment.

"The Commission will continue to look at aggressive tax planning measures under EU state aid rules to assess whether they result in illegal state aid," said Vestager. "We have made a lot of progress already at national, European and global levels, and we need to continue to work together to succeed."

The politics of the Apple case

The *Apple* case is not just important to international corporations operating in the EU. If the EGC had ruled in favour of the Commission, the US company would have had to pay a €13 billion tax bill to the Irish government.

Feargal O'Rourke, managing partner at PwC Ireland, has called the Commission's investigation a "land grab" because the profits were already taxed in the US. He acknowledged the argument that Apple should pay more tax but stressed: "Ignoring the law is not the way to do it."

Yet O'Rourke is often credited with helping to design the double Irish structure that Apple used for more than 30 years. It was this structure that became synonymous with Ireland's economic strategy to bolster foreign direct investment (FDI).

The Irish government created its low tax model in the 1980s to secure FDI. Over the past 40 years, Ireland has welcomed companies such as Apple, Google and Facebook to its shores. Many of these companies have built a sizeable presence in Dublin and elsewhere.

It is this strategy that the case brought into question. Critics have claimed that Ireland has become a 'tax haven' through schemes like the double Irish. Nevertheless, the supporters of Ireland's low-tax strategy would defend it on economic grounds.

Dan O'Brien, chief economist at the Institute of International and European Affairs, says: "Ireland is not a tax haven. The government's stance on taxing multinational-

als has been proportionate, aligned to the national interest and in keeping with multi-lateral values."

This is unlikely to satisfy critics though. George Turner, director of TaxWatch in the UK, calls the EGC ruling "an enormous blow".

"There is no doubt that Apple did engage in an extremely aggressive tax avoidance scheme that sought to defund governments," says Turner. "This is clear through the extremely low effective tax rates the company achieved."

As a result of the Irish tax rulings, Apple recorded European profits of €16 billion in 2011. However, under the terms of the rulings, only around €50 million was taxed in Ireland.

The Commission alleged that the effective tax rate in Ireland was just 0.005% in 2014, although Apple stresses that its tax structure in Ireland should be seen in a global context. The company stands firm that its global effective tax rate was 24.6% at the time.

The next battle

The European Commission has made it clear it is going to appeal the *Apple* case and take it to the Court of Justice of the European Union (CJEU). However, the Commission may be in a weaker position from the outset given that the CJEU only hears points of law and the EGC decision was grounded in the facts of the case.

While the Commission pushes ahead with its appeal, the EU is pursuing new measures to crack down on tax avoidance and evasion. It may be that the Commission will redouble its efforts to put a stop to the kind of tax practices this case raised. Furthermore, digital tax is at the top of the political agenda in 2021 and a win at the CJEU in *Apple* could embolden the Commission to be more aggressive in its tax strategy. ■



Amy Coney Barrett

US Supreme Court Justice



Source: Rachel Malehorn

Amy Coney Barrett is the youngest justice on the US Supreme Court. She is also seen as one of its most conservative judges. However, taxpayers who think Barrett will bring her political baggage to her approach to tax law will be surprised.

In the case of *VHC Inc. v. Commissioner*, Judge Barrett upheld the US Tax Court 2017 judgment that the Internal Revenue Service (IRS) was right to deny a Wisconsin holding company's claim to a bad-debt deduction for loans made to the son of VHC's founder.

The IRS had disallowed the \$92 million deduction on the grounds that the debt in question was not bona fide and therefore fell short of the statutory requirements for the deduction. Yet VHC argued that this was wrong because Ron Van Den Heuvel, the founder's son, would eventually repay the debt.

The case was decided in August 2020 and Judge Barrett agreed with the Tax Court's finding that the transactions did not amount to a true creditor-debtor relationship. As a result, the holding company was found ineligible for a deduction under Section 166 of the Internal Revenue Code.

This is just one case with a clear lesson for taxpayers: Judge Barrett will not be an ideologue, at least when it comes to tax matters. She takes a strict statutory reading that relies on precedent. The decision in this case could have been made by a conservative or liberal judge.

Matters of interpretation

The Trump administration fast-tracked Barrett's appointment to the Supreme Court following the death of Justice Ruth Bader Ginsburg. It was a landmark

appointment since the court has become a central point of struggle in US politics.

The reasons why the Republican Party wanted Amy Coney Barrett are clear. She has a reputation as a devout Christian with strong views on issues like abortion and LGBT rights. Many observers expect her appointment to tip the balance on Supreme Court judgments for decades to come.

Judge Barrett approaches the law from a textualist and originalist position. This means precedent will play a key role in her decisions on tax law.

During the confirmation hearing, Republican Lindsey Graham, senator for North Carolina, asked Barrett to explain originalism "in English".

"In English that means that I interpret the Constitution as a law and that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it," said Barrett. "So that meaning doesn't change over time and it's not up to me to update it or infuse my own policy views into it."

She explained: "For textualism the judge approaches the text as it was written, with the meaning it had at the time and doesn't infuse her own meaning into it."

Long before she was ever considered for the role, Barrett was a clerk for Supreme Court Justice Antonin Scalia. He was one of the most famous conservative judges in the court's history. He was also an originalist and a textualist.

"People say you're a 'female Scalia'. What would you say?" asked Graham.

Barrett responded: "If I'm confirmed you would not be getting Justice Scalia, you would be getting Justice Barrett. And that's so because originalists don't always agree and neither do textualists."

The Senate voted to confirm Barrett by 52 votes to 48. She was appointed just over a week before the November 2020 US presidential election. Donald Trump is no longer president, but Barrett might end up being a part of his legacy.

The Supreme Court will likely have a conservative majority for the foreseeable future. Yet this may mean more continuity for taxpayers than it might for some social issues. The divisions over tax policy and law are not simple splits between left and right.

After all, it was a Republican administration that introduced an anti-abuse tax and set a minimum rate for US enterprises. Furthermore, the Democrats are not in a rush to remove these policies. Instead, the division will be over how these policies are applied.

In the meantime, US taxpayers can expect more scrutiny and more controversy. The IRS needs to find more tax revenue from somewhere, and, as the last few years have shown, the courts will not necessarily save the taxpayer. ■

Piet Battiau

Head of the Consumption Taxes
Unit, OECD

Indirect tax has been particularly crucial in managing the disruption caused by COVID-19 during 2020. For Piet Battiau, head of the consumption taxes unit at the OECD, it has meant an unprecedented effort to deliver emergency fiscal policy recommendations for countries around the world.

Working alongside a team of experts, Battiau has provided support for emergency work while maintaining projects to improve indirect tax policy and administration. He spoke to *ITR* about the highlights and obstacles of 2020, as well as what will be key in 2021.

ITR: What have been your highlights over 2020?

Piet Battiau: It is difficult to identify highlights.

One of the main ones has been the delivery of the G20 report on fiscal and tax policy responses to the COVID-19 crisis, which we delivered in record time in April. At that point, it was very early days after the outbreak. It was not a specific list of indirect tax measure and we were only one piece of the jigsaw puzzle. It was nice to use the COVID-19 outbreak as an opportunity to co-ordinate and co-operate across all tax disciplines to take a holistic view on tax policy design.

The report looked across tax policy responses and fiscal policy responses, discussing how it might evolve and it seems we have foreseen things quite accurately. To look at that and see how broader tax policy can fit into those responses was interesting. The report has been quite influential.

The leadership on that work was mainly from our tax economist colleagues but we managed to contribute quite a bit from our indirect tax experience.

COVID-19 forced us to think slightly out of the box and look at what we as an organisation can do in responding to the crisis.

We also created a virtual platform, because of worldwide lockdowns, where we managed to get tax authorities and businesses together to track countries' VAT policy responses and to evaluate them. We organised interactions between administrations and businesses on how VAT policy could help in reducing hardship from the crisis, for both households and businesses.



The way in which VAT operates means that a lot of the work in supporting businesses was focused around reducing compliance burdens. That has been rewarding work that is ongoing. We keep tracking and evaluating it as the crisis evolves.

In practice, this meant that we identified where the main pressures were for the business communities from a VAT perspective. A lot of the attention went to cash flow issues, but many businesses saw customers defaulting on invoices and that created pressure to pre-finance VAT. VAT payment deferrals were an important instrument but also flexibility in payment plans and debt relief regimes were all issues that were discussed and considered.

Businesses saw their sales volumes drop while still incurring VAT on their fixed costs, so speedy VAT refunds was key in alleviating cash flow pressures.

What is often forgotten is the difficulties of VAT reporting and filing obligations, which was highlighted by the COVID-19 restrictions on compliance.

Thirdly, our publication of consumption tax trends, released on December 3, is always a highlight. It includes a special section on COVID-19 measures included in OECD countries tax policy responses.

One of the key points of this publication is the observation that almost all OECD countries have implemented the OECD standards for the collection of VAT on online trade, services and digital products. Alongside that, we are launching three major projects for the year, delivering regional toolkits on VAT and digital trade for Latin America (LatAm), Southeast Asia and Africa.

ITR: What has been your biggest challenge over 2020 and how did you overcome it?

Piet: We are no different from any other organisation in that going into complete lockdown created challenges.

One particular aspect is that we are an international organisation that is aimed at developing internationally-agreed standards and evidence-based policy that requires intense interaction between countries.

That involves many interactions, meetings, workshops and building of trust, achieving buy-in through face-to-face discussions and all that has become more challenging. All our meetings have been moved online. This has been the default approach to overcome restrictions but this has its own limitations.

It has worked surprisingly well but obviously we have faced limitations because there is a lot more distance between stakeholders and our normal partners.

It has been particularly challenging for projects like the regional toolkits, the aim of which is to bring the OECD standards and recommendations into one level, down from the general policy guidance. This is systematic implementation guidance and it takes account of the specifics of each region.

Understanding that dimension typically requires that intense interaction. However, we are handling it and we are pretty much on track to deliver along our plans and timelines. Maybe some time slippage here and there, but nothing major.

ITR: What will define the coming year for you?

Piet: This will be the delivery of all the projects that we have been working so hard on this year. The three regional toolkits, first LatAm, then Southeast Asia, then one for Africa will probably come a bit later. They will provide end-to-end guidance on strategies to collect VAT on digital trade, like a detailed manual.

We will deliver our reports on the impact of the sharing and gig economies on VAT policy administration and possible responses to it.

What is important is not just delivering those reports but also making sure that countries are in a position to implement those recommendations. We are not forcing them to but because of the consensus they will want to implement them. We need to assist them in doing that. That comes through workshops, engagement and on-site missions but also so-called e-learning modules on VAT in general, VAT design related to digital trade, and this is targeted at tax authorities but complements other products and guidance.

Compensating for that lack of physical interaction, through physical workshops and in-country engagement and assistance, will be one of our main challenges and priorities. ■

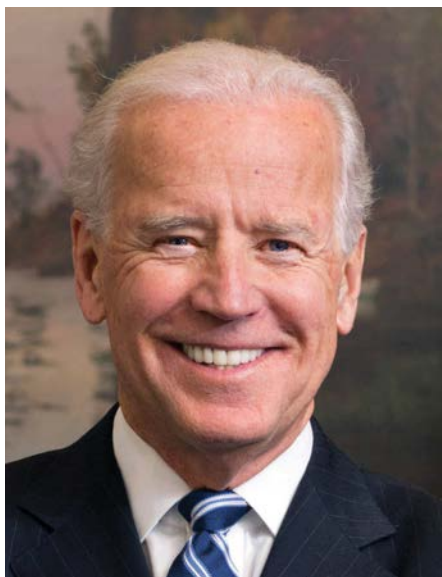
Joe Biden

US President

President Joe Biden was sworn in on January 20 with a plan to reverse his predecessor's tax giveaways by raising taxes for businesses and high-income individuals. There are many demands on the administration but tackling the coronavirus pandemic and its devastating economic impact is at the top of the agenda.

Even before Biden took office, the president-elect was working to put together a historic \$1.9 trillion stimulus package. However, the business community may be more concerned about the future of the US tax system.

Despite all the uncertainty, the Biden administration has a strong mandate to raise taxes since the Democrats have won a majority in Congress. Yet, as a US senator, Biden represented Delaware – a state



famous for having no sales tax or corporate tax.

Biden has styled himself as a 'moderate' Democrat for much of his career and yet he has taken on ideas from the left of the party to prioritise climate change and

inequality. This spells higher taxes for individuals and businesses.

Observers expect Biden to break with the Trump years and re-engage with the OECD and the European Union. However, there will be more continuity with the Trump administration than some of Biden's supporters would like to see.

The future of US tax reform

The 2020 campaign saw Biden pivot to the left to compete with Democrat presidential nominees Bernie Sanders and Elizabeth Warren. As a result, the Biden team has made it clear that overhauling the Tax Cuts and Jobs Act (TCJA) and fighting climate change are at the forefront of policymaking.

The expectations are that Biden will raise the corporate tax rate and try to introduce a carbon tax. He has pledged to increase the headline corporate rate from 21% to 28% and the global intangible low-taxed income (GILTI) rate from 10.5% to 21%.

At the same time, the Biden tax plan includes a pledge to impose an alternative minimum tax rate of 15% on companies

The Black Lives Matter movement

The racial justice movement led by the Black Lives Matter campaign reached new heights in the summer of 2020, drawing attention to systemic racism in the tax sector. Tax professionals hope for material change in 2021.

Protests against racial inequality and police violence in the US were sparked by the murder of George Floyd, an African-American, by a white police officer in Minneapolis, US, on May 25 2020. The protests quickly spread to countries as disparate as Japan, Norway, and Brazil. The demonstrations drew attention once again to the horrific discrimination and violence faced by Black communities and people of colour in the US and around the world.

The movement for justice was also a reminder that racism has infiltrated all corners of society, not just the police – albeit not always with such fatal consequences. In business, and in the tax world, people with non-centralised identities are underrepresented at the highest levels. Discrimination on the grounds of race, gender, sexuality, disability, social class, religion, and other identities is a routine occurrence in our societies and workplaces.

In 2020, though, the ground shifted. The social unrest of the past year provided a solid foundation on which to build a more equitable culture. For tax professionals working for advisory firms and corporations, that means analysing the diversity

of their teams and taking action to remedy any shortcomings.

Demonstrations and protests

The events leading up to the Black Lives Matter protests that shook the world in 2020 will be familiar to many. In February, Ahmaud Arbery was fatally shot while jogging in Georgia, US, after being pursued by three white men in vehicles. In March, Louisville police broke down the door of Breonna Taylor's house on a drug search warrant and fatally shot her. Then, in May, George Floyd was murdered on camera by a white police officer, Derek Chauvin. Chauvin pressed his knee to Floyd's neck for more than eight minutes during an arrest for allegedly using a counterfeit bill in a grocery store.

The Black Lives Matter movement had been steadily gaining national recognition since its foundation in 2012, but Floyd's death sparked a resurgence of fury and a determination for justice, and this time the energy radiated across the world. The Washington Post reported in June 2020 that at least 450 protests had taken place globally, but a website dedicated to mapping the protests tallies more than 4,000

demonstrations in locations from Iceland to Uganda.

Chauvin was eventually charged with second-degree murder following sustained public pressure, while the three other officers involved were charged with aiding and abetting murder and manslaughter.

An article from The Economist stated that Floyd's legacy is "the rich promise of social reform", and it is true that the global outrage at Floyd's murder has opened up space for discussions around racial equality. This energy must be harnessed to transform the way businesses approach the issue – and transformation is certainly needed. Of the 170 people who answered ITR's survey on diversity in the tax sector in 2020, nearly 35% said that discrimination because of race and ethnicity is still a problem.

Diversity in the tax world

The racial justice movement feeds into a wider narrative about recognition and fairness for all underrepresented groups.

Some kinds of diversity have significantly improved in recent years; ITR's research showed that law firms in countries like China, Singapore and Brazil are approaching a gender balance. However, the scales

with a book income of \$100 million or more. All of this would result in a rise in effective rates for US businesses.

Although the increase in the headline corporate tax rate will still be historically low, many US companies will see their effective tax rates increase. However, the basic framework of the TCJA will remain in place. The Biden administration will also pursue similar goals with its other tax policies.

Biden plans to introduce a 'Made in America' tax credit and a surtax on US-consumed goods produced overseas. The tax credit would offset investments contributing to a growth in US jobs, whereas the surtax will raise the tax cost of producing goods overseas to 30%.

Although the Biden administration will break with the Trump era of low corporate taxes, there will be continued efforts to raise incentives for US businesses to onshore production. The same might be true for US diplomacy.

The return of the old normal?

The Biden administration is expected to bring a return to US engagement with

international organisations and trading blocs, whether it is the EU, NATO, the OECD or the United Nations. Many observers predict the US will regain its pre-Trump posture.

By contrast, former President Donald Trump's administration pitched an aggressive trade strategy based on a preference for bilateral agreements. This created conflict between the US and the EU over digital tax and state aid, for example.

The next four years may be defined by a shift back to old commitments, although much has changed since 2016 when it comes to tax policy. President Biden may find he has to pick up some of the same weapons Trump used in negotiations.

Neither the Republicans nor the Democrats want to see the household names of Silicon Valley being hit with a digital services tax (DST) from foreign governments. The US will likely keep the threat of tariffs on the table in trade disputes.

With a narrow majority in Congress, the Biden White House will have to work with the Republicans in the Senate to deliver tax changes, but at least both sides

agree on matters such as DSTs. The underlying causes of the so-called 'trade wars' – including intellectual property rights in China and DSTs in the EU – are still in play.

At the same time, the Biden administration might try to resurrect the Transatlantic Trade and Investment Partnership (TTIP) in a new form. The 2016 election, coupled with the UK vote for Brexit, helped kill the TTIP, but it is possible the US could try to secure a similar agreement with the EU.

This may be bad news for countries like the UK, where Prime Minister Boris Johnson's government hopes to secure a free trade deal with the US. Meanwhile, Ireland may find the US more open to its concerns over Brexit and the implications for the land border with the UK.

In short, the Biden era may be much more familiar than the chaos caused by Trump. The dynamics in international tax have changed a lot since 2008 when Biden was last in government as vice president, but the next four years will define his legacy. ■

tip back when the data is narrowed to show the highest-ranking employees: the numbers of male and female partners. In addition, *ITR*'s research from 2020 showed that 46% of respondents who had been discriminated against at work believed this was on the grounds of gender.

Nevertheless, one head of transfer pricing told *ITR* in April 2020 that gender diversity had improved faster than ethnic diversity due to "a conscious push to encourage more women at senior grades". The Black Lives Matter protests of 2020 should serve as a reminder to the tax world that the matter of racial and ethnic diversity and fairness in the workplace also requires urgent attention.

Across the US offices of one major law firm that *ITR* investigated, approximately 36 out of 209, or about 17%, of individuals working across the tax practice were from the black, indigenous, and people of colour (BIPOC) community. The problem intensifies as the level of seniority increases: of the approximately 103 partners at the same firm, only 10 were non-white.

This inequality stands in the way of BIPOC people achieving their career ambitions, and can even lead to people taking themselves out of the race. One senior international tax manager from France and working in Switzerland told *ITR* that she and some non-white colleagues were forced to switch career trajectories because of the uneven playing field.

"There were three or four black people within the transaction tax group and we were never promoted. Eventually, we left



Tax professionals say that transparency is key to companies improving their diversity

the Big Four because we were never ever getting promoted," she said.

Crucially, businesses must ensure they avoid paying lip service to diversity while failing to instigate real change. *ITR*'s 2020 survey revealed that 32% of respondents felt they had been included in something at work so that the company could appear inclusive, rather than for their skills. In 2021, businesses and leaders need to do better.

Hopes and advice for 2021

Racism in tax was a key topic of conversation during *ITR*'s 2020 women in tax events. Tasneem Kadiri, tax director for UK and Ireland at L'Oréal, and Betty Fuafeac, assistant tax director at Expro, spoke on racism in tax at *ITR*'s Women in Tax Forum, Europe in September 2020. They offered tax leaders some suggestions for improving the diversity balance in their organisations in 2021.

One of the most important points is transparency. Fuafeac said that companies should publish statistics on the diversity of their workforce, while Kadiri proposed voluntary reporting on the ethnic pay gap.

Fuafeac added that governments could help by enforcing these reporting obligations in a similar way to the gender pay gap requirement.

Transparency requirements can also be useful for pressuring company leaders to commit to diversity goals. Fuafeac stressed the importance of concrete commitments, pointing out that "most companies are considering policies on how to diversify their workforce in general, with nothing specific from tax leaders".

"The big question is: would such policies be implemented – and if yes, to what scale?" asked Fuafeac.

In terms of practical advice for improving diversity, Kadiri suggested that hiring managers should ensure they are interviewing a diverse pool of candidates. "They should really look to enforce this with their talent acquisition teams and any external recruiters," she said. Fuafeac added that human resources (HR) departments could help to "implement new policies requiring hiring managers or team leaders to build a diverse team whenever there are more than three people in a team or department".

If change is going to happen, tax leaders need to commit to concrete targets and embrace transparency to hold themselves, and their organisations, accountable. The temptation for leaders may be to shy away from the challenge. However, the racially charged events of 2020 and the responses to *ITR*'s diversity survey are evidence that, as things stand, change is not coming fast enough. ■

BlackRock vs HMRC

The landmark case with a big impact on the EU financial services sector also presents a post-Brexit opportunity.

A judgment from The Court of Justice of the European Union (CJEU) on BlackRock's UK VAT liability could prompt businesses across the EU to review supplies of fund management services and split VAT exempt and non-exempt services.

On July 2 2020, the CJEU handed down a judgment in *BlackRock vs HMRC*, on the questions referred by the UK Upper Tribunal on the proper interpretation of Article 135(1) (g) of Council Directive 2006/112/EC on the EU VAT system.

The Upper Tribunal (UT) wanted to know whether the single supply of management services made by a third-party provider to a fund manager could be exempt from VAT when it is used by that fund manager both in the management of special investment funds (SIFs) and in the management of other funds that are not SIFs.

The CJEU noted that Article 135(1) (g) of the EU's VAT Directive must be interpreted as meaning that a single supply of management services, provided by a software platform belonging to a third-party supplier for the benefit of a fund management company, which manages both SIFs and other funds, does not fall within the exemption provided for in that provision.

"The CJEU seems to think it was a very simple case, they've not been enthusiastic for the commercially sensible arguments that BlackRock put forward," says Rupert Shiers, partner at Hogan Lovells.

The CJEU case examined BlackRock's VAT liability on the provision of financial services. BlackRock UK, part of BlackRock, received a service supplied by a US provider, BlackRock Financial Management Inc.

This service, called Aladdin, contributed to the management of BlackRock's \$6.29 trillion assets, including SIFs. Under Article 135(1) (g) of Council Directive 2006/112/EC the management of SIFs is exempt from VAT.

However, the UK's tax authority, HMRC, determined that BlackRock was liable for VAT on the use of the Aladdin service under the reverse charge mechanism. BlackRock challenged this, arguing that the service was VAT exempt as it was used to manage SIFs.

Reviewing arrangements

One of the key issues for BlackRock UK was that it was not able to clearly differentiate between the VAT-exempt SIFs and other funds. This was because the company's split varied with the value of the funds and therefore could not be precisely allocated.

The CJEU noted that if there was sufficient data to prove to a tax authority that services were provided for SIFs alone, services provided to a fund manager could be VAT exempt.

"This case may lead asset managers, and their advisors, to review arrangements and ensure where supplies are being treated as exempt that there is a precise allocation between any SIFs and other funds

under management, together with evidence to support this," says Richard Taylor-Whiteway, head of tax at Brockwell Capital.

This will require companies to segment taxable and exempt services by treating them as separate supplies and structuring them in this way, increasing the administrative burden and adding to costs.

While this requires increased investment in resources, taxpayers could still secure some tax savings by having a segment of supplies exempt from the 20% VAT rate. If taxpayers fail to do this, all supplies would be taxable and would add to the overall costs of operating, perhaps reducing competitiveness.

Some taxpayers had anticipated the CJEU's judgment and set up internal arrangements so that they make separate supplies of the different components.

While this case considers VAT, there is crossover with transfer pricing (TP). Many businesses will receive charges from overseas related companies and may have inter-company agreements. If the *BlackRock* case is considered more broadly, other VAT exempt transactions could become taxable and have implications for TP arrangements.

Post-Brexit opportunity for UK

Alongside the next steps for the UT, there is also a consideration for the tax treatment of mutual funds post-Brexit. The UK could focus on maintaining competitiveness in the financial services sector once it is no longer bound to the EU's common VAT system.

Tax professionals have noted that some of the measures announced in the March 2020 UK budget indicate the VAT system for financial services will break with EU standards, including a review on fund management services, which has been put on hold during the COVID-19 pandemic.

The UK could look to emulate jurisdictions, such as Luxembourg, which have a wide VAT exemption for fund management services and have increased competitiveness in attracting companies.

"The EU laws are not able or willing to make this sort of fine-tuned adjustment because the principle that exemptions are to be construed strictly is so baked into the philosophy of an EU VAT," says Shiers.

The BlackRock case has highlighted opportunities for the UK to be more flexible than the EU on VAT exemptions for fund management services. However, what could be perceived as tax reductions for financial services may be politically difficult to enact in the aftermath of COVID-19.

In the meantime, businesses in similar positions to BlackRock will seek to minimise their VAT risks by re-examining their supplies of services and strengthening their positions with data and clear segmentation. ■



David Bradbury

Head of the Tax Policy and Statistics Division at the Centre for Tax Policy and Administration at the OECD.



David Bradbury leads the statistics and data-focused work at the OECD's Centre for Tax Policy and Administration, and has been a central person in helping develop and improve the OECD's BEPS project. One of his career highlights has been co-leading early development on the two-pillar digital tax proposals, and working with his team on addressing the gaps between international tax norms and the digitalisation of the global economy.

In his most recent work, Bradbury led the release of the economic analysis and impact assessment on the OECD's two-pillar solution in October 2020. It was a highly anticipated report and highlighted that pillar one and two could collectively net up to \$80 billion more in annual corporate tax revenue, approximately 4% of global corporate income tax revenue.

"We needed to make many assumptions around the parameters and design of the report because there is still no agreement at this point," said Bradbury regarding its limitations with only some agreement on

the technical details of the two-pillar solution. "However, the main findings show that these reforms would lead to a more favourable environment for investment and growth," he added.

"Big points in the debate continue to rest around the scope of data and user contributions," explained Bradbury. "It's happening with a greater degree of intensity than we've seen. The scale of reliance on intangible assets is much higher, and managing expectations on the pace of revising global profit allocation and user participation rules is even more necessary."

Consumer-facing companies with significant digital operations that do not need a physical presence to source value from a country are in scope of the framework rules that Bradbury helped develop under pillar one about reallocating profit from intangible assets to market jurisdictions in late 2019.

"In a post-crisis environment, the idea of ensuring that multinationals pay a minimum level of tax somewhere is going to be

a proposition that will have even more support," said Bradbury.

Outside of contributing to the digital tax proposals, Bradbury and his team develop methods to measure and monitor the BEPS actions that are reflected in the results of an annual economic analysis released by the OECD. His division primarily has focused on improving methods of measuring and monitoring BEPS Action 11 about access to existing and future data sources.

The results that Bradbury's department release continue to evolve and improve with more routine data from sources such as country-by-country (CbC) reports and the common reporting standard (CRS). They also recommend a range of sources and tools to OECD countries to monitor and evaluate how effective BEPS counter-measures work too.

Bradbury's most telling contribution may come over the next few years as his division delivers options for measuring and monitoring the success of pillar one and pillar two if they are finalised and implemented.

"There will be more pressure on trying to resolve things like pillar one," said Bradbury. "Pillar two is becoming something that will attract more and more attention from countries too," he added, referring to a minimum level of taxation to mitigate a race to the bottom in global corporate tax rates.

However, the chances of the OECD delivering a consensus solution by mid-2021 are low given the ongoing technical challenges tied to the proposals, including segmentation to determine correct taxation for Amount A under pillar one. There are also concerns from developing countries about using mandatory binding arbitration as the dispute resolution mechanism, which was not included in the OECD's latest two-pillar blueprint released in October 2020 following significant pushback.

"While, I doubt we'll get a complete consensus, a multilateral solution is still significantly more beneficial than the alternative and that's an incentive to try," said Bradbury.

The consequences of failing to find a consensus on the OECD's solution are steep because the EU and a number of other countries have already implemented legislation for digital service levies and will start taxing large businesses in 2021.

These unilateral measures would put large businesses in the middle of multiple taxation risks amid weaker international legal protections. This is a result that will likely change business behaviours, including replacing supply chains, relocating intangible assets, and passing on the costs of the tax to consumers. Bradbury's work is not done yet. ■

Stewart Brant

Head of the Transfer Pricing Unit,
OECD

Stewart Brant heads the transfer pricing (TP) unit at the OECD's Centre for Tax Policy and Administration. The TP unit is tasked with the hard work of designing pillar one and its three-tier profit allocation mechanism, defined by Amounts A, B and C, for taxing the digital economy.

With previous experience at the OECD, when the Global Forum on Transparency was launched, and roles at the US Internal Revenue Service (IRS) and Treasury Department working on the Foreign Account Tax Compliance Act, Brant has a wealth of experience he has been able to bring to his role at the OECD.

Designing pillar one of the OECD's digital tax blueprint is not an easy task, but Brant believes his first-hand experience on audits while at the IRS and Treasury, looking at transfer pricing issues like intellectual property (IP), is helping. "We looked at a lot of digital companies and pharmaceutical companies that were offshoring IP," Brant tells *ITR*.

This experience may have helped prepare Brant for working on pillar one. However, he stresses that the project is still a challenge because it involves so many new concepts. "Digital tax is a whole different beast," he explains. "It's all new what we're creating."

"We are working on one of – if not the most – fundamental changes to the international tax system since the 1930s," he stresses. "In the tax world, it doesn't get much bigger"

The OECD received more than 3,000 pages of comments from stakeholders in its October-December 2020 consultation on the pillar one and pillar two blueprints. Despite the volume of feedback, the Paris-based organisation was able to link the swathes of comments together based on the similarity of some views.

One of the things that came out most from the consultation at the Inclusive Framework level is the lack of agreement on the scope of Amount A. Reaching a consensus on Amount A is the key question for solving pillar one.

"It's hardly a secret that the scope of Amount A remains to be settled. Inclusive Framework members have expressed different views, but ultimately to achieve consensus everyone will need to make compromises," says Brant. "This isn't an issue that is lost on our members."



"COVID-19 hasn't exactly helped, but getting 137 countries to agree on the publication of the pillar one and pillar two blueprint was a real achievement. And I believe puts us in a good place to reach a successful conclusion this year," he adds.

Brant accepts that Amount A, which allocates a share of deemed residual profits to market jurisdictions using a formulaic approach, may have to change for a final agreement to be reached.

"The US has been fully engaged with discussions on Pillar One. Yes, there have been some challenges – but that's almost inevitable during any international negotiations," says Brant. "The new US administration obviously has some important decisions to make, but in her Senate confirmation hearing Treasury Secretary Yellen was clear that there is commitment to multilateral efforts to resolve the digital tax dispute."

The US position, under former Treasury Secretary Steven Mnuchin, was not acceptable to a majority of countries, but there is now hope of a "new approach" since power has changed hands in Washington DC.

"We all have to be optimistic here at the OECD. We have to keep progressing at the technical level," says Brant, who

expects more engagement from the US under President Joe Biden and Treasury Secretary Janet Yellen.

"It will kick-start negotiations, but it's been a long journey with the US," says Brant. "We're in the waiting period right now."

However, the disagreements are not all about Amount A. The TP unit is thinking about how to rework Amount B, which proposes a fixed rate of remuneration for baseline marketing and distribution functions in the market jurisdiction, because of the scepticism of some stakeholders.

"The public input that we've received completely mirrors what we've heard internally from our Inclusive Framework delegates. It's the same conversation," explains Brant.

"Transfer pricing rules are complex and IF members are unanimous in their support for simplification. But agreeing standardised returns is difficult – members have divergent views on the 'right' return," he continues.

"So, we know there is a problem that needs to be fixed. But, we need to find a solution that works for everyone," he adds. "There are two-sides to every transfer pricing dispute, so to prevent disputes we need a solution that both sides can agree to."

Knowledge sharing

Much like 2020, 2021 will be a busy year. The OECD will be updating its guidance on the pandemic, particularly when it comes to global mobility and the implications for corporate tax residency and permanent establishment issues.

“Digital has been the primary focus. But I was really pleased that the Inclusive Framework was able to issue guidance on the transfer pricing implications of COVID-19 at the end of last year,” says Brant.

“The team worked really hard to put together guidance that our members could agree and that has been warmly received by businesses,” he adds. “And we’re not done quite yet.”

The OECD is also launching an initiative to support national efforts to alleviate the economic impact of the pandemic. The task will require the various units of the Centre for Tax Policy and Administration to come together, including the Forum on Tax Administration (FTA), members of the mutual agreement procedures (MAP) forum, various working parties and field experts.

“We’re planning to launch a knowledge-sharing initiative for tax administrators to come together and discuss the issues arising from COVID-19, whether that’s how to conduct virtual competent authority meetings or how to do benchmarking searches for FY20,” says Brant.

Yet the COVID-19 pandemic has not derailed the TP unit’s progress on digital tax. “We’ve been able to adapt quite well. It’s remarkable that we’ve managed to achieve as much as we have over the last year while working remotely,” says Brant.

“Engaging with businesses remain has been important throughout this process. We’ve had a lot of really constructive conversations and it’s clear from the public consultation that businesses remain very supportive of the work the OECD is doing,” he adds.

However, the difficulty has been talking policy with representatives of different countries through virtual platforms like Zoom. “It’s hard to have meetings in Zoom to discuss the building blocks of the digital project. A lot of the really important conversations happen over coffee outside the formal meetings itself,” says Brant, a view also shared by Pascal Saint Amans, director of the OECD Centre for Tax Policy and Administration.

Over the coming year, Brant has to get the technical aspects of pillar one in place to ensure a final agreement can be reached by mid-2021. The TP unit’s work on digital tax is the biggest shake-up in international tax policy in decades and the work of the TP unit will be integral to its success. ■

Brazil’s Supreme Court

The court that will decide the fate of how to tax software in the most important case of the decade.

The majority of Brazil’s Supreme Court judges have decided that, for tax purposes, software downloads are services rather than a sale of goods, although the judgment is pending on one final vote still to come from the most recently appointed Judge Nunes Marques.

The landmark judgment is considered among the most important for the IT sector in the past decade. With Brazil’s digital economy rapidly growing, a case of this magnitude clinches a spot in *ITR*’s Global Tax 50.

Brazil’s Supreme Court has judged two cases concerning the tax treatment of software licensing. One was against the laws of the state of Mato Grosso and the other of Minas Gerais. Both cases have been pending judgment for many years, over whether the municipal services tax (ISS) or the state goods tax (ICMS) should be levied on licensing the right to use software. The conflicts were essentially over which level of government held the taxation rights for these activities – municipalities or states.

The court decided that software-licensing activities fall within the scope of the ISS, and therefore the taxing rights are held by the municipalities. This is seen as a strong signal from the legislative power and shows that the executive branches of government cannot single-handedly decide what they want to tax, but Judge Nunes Marques still needs to vote on the case.

Luiz de Medeiros Ferreira, tax committee leader at IT company association Brasscom, says: “The decision was celebrated by the market in the end and from a technical standpoint it reinforced the true power balance. In terms of legal certainty, this was what was prescribed in the law and the decision came to confirm the compliance with the law.”

External stakeholders asked the court to be admitted as a third party under *amicus curiae* for the decision, allowing contributions from Brasscom, as well as the Brazilian association of software companies (ABES) and the Brazilian Association of Capital Finance Department (ABRASF). All advisors to the court argued that the ISS should apply in the case of software licensing as most taxpayers already apply it to their transactions.



The judgment was crucial because, if the ICMS tax regime were to prevail, it would have automatically opened up five years of liability and would have likely resulted in another wave of litigation. While the judgment on the case is not final, the reporter of the case has suggested the court modulates the effects of the decision.

This means that the decision is only going to be applied prospectively, not retrospectively. The modulation has to be approved by a majority of ministers of the court. Additionally, it is not specified how that modulation would work but it is open to interpretation, potentially exposing taxpayers to further subjectivity and uncertainty.

Furthermore, there are expectations that the decision on standard licensing will influence other cases concerning customised software licensing.

While the case seems like a win for the growing digital sector in the world’s eighth largest economy, it is hard to extend the rationale for this judgment to other areas. Brazil’s tax system remains particularly complex for new technologies and a broader reform is necessary to bring sufficient certainty to taxpayers. ■

Brexit

The UK's exit from the European Union complicates taxation and trade

After years of wrangling, the UK has finally left the European Union, with the trade and cooperation agreement (TCA) setting out the basics of a future relationship. The TCA secured tariff-free trade between the EU and the UK, but the tax implications are much broader.

Even before the transition agreement ended, the UK had lost more than £1.2 trillion (\$1.6 trillion) in assets to the EU, according to EY. Many financial institutions have created 'hubs' in the EU, moving to Amsterdam, Frankfurt, Paris and Madrid.

Meanwhile, the UK is restarting trading in Swiss shares on the London Stock Exchange. Prime Minister Boris Johnson and Chancellor Rishi Sunak have talked up the idea that Brexit will "reinforce" London's position as a financial centre, yet the TCA does not guarantee passporting rights for finance.

Nevertheless, the Johnson government has delivered on its promise to "get Brexit done". The terms of the Brexit deal will have implications for businesses operating in the UK and the EU for many years.

Getting Brexit done

The TCA was finally agreed on December 24 2020, after months of wrangling over fisheries and threats to leave with 'no deal'. The UK government even threatened to tear up the Withdrawal Agreement as part of its negotiation strategy.

Despite appearances, the UK government kept the Withdrawal Agreement to complement the TCA. Northern Ireland will remain in the UK customs territory but continue to align with EU standards as part of the agreement signed in October 2019.

The TCA entrenches the Northern Irish Protocol and creates an effective sea border between mainland UK and Northern Ireland. This was a compromise to ensure the UK-Irish land border stays open, while allowing checks to take place between the mainland UK and Northern Ireland.

However, the lack of clarity over rules of origin and a shortage of customs brokers will create more problems for businesses. Tax professionals warn that rising traffic levels and increasing customs requirements will continue to create headaches for MNEs throughout 2021.



Dynamic alignment

The UK has agreed to apply similar standards to the EU on state aid, while customs checks will apply and frictionless trade has ended. Brexit will allow the UK to diverge with EU standards in many areas, even if the deal means creating a 'dynamic alignment'.

Some changes are already becoming clear. Since the deal became law, the UK has dropped plans to introduce the sixth iteration of the EU Directive on Administrative Cooperation (DAC6) and instead opted for the OECD's mandatory disclosure rules (MDRs).

"This is a clear sign of the way forward post Brexit," says Gary Ashford, vice president of the Chartered Institute of Taxation.

The fact that DAC6 will not apply in the UK is a relief for British businesses and intermediaries who thought it was too broad. Those same businesses have to go back to the plans they put in place to administer DAC6. Parts of those plans might still be useable, but it will take more work to adapt them to suit the MDRs. This is just the beginning.

Singapore-on-Thames

Critics of Brexit have presented the UK's exit as a possible route to turn the country into a tax haven. The phrase 'Singapore-on-Thames' has become a common feature of the debate.

On the one hand, the TCA includes a commitment to uphold global standards on tax transparency and combat tax avoidance, while, on the other, it has no provisions constraining the UK corporate tax regime.

However, the UK already has a historically low corporation tax rate of 19%.

Yet the EU cannot bind the UK's corporation tax policy to any conditions because the economic bloc is not a fiscal union. Secondly, many low-tax jurisdictions are EU members, including Ireland, Luxembourg and the Netherlands.

The final choice for whether the UK chooses to cut its corporate tax rate to 17%, the same rate applied in Singapore, is very much in Sunak's hands.

"On the regulatory side, he has been tasked by the Prime Minister with leading a Whitehall-wide review to identify regulations which can be reformed," says George Bull, senior tax partner at RSM UK.

Although Bull describes Sunak as a "realist", he notes that discussions happening at the Treasury ahead of the March 3 budget "points towards corporate and other tax increases sooner rather than later".

One silver lining is that taxpayers can rest assured that the VAT rules are unlikely to change in the UK post-Brexit. The British government relies on VAT to raise an immense amount of tax revenue and this is now a necessity because of the COVID-19 crisis.

Even though the UK is free of the EU VAT regime and no longer obliged to set a minimum rate of 15%, there is no sign of the UK dropping VAT or reducing its rate after Brexit.

New fights on transfer pricing?

The European Commission has used its competition powers to curtail corporate tax policy and transfer pricing in the past, and it will not refrain from doing it again. State aid compliance was a fundamental demand for EU negotiators who wanted

Raquel Buenrostro Sánchez

Head of the Mexico Tax Administration Service

Mexico's 'Iron Lady' leads the country's tax authority and is cracking down on multinationals.

Like many other countries, Mexico's economy took a severe hit in 2020, plunging it into the worst recession in decades. However, unlike in some other jurisdictions, the country's tax authority pressed on with stricter compliance measures and initiatives to increase tax revenues.

Raquel Buenrostro is head of Mexico's tax administration, the *Servicio de Administración Tributaria* (SAT). She earned the tag of "Iron Lady" with a clampdown on federal procurement that cut spending by \$9 billion in a year and seems to have succeeded in boosting tax revenues since taking the job in January 2020, cementing her place on *ITR's* Global Tax 50 list.

President Andrés Manuel López Obrador speaks to his tax chief at least three times a day, and reportedly has so much faith in Buenrostro that he goes direct to her, rather than via the finance minister.

"She is an extraordinary, honest woman and I support her because she is subjected to great pressure," López Obrador has said.

The president has promised no new taxes for three years. Instead, he wants to raise revenues through more efficient collection. He has also threatened to expose 15 companies he says owe a total of \$2.3 billion in back taxes. Buenrostro has said the list of 15 represents just a handful of those companies in arrears.

As part of broader government rhetoric Buenrostro has set her sights on multinational enterprises, often branded as tax dodgers by the government. She has targeted her enforcement efforts on the country's large taxpayers and threatened to use criminal charges as part of the tax crackdown.

"There was tax fraud in the past, and it never led to criminal procedures.



Executives now know that if they commit tax fraud, we will have to open a criminal procedure," Buenrostro has said, noting that the biggest debtors were in industries including steel, food, autos, pharmaceuticals, finance, mining, retail and energy.

The SAT's campaign has succeeded in extracting hundreds of millions of dollars from Walmart's Mexico unit, Coca-Cola bottler Femsa, IBM and silver mining group Fresnillo, with many other firms under intense scrutiny. In 2020 alone, the SAT opened around five complaints over tax fraud against large companies.

Notably, both Femsa and Walmart said in stock exchange announcements in May 2020 that they were paying M\$8.79 billion (\$438 million) and M\$8.08 billion, respectively. Femsa stated its payment finalised differences in interpretation over taxes paid abroad and Walmart said it concluded substantial financial matters. López Obrador also said that IBM would pay M\$669 million and that carmaker Toyota had made payments.

Digital VAT

Buenrostro has also overseen the introduction of a 16% VAT on digital services supplied by non-resident businesses in June 2020. This effectively changed the

VAT treatment from the import of services to a national service provision, obliging non-resident digital platforms to register for VAT purposes, collect the tax from the users and remit it to the Mexican government.

The government's approach to building its legislation on digital services has drawn criticism as it only sought input from one major player, Uber, while other companies operating in the digital economy have said that a more sector-specific approach is necessary to accommodate varying business models.

Most companies fear being in trouble with the SAT and will likely encourage MNEs to proceed with caution. However, some experts fear legal reforms allowing executives of companies or individuals to be jailed before trial could be abused.

Max Diener, a professor and former federal tax prosecutor, has called the tactic "fiscal terrorism". He called Buenrostro an "excellent public servant" but fears she has enormous and "very dangerous" discretionary powers.

Additionally, the tax authority has come under criticism, accused of forcing companies into paying while the sums in question were being disputed in court or are still under audit.

However, Buenrostro says that the tax authority's strategy is in line with the law and everyone has to comply, noting that there are no privileges and waivers.

"It's not fiscal terrorism because people are paying up. Those who feel threatened and pressured are the ones who aren't," she has said.

Her tenure will continue into 2021 and is likely to remain focused on MNEs' tax strategy. Striking a balance between tax collection and creating an environment for post-COVID economic recovery will be key. Meanwhile, tax directors in Mexico must ensure they minimise the risk of being targeted by the SAT. ■

to prevent the UK from undercutting the trade bloc.

As part of the TCA, the UK agreed to apply similar standards to the EU on state aid with some room to implement new subsidies. The catch is that the EU can challenge the UK on unilateral measures that undermine the terms of the deal.

Under the TCA, the EU and the UK will have to create a dispute resolution

mechanism to handle such matters. The mechanism will cover unilateral measures when they impact trade and investment between the EU and the UK.

This might mean the UK is vulnerable to new fights over transfer pricing. The Commission has gone after multinational companies for securing apparent 'sweet-heart' deals in EU jurisdictions. The same principles will continue to apply to the UK.

What the deal means is unfolding week by week. Brexit may be 'done', but the future EU-UK relationship has barely been sketched out.

Provisions missing from the TCA include safeguards for UK service industries and no passporting rights for the financial services industry. These two sectors make up a significant part of the UK economy. There is still work to be done. ■

Allison Christians

Associate Dean (Research) and the H Heward Stikeman Chair in the Law of Taxation at McGill University, Canada

Allison Christians notably shared the OECD blueprints on the pillar one and pillar two proposals on her blog before they became public, offering tax professionals beyond a privileged few valuable time to assess the plans.

However, Christians has done much more than that over the past year and secures a place in *ITR*'s Tax 50 for her work in international tax matters.

Christians has strong views on what the OECD could do better, suggesting alternative solutions to the digital tax proposal, such as a third pillar, and is keen to see the United Nations Sustainable Development Goals (SDGs) be achieved through tax policy advancements.

Most notably, however, the tax professor posted the pillar one and pillar two blueprints on her blog in September 2020 once she discovered they had been shared between some law firms and multinational companies.

"I would not say that I leaked the documents, rather I disseminated more broadly that which had already been leaked to a select group," Christians tells *ITR*.

Christians had learned that the blueprints were circulating among some lawyers and the Big Four accounting firms. An hour after making a request via Twitter for someone to share the documents with her, she received half a dozen copies from different sources.

"As we have seen in the past, once ideas are set out in official looking documents, it is harder to influence the direction of policy reform. Those who had the documents in advance of public dissemination had already had an unofficial, and unacknowledged, opportunity to make their views part of the final document," explains Christians.

"I made the documents more widely accessible beyond that privileged circle, but they were already fully leaked before I received them," she adds.

Christians believes policymaking needs to be more transparent at the national level and internationally at the OECD to make the process fairer.

"I believe this transparency is particularly appropriate as we look to BEPS 2.0, especially in terms of knowing who is making what suggestions to shape the influential policy documents that we are told are being forged through the fully

equal participation of all Inclusive Framework member countries," she says.

Monitoring the digital tax developments is a challenge many experience. Christians says she tries to keep up with the "extraordinary volume of materials" by making list after list of things to read and think about, and then gradually reading, absorbing and writing about what she has consumed.

Pillar three

Christians appears to have little faith in real progress at the OECD, however. She believes that the programme of work on digitalisation is likely to produce a global tax deal that looks much like the old one, with a relatively modest redistribution of taxing rights among a few key states, thus missing an opportunity for meaningful reform.

"I don't think that anything has changed in the world that would change my mind on this point," Christians says. "The OECD itself seems to recognise this,

in proposing a third pillar aimed specifically at addressing issues more relevant to low income countries."

Christians also wants to see the OECD release the data that led to its impact assessment of the tax challenges arising from the digitalised economy to allow independent researchers to investigate the organisation's findings.

The OECD used a combination of public and non-public data sources in its analysis, but Christians says designing a comparative measurement tool without external review, replicability, and critique "violates good research principles".

"External scrutiny is useful to improving research methodology, to ensure that the proposed method actually produces reliable data. Since the OECD's work has a global impact on a multitude of stakeholders, review by non-affiliated researchers seems appropriate. Of course, the OECD understands very well the importance of peer review, as it has implemented multiple forms of such review when it comes to compliance with agreed standards," Christians explains.

Nevertheless, the tax professor and her colleague Tarcisio Diniz Magalhaes have suggested in a paper that there needs to be a 'pillar three' that creates a global excess profits tax.

Although she continues to receive inquiries about this, Christians says implementation at the global scale is hampered



by the delay in reaching an agreement on pillars one and two. “I fear that no agreement will be reached on either pillar,” she says. “If no agreement is reached, the prospects for a third pillar built on the same foundation are reduced.”

That said, the core idea of excess profits taxation does have real merits, and is being examined by many policymakers, according to Christians.

“We are seeing news stories about those who are realising extraordinary windfalls due to the pandemic. When it comes time to finding revenues, there will be more political appetite for a tax that fairly distributes the burdens, and that does so without unduly impacting economic growth. A tax that reaches pure economic rents, as our pillar three seeks to do, is a viable reform in that sense,” says Christians.

Environmental tax policies

Another key area of Christians’ work is that on environmental tax policy.

“I’ve been working on the intersection of tax and sustainability for some time, and in 2020 was pleased to receive a five-year research grant to continue that work, which I am doing in collaboration with

experts in law, philosophy, environmental science and engineering, as well as investors interested in promoting sustainable tax practices,” explains Christians.

Moving beyond an excise tax on carbon emissions will be important for tax to more closely align tax policy with sustainability goals.

“We need to overcome the systemic unsustainability that is currently subsidised by conventional income tax norms, including in highly technical areas like transfer pricing, as well as in the procedural rules we use to work out conflicts among jurisdictions,” says Christians.

As the tax professor continues work on her reform proposals, the coming few years will be focused on conducting case studies and further research.

Yet 2021 will be busy for Christians as she completes a manuscript on a new normative justice framework for international taxation with Laurens van Apeldoorn from the Open University in the Netherlands, entitled Tax Cooperation in an Unjust World. She will also be working on an edited collection with Sergio Andre Rocha on the Multilateral Instrument, in which she will outline her MLI 2.0 wish list.

Nevertheless, Christians will continue to participate in the digital tax debate, as well as cataloguing the different ways that countries have taxed or could tax cooperative surplus, which refers to the gains produced through cross-border cooperation, including some that are not yet accounted for in the global corporate tax base.

“In keeping with 2020, I expect the flow of information and updates on tax to be quite voluminous in 2021 and so a big challenge will be to continue to keep up with developments as they happen while still undertaking careful research – an inherently slow process,” says Christians.

“If no agreement is reached on pillars one and two, and perhaps even if it is, I expect that there will continue to be significant movement on digital services taxes of various kinds, together with trade conflicts surrounding those taxes,” she continues.

“As such, I expect to keep working on understanding the intersection of tax and trade in 2021,” she adds. “These issues intersect with the question of sustainability in taxation, so I expect some synergies across these topics in the coming years.” ■

COVID-19

The virus that has changed the world

ITR’s Global Tax 50 would be incomplete without recognising the significant impact that COVID-19 has had – and continues to have – on all aspects on personal and business matters worldwide.

Initially expected to have a temporary impact on businesses, health and travel, the coronavirus has instead changed the long-term plans of many businesses and governments. Digital transformations, global mobility policies, transfer pricing arrangements, supply chains and much more has had to adapt to a different way of working, which is unlikely to return to the pre-COVID normal.

When travel and business operations began to be affected in early 2020, tax departments were tasked with releasing as much cash as possible by pushing for tax refunds they were owed and utilising government incentives. Indirect taxation and the teams responsible also became more important in supporting companies to manage cash flow and maximising tax relief opportunities.

Governments were quick to announce measures to support businesses at risk of closure in most countries as part of the COVID response. Many also delayed a

number of tax initiatives that were due to be launched in 2020, such as the UK’s Making Tax Digital (MTD) project for VAT, e-invoicing in India, and reporting under the EU Directive on Administrative Cooperation (DAC6).

Although welcome, these efforts also sparked worry among profitable and large businesses that they would be the targets when governments went looking for money to fund COVID-19 spending. Like the 2008 financial crisis, the coronavirus pandemic has had a significant impact on government coffers, business profits and national infrastructure.

Businesses were concerned that recouping COVID-19 spending would mean more tax payments or a higher compliance burden, mostly in the form of audits and reassessed tax liabilities, with the added risk of costly disputes and reputational damage.

Remote working and virtual working practices were two of the first areas that led to concerns among tax departments of exposing the business to new permanent establishment (PE) risks and employment taxes.

Some governments have provided guidance on whether remote working

creates PE risks or not and reassured taxpayers over tax payment holidays and other liabilities. Guidance from the OECD on COVID-related tax implications has helped this effort. Over the past year, many tax functions have focused on getting their documents in order, albeit virtually.

Meanwhile, remote working has led to faster digital transformations, which will continue in 2021.

According to UK consultancy firm McKinsey, the rate of technological innovation tripled in 2020, amounting to three years’ worth of innovation in just nine months. In the tax sector, that has led to advanced software solutions providing real-time analysis of tax obligations that allow businesses to unlock cashflow and manage audit risks.

“In response to this demand, technology providers have prioritised the inclusion of anomaly and error detection and tax data analytics,” according to McKinsey. “Tax data analytics provide insight into existing and live tax data using natural language processing, which interrogates the data at source, i.e. directly from the ERP or accounting software.”

The digital transformation trend will continue in 2021, both for businesses and tax authorities.

“The pandemic will only further accelerate the ongoing digital transformation of tax administrations around the world. Some of this will benefit taxpayers, such as being able to have improved virtual access to their revenue authority contacts. But for others, this will only compound tax risk and controversy,” says Kate Barton, EY global vice chair of tax.

As the pandemic continues for a longer period than first estimated, governments are putting plans in place to manage the ongoing costs, as well as preparing a pathway to a post-crisis version of the tax landscape.

The deficit dance

The difficulty that governments will be navigating in 2021 is that they need more money, but cannot easily raise taxes to fund their expenses. Their traditional reliance on businesses to pay for costs will not work as many companies continue to struggle to make a profit during COVID-19 restrictions.

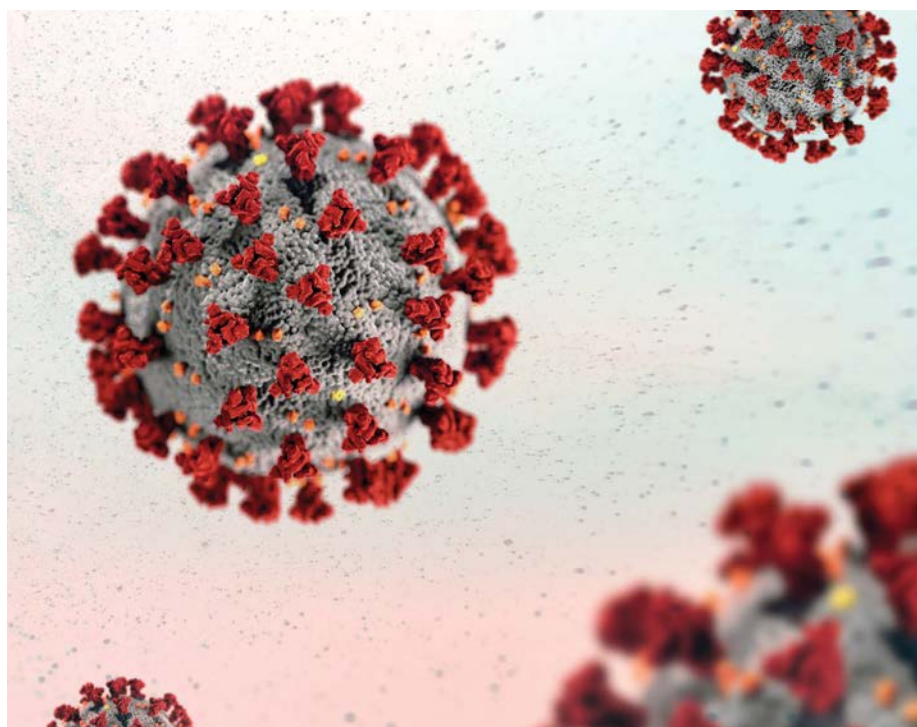
“Eventually, governments will look to balance budget deficits and taxes will invariably rise – but timing those increases carefully will be crucial if governments are to drive growth,” according to EY’s Kate Barton. “Looking into 2021, we expect the COVID-19 pandemic to continue accelerating the transformation of the global economy.”

Although taxpayers should plan for higher tax rates – especially in the US – governments are likely to focus on cutting tax incentives, abolishing reduced tax rates, toughening tax avoidance measures, and plugging revenue gaps through tax demands and audits.

There will also be a renewed focus on environmental taxation and more efforts to find an international agreement on taxing the digitalisation of the economy, or implementing unilateral digital taxes if delays continue at the OECD. Some governments could also take more radical measures to guarantee a necessary boost to tax revenues, such as legalising and taxing cannabis.

Many tax advisory firms have also predicted a slew of tax changes that may happen as part of the COVID-19 recovery, such as:

- Using tax policies to encourage companies to make goods closer to the consumer to diversify supply chains;
- Broadening the VAT/GST base by re-evaluating exemptions and reduced rates that create legal uncertainty;
- Removing unnecessary limitations on the right to recover input tax. Quick recoveries of VAT and GST refunds



during the height of the pandemic were essential to business cashflows. Some of the temporary measures may become permanent;

- Improving efficiency of tax collections through technology and cooperative compliance procedures;
- Greater use of data analytics, real-time reporting, pre-filled returns, split payments, and artificial intelligence to improve the design and operation of future tax systems, tax reporting, and tax collections; and
- Introducing wealth taxes that target high-net-worth individuals and big businesses.

Increasing regulation, tighter tax rules and more compliance being introduced will keep tax departments busy.

“In 2021, management teams should continue to view risk management and compliance as a critical function to enable, rather than restrict, a business,” according to Hari Bhambra, global head of compliance solutions at Apex Group.

Regulatory changes intended to stimulate investment and access to capital, while navigating the ongoing uncertainty and repercussions of COVID-19, could be of some benefit. These will likely lead to more digital tax filings and more transparent interactions with tax authorities, such as India’s faceless assessments regime. Many anticipate more advantageous research and development incentives and easier investments as countries try to attract foreign direct investment (FDI).

At the same time, environmental initiatives are likely to be boosted, although this could create a higher tax burden for businesses.

ITR’s research on environmental tax showed many governments are looking at tax measures that promote greener practices. These efforts are expected by many to be accelerated in 2021 as governments look for revenue-raising measures that appease the electorate and show a greater commitment to the UN Environmental Sustainable Goals (ESG) and the Paris Agreement.

The EU’s Green Deal is just one example of this trend. In addition, with US President Joe Biden having re-committed the US to the Paris Accord, global efforts will be expedited.

“Every crisis brings changes to the existing tax system. This crisis may give rise to new environmental tax measures,” according to Stefano Giuliano, partner at CMS.

“It will be very easy for governments to go after the energy industry,” adds one global head of indirect tax at an energy company, because the sector is “big and easy to isolate”.

Tax departments will be important to business decisions as companies look to introduce sustainable business measures to reflect these developments. The global use of virtual platforms for meetings is one area that offers cost savings and the ability for companies to show their pro-environment approach through reduced travel, but more will need to be done.

Companies have realised how important the tax function is. What was in the past seen as a business burden has been thrust into a boardroom essential. While businesses struggle through the crisis, this presents an opportunity for tax professionals to make their mark.. ■

DAC6

Reporting under the EU's hard-hitting disclosure rules starts in January 2021, and advisors say these are among the world's most complicated measures.

Despite two years to prepare for the European Council Directive on Administrative Cooperation (DAC6) after it was passed in March 2018 to increase tax transparency, many advisors are still making adjustments to their disclosures ahead of the first reporting deadline in January 2021 in most EU countries. Some consider DAC6 to be one of the most complicated reporting requirements globally.

Many EU countries are preparing to start collecting reports at the end of January from the mandatory automatic exchange of information of cross-border tax arrangements, since the deadline was postponed by six months in most countries after an EU Parliamentary vote in mid-2020.

The directive requires intermediaries to report potentially aggressive tax arrangements to their national tax authorities in the EU. Intermediaries can include accountants, tax advisors, banks, lawyers, and wealth managers who help to facilitate cross-border transactions. Where intermediaries may fail to report, businesses will have to meet the reporting obligations.

However, the hallmarks that define the reporting requirements are much broader in scope on what kind of cross-border tax arrangements should be reported to the authorities compared to similar regimes such as the common reporting standard (CRS).

"It moves away from objective criteria and towards subjective standards," says Ali Kazimi, managing director of Hansuke Consulting. "It's very easy to follow 'don't do X, Y, Z' because that's specific, but if I was to say 'don't be naughty' then what does that mean? That's the difficulty for financial institutions; it's not that they don't want to comply, but some still don't know how."

The wider corporate concerns on DAC6 stem from vague guidance on implementation of domestic rules that led to different reporting requirements and data governance strategies across EU countries. Some common differences appear in domestic legislation and available guidance regarding the definition of an intermediary and the quantum on reportable transactions.

The five main hallmark categories that underpin the DAC6 rules are linked to cross-border transactions, the automatic exchange of information and transfer

pricing. They cover several areas including timing, tax perimeters and geographical criteria. These broad hallmarks for DAC6 mean firms and businesses are likely to over-report rather than under-report to remain compliant with any domestic rules and limit any future challenges.

C in-house tax directors suggest that some reporting networks of intermediaries can jeopardise a company's tax planning if more tax arrangements are disclosed than necessary. In response to this risk, many large businesses are using a combination of external advisors, in-house expertise, and specialist IT tools to identify their DAC6 reporting obligations in advance.

"This is worrying for us as a taxpayer," says Raisa Nowab, head of global tax operations at BMI Group, referring to the high penalties for wrong reporting or missed deadlines under the tax regime. In some cases, mistakes could even lead to a criminal offence charge, she adds.

In a survey by UK revenue authority, HM Revenue & Customs (HMRC), published in August 2020, 37% of accountants

and 46% of lawyers could not say what might constitute a reporting requirement under DAC6.

The UK may add more complexity to these cross-border disclosures, after re-focusing its implementation of the EU's mandatory disclosure rules to target only Hallmark D about obscuring beneficial ownership. The move marked the conclusion of final details of the Brexit trade deal before the first DAC6 reporting deadline on January 30 in the UK, and it also confirmed the country's move to replace EU rules with the OECD's mandatory disclosure rules in 2021.

The complexities for large businesses come from working under two disclosure regimes, and a lingering question is how to manage cross-border reporting via UK intermediaries when the EU begins reporting under DAC6 on a large scale in February. The reporting requirements will also vary from one EU country to the next. Some taxpayers are lobbying the EU to revise its rules to simplify the reporting process.

In-house tax directors are taking a closer look at their business operations to stress test which areas may be vulnerable to the disclosure regimes, instead of looking at everyday individual transactions that may be caught from over-reporting. More clarity on the various corporate strategies to manage the different reporting requirements and risks of over-reporting tax arrangements will come after the first few months of reporting in 2021. ■



Reporting under the EU's hard-hitting disclosure rules starts in January 2021

Dinh Tien Dung

Minister of Finance in Vietnam

Finance Minister Dinh Tien Dung earns a spot in ITR's Global Tax 50 for introducing tax measures that support Vietnam's growth as a key supply chain hub for multinational businesses operating in Asia, even during the pandemic.

Dung was the chief of state audits in Vietnam before being appointed to the role of finance minister, experience that may contribute to expanding the country's tax base. Dung has led Vietnam's economic growth as the finance minister since May 2013, and opened the economy to more investment amid the



Dung has led Vietnam's economic growth as the finance minister since May 2013

COVID-19 pandemic by introducing major tax incentives.

The Law on Investment No. 61/2020/QH14 and the Law on Enterprises No. 59/2020/QH14 were enacted in June 2020 to eliminate certain investment processes and introduce corporate tax governance changes. Advisors say fiscal policies in 2020 opened the door to corporate investment in specialised businesses

relevant to major supply chain operations, and may also help reform heavily indebted state-owned enterprises.

"Jurisdictions across the Asia-Pacific region including Vietnam are recovering from the pandemic exceptionally quickly with astounding strides in stabilising and boosting the economy," says Oleg Rak, managing partner at Mason Rak, regarding the fast-growing supply chain hubs in the region.

Vietnam is competing with Indonesia and India to attract more manufacturing businesses, and Dung has helped Vietnam build a strong environment of supportive industries in 2020 to provide crucial solutions for investors in the manufacturing sector to overcome cost, quality, and market share issues. Supportive industries are complementary businesses that manufacture materials, accessories, components and spare parts used for assembling finished goods.

Digital services taxes

Countries around the world are introducing unilateral digital services taxes (DSTs) as they wait for a multilateral OECD solution, creating a higher compliance burden and double taxation risks for taxpayers.

Digital services taxes have been a hot topic for a few years, but 2020 saw a surge in interest and legislation from countries seeking to extract revenue from digital multinational enterprises (MNEs). By the end of the year, there were 25 countries globally with a form of digital tax, eight of which joined the list in 2020. In 2021, their ranks have already been swelled further by Kenya, Paraguay, Spain, and Vietnam.

The economic devastation wreaked by the COVID-19 pandemic, and the subsequent need for countries to shore up state finances, undoubtedly contributed to the trend. However, there is also a growing impatience with the OECD's multilateral agreement, the deadline for which has been extended to mid-2021.

Pascal Saint-Amans, director of the OECD Centre for Tax Policy and Administration, told *ITR* that there is a strong basis for an agreement. Nevertheless, the public consultation on the pillar one and pillar two blueprints in January 2021 highlighted some contentious issues that will be difficult to resolve.

Meanwhile, and although the OECD is making a visible effort to improve the inclusivity of its tax work, concerns remain that the organisation does not adequately represent the interests of non-western

countries. In November 2020, the East African Community (EAC) member states of Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda announced a plan for a joint strategy for taxing the digital economy within the EAC.

The EAC is not the only group of countries considering a DST. Paul Tang, chair of the European Parliament sub-committee on tax matters that was established in 2020, told *ITR*: "We need a European proposal – what will the EU do if the OECD fails?"

Things are moving forward as the EU released a consultation on its proposed DST in January 2021.

Tang believes that a strong European position could help to accelerate the OECD talks by forcing the US to engage. Throughout 2020, former President Donald Trump's administration hindered progress by trying to protect digital MNEs headquartered in the US, such as Facebook, from foreign taxes. Washington's withdrawal from the discussions in June 2020 was a blow, and it remains unclear what President Joe Biden's stance will be on the multilateral proposal.

Meanwhile, individual countries face public pressure to tax the corporate behemoths that profit from their citizens' activity. These include household names such as the US FAANG compa-

nies (Facebook, Amazon, Apple, Netflix and Google), whose digital operating models are not accounted for in many tax systems designed for a brick-and-mortar world.

While DSTs offer benefits to countries in the form of increased tax revenues, they are not without risk. Take France's unilateral DST, which was enacted in 2019. The US, which is home to many of the largest digital MNEs and has made its opposition to DSTs known, argued that the tax unfairly singled out US corporations. In retaliation to the tax, Washington threatened to introduce a 25% tariff on US imports of French goods including handbags and makeup.

In January 2021, the US Trade Representative's Office (USTR) announced the indefinite suspension of the tariff. However, this is likely to be a temporary reprieve. The US is planning to coordinate tariffs on France with those on other countries that are also introducing DSTs, implying that a number of trade wars may be on the horizon.

MNEs have also raised concerns that DSTs could create an unacceptable compliance burden, increase the risk of double taxation, and damage investment. Companies commenting on the OECD's pillar one and pillar two blueprints at the start of 2021 suggested that a multilateral solution is only viable if the members of

For example, Decree 111/2015/ND-CP offers tax holidays for businesses manufacturing products from a list of prioritised supporting industrial products. It has measures such as up to VND 7.5 trillion (\$324.3 million) in annual tax exemptions for certain land use between 2021 and 2025 to support longer-term growth of the tax base through more foreign direct investment.

“Vietnam is regarded worldwide as a COVID-19 success story,” says Quang Chau Huy, managing partner at Rajah and Tann Asia. “Innovation has become a dominant theme in Vietnam’s new investment tax laws and other legal instruments. The government incentives and streamlined regulatory procedures like the abolishment of the investment registration certificate encourage foreign direct investment in certain sectors.”

Most of Vietnam’s economy is made of small businesses, approximately 93% of the

760,000 businesses in the country, so deferrals on tax payments and reduced corporate income tax for small and medium enterprises (SMEs) were highlights in May 2020. Dung proposed a 30% corporate tax cut for businesses with annual revenue of less than VND 50 billion.

Other countries are using similar tax programmes in a bid to boost their economies to sustain longer-term growth. However, in line with stricter audits trending in the Asia-Pacific region, Vietnam-focused advisors suggest carefully managing in-house transfer pricing (TP) compliance to prevent adjustments and penalties. Vietnam adjusted its TP rules in late-2020 so taxpayers with cross-border related-party transactions during the tax year must disclose those arrangements in their annual income tax filings too.

“BEPS and BEPS 2.0 took a long time and now the OECD needs to work on 3.0 because of the remodelling of whole

structures and supply chains,” says one head of tax at a multinational electronics manufacturer, regarding the international risks of certain government incentives.

With ongoing BEPS 2.0 negotiations about tax rules to fit the growing digital economy, Dung introduced a mechanism to collect tax from cross-border digital service providers based on revised permanent establishment rules that became effective in July 2020, and it applies corporate income tax and VAT to digital businesses.

These unilateral digital services taxes (DSTs) have led to higher trade tensions with the US, and the US Trade Representative is already threatening to levy tariffs on certain countries, including Vietnam. The country’s open economy has felt the impact of the trade war and financial volatility, but has nonetheless remained resilient to the external headwinds amid the pandemic. ■



DSTs are increasing in proliferation as countries impatiently await an OECD solution

the Inclusive Framework (IF) repeal their unilateral measures.

As the number of DSTs globally continues to increase, it has been suggested that if their rules, application and rates are broadly similar, at a certain point the world will have unintentionally achieved a *de facto* multilateral solution, albeit one without an agreed contractual basis.

Speaking at a TaxCOOP conference in October 2020, Brian J Arnold, senior

advisor at the Canadian Tax Foundation, suggested this scenario could occur, although it is a long way off.

However, there remains the problem of double taxation, which is not solved by unilateral DSTs, no matter how aligned national rules are with one another.

Saint-Amans is fairly optimistic about the potential to progress the digital tax solution in 2021. However, there are difficulties, including the still-unknown posi-

tion of Biden’s US administration and the demands of managing the COVID-19 pandemic. It may be possible to settle some key questions by summer 2021, but a full agreement is likely to be unrealistic. In the meantime, countries will continue to introduce unilateral DSTs, presenting a pressing question that fails to receive a definitive answer or promise of action: when a multilateral agreement is finally reached, will the DSTs all be scrapped? ■

Digital transformation

The COVID-19 pandemic has accelerated the trend towards tax digitalisation, with revenue authorities and taxpayers alike racing to improve efficiency and compliance using technology.

Digital transformation was happening before COVID-19 threw the business world into turmoil in early 2020. However, there is no doubt that the global health crisis, and the overwhelming adoption of remote working practices that followed, accelerated the process.

In the first months of the pandemic, many tax authorities put audits on hold and focused on providing support to struggling businesses in the form of tax exemptions and payment delays. Yet as time passed, it became clear that a fundamental shift towards operating online was necessary, precipitating a greater interest in technology.

Multinational enterprises (MNEs) also began to investigate digital solutions for collecting data and eliminating human error amid concerns that tax authorities would become more aggressive in the wake of the pandemic.

Tax functions and technology

Tax teams are looking to technology to streamline their operations and save valuable time. External and internal software can help with data harvesting and consolidation, allowing work that would take months to complete manually to be automatically processed in a matter of minutes. One head of tax tells *ITR* that implementing an internal macro has saved her team an enormous amount of time on VAT compliance. “It used to take about 420 days a year to do the VAT. Now it takes around 65,” she says.

Another benefit of using technology is that it eliminates the risk of human error, therefore substantially de-risking the tax function. This is particularly valuable during high-stress periods such as end-of-year reporting when tax teams are tired and overstretched.

However, in other areas, tax teams are cautious about introducing technology. At *ITR*’s Taxation of the Digital Economy Summit in September 2020, attendees said they wanted to understand more about how their data is organised before investing in bolt-on solutions to their enterprise resource planning (ERP) software.

Nevertheless, data collection, synthesising and analysis are playing major roles in how MNEs are reacting to the pandemic. Collecting data for transfer pricing (TP) reports has been problematic for tax directors, as figures from the accounting and



An internal macro has reduced the time that one tax team spends on VAT by 85%

finance departments do not always correspond with the company’s TP documentation.

To manage this, tax directors are looking for greater integration of the tax department within companies. This is fundamental to avoiding internal conflicts and misunderstandings, and creating a successful operational transfer pricing (OTP) system. Tax teams are also searching for IT systems that will allow them to remain one step ahead of revenue authorities and avoid unwanted surprises such as audits or unmanageable compliance requirements.

Ironically, tax professionals tell *ITR* that the economic impact of COVID-19 could hamper opportunities for investment in tax technology as resources are directed elsewhere. Tax professionals advise framing conversations with key stakeholders around the concept of a return on investment to encourage senior executives to buy into initiatives.

This shift to digital operations has impacted the opportunities available for employees in tax. As tax functions become increasingly digitalised, technological experience is becoming highly valued by recruiters. Gemma Low, tax automation manager at Royal Mail, told *ITR* in November 2020 that as tax directors are considering a wider pool of employees, job applicants do not need the same background in tax that would have once been necessary. Low added that digitalisation presents opportunities for tax professionals because, with manual data processing replaced by automation, employees can spend time on more interesting and valuable projects.

Data and analytics

To a large extent, the digitalisation of MNE tax functions is being propelled by the demands of revenue authorities and regulatory bodies around the world. Tax transparency initiatives from the OECD include the automatic exchange of information (AEOI) and country-by-country reporting (CbCR), while the EU’s Directive on Administrative Cooperation (DAC6) increases the compliance burden further.

Tax authorities are relying on increased data visibility to reduce the tax gap and curb base erosion and profit shifting at a time when multinationals’ tax affairs are under extreme scrutiny due to the global economic hardship caused by COVID-19. Revenue authorities are keen to recoup the costs of the pandemic on behalf of governments that have emptied state coffers to prop up their domestic economies.

Revenue authorities are therefore investing in algorithms and automated analyses to find anomalies in digital submissions from taxpayers. These include social network analysis, predictive analytics and unsupervised machine learning. Each of them can be used to identify discrepancies and trigger an audit case.

Meanwhile, taxpayers must deal with a global rise in continuous transaction controls (CTCs) such as real-time reporting and e-invoicing. First introduced in Latin America in the early 2000s, the concept is spreading across the globe as tax authorities focus on closing the so-called VAT gap, which refers to the disparity between the VAT revenue that tax authorities should collect, and the money they actually receive.

Revenue authorities are also interested in capitalising on the data that CTCs provide to inform their economic policies, while some countries are keen to see local companies benefit from the cost savings that e-invoicing can offer.

As the COVID-19 pandemic rolls on, for tax teams considering digitalisation, the question is not whether or not to digitalise, but how to do so. Tax transparency requirements from organisations such as the OECD and an increasing compliance burden from cash-strapped revenue authorities have left no other option. Technology is necessary to de-risk the tax function and meet the many demands on tax directors’ time.

In this transition period, there will be teething problems and tax directors are likely to feel under pressure. However, the good news for struggling MNEs is that technology is an investment in the future, safeguarding the company against risks and offering opportunities to employees. ■

East African Community

Regional intergovernmental organisation of six member states

The East African Community (EAC) took matters into its own hands in 2020 and agreed on introducing forms of digital tax across the six member states after growing tired of OECD delays. The bold decision wins it a place in *ITR*'s Global Tax 50.

The EAC is a regional intergovernmental organisation, with its headquarters in Arusha, Tanzania. Home to more than 177 million citizens, the EAC is one of the fastest growing regional economic blocs in the world. It is widening and deepening cooperation among its member states in various areas for their mutual benefit. Regional integration has led to establishing the East African Customs Union, the Common Market in 2010 and the East African Monetary Union Protocol.

The process towards an East African Federation is also being fast-tracked, showing that leaders are determined to construct a powerful and sustainable economic and political bloc.

Following the 48th East African Revenue Authorities Commissioners General's (EARACGs) meeting on November 11 2020, Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda decided to develop a joint strategy for taxing the digital economy and tackling base erosion, profit shifting and illicit financial flows within the EAC.

The six nations agreed to address the "legal framework in terms of definitions, identification of players and the legal mechanisms", said the statement released by the Kenya Revenue Authority.

The ministers also agreed to use technology and data analytics to enhance revenue collection, compliance and identification of potential revenue, as well as increasing support to taxpayers and building the skills of revenue staff. The integration of domestic tax systems across the countries will also be expedited through a team of appointed commissioners and directors who will work closely with the African Tax Administration Forum (ATAF).

In addition, the revenue authorities will:

- Continue using the alternative dispute resolution mechanism to unlock revenue;

- Provide bilateral or collective support to the South Sudan National Revenue Authority;
- Continue engaging with the EAC Secretariat on the need to establish a committee on tax affairs at the EAC where tax administration matters not related to customs can be deliberated;
- Conduct lifestyle audits across the region to improve the integrity of staff in the revenue authorities;
- Mandate the Commissioners of Customs to establish the information gaps and report back to the EAC to decide how to effectively share information among the revenue authorities; and
- Support the EAC Secretariat on the operationalisation and sustainability of the regional electronic cargo tracking system in terms of funding options, institutional framework and interconnectivity.

Protecting revenues

While negotiations at the OECD on pillar one and pillar two are extended and delays on introducing a new Article 12B to the UN Model Tax Convention continue, the EAC nations have lost patience with the multilateral efforts. In addition, tax authorities reported declining revenue performance during the period of March-

September 2020 due to the COVID-19 pandemic with the greatest decline being registered in May 2020. This was an unprecedented fall when revenues have on average been growing at double digits, influencing the EAC's decisions to no longer wait for multilateral efforts.

On January 1 2021, Kenya's digital services tax (DST) entered into force. One of many unilateral laws across the world, it applies a rate of 1.5% on gross transaction values. More than 1,000 companies are expected to register to administer the tax.

Uganda is also looking at introducing a DST in 2021, but this will be unwelcome after the country's introduction of an over-the-top tax in 2019, sometimes referred to as Uganda's DST. Similarly, Tanzania imposed an annual levy on for bloggers and online radio and television services to stop hate speech and 'fake news'. The Electronic and Postal Communications (Online Content) Regulations, 2018, require such service providers to pay for a license that can be revoked with little notice. Critics argue this is a service tax and a means to curb free speech.

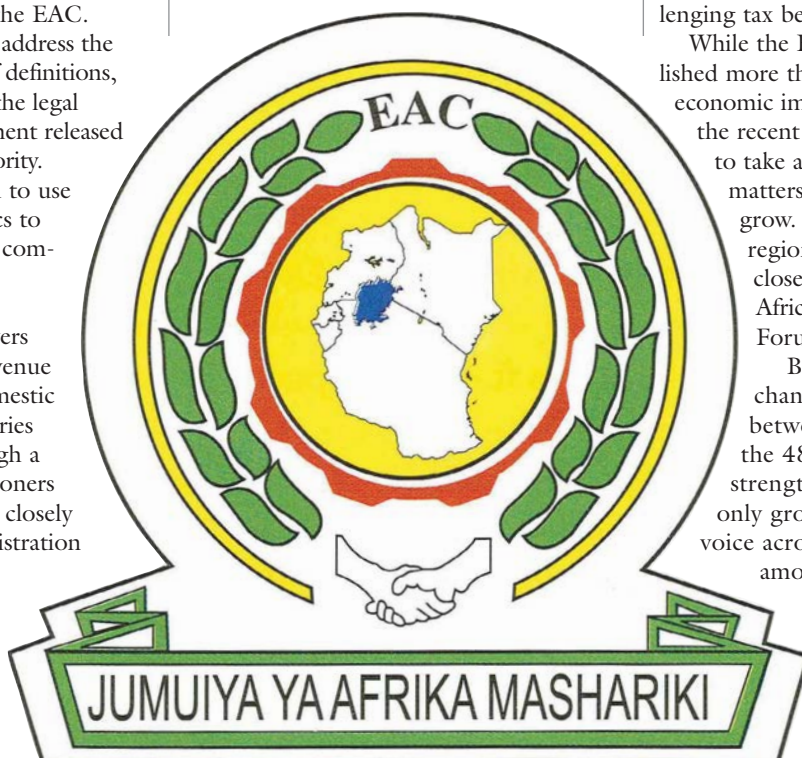
These DSTs are in line with the trend across the continent, such as in Nigeria and Zimbabwe. The ATAF has even published a draft template for DST legislation for member countries, with a recommended rate of between 1% and 3%, suggesting the number of laws targeting such activities will grow.

Although the other EAC member countries have not announced DSTs yet, some are taking other measures affecting companies. For example, Rwanda has established transfer pricing rules and a number of African countries are getting stronger at conducting audits and challenging tax behaviours.

While the EAC may have been established more than two decades ago, it is the economic impact of the pandemic and the recent ability of member countries to take action on international tax matters that has seen its influence grow. It is also part of greater regional coordination, working closely with ATAF and the West African Tax Administration Forum.

Based on recent legislative changes and the agreement between revenue authorities at the 48th EARACGs meeting, the strength of this economic bloc will only grow, offering it a stronger voice across the continent and

among international organisations. Taxpayers would be wise to prepare for changes that could increase their tax liabilities and result in tougher tax investigations. ■



Environmental taxation

Unique circumstances present an opportunity to rebuild greener.

While COVID-19 has wrought unprecedented social and economic impact globally, every crisis brings an opportunity to shape the recovery. The pandemic has presented a perfect storm to push for a greener recovery.

The urgent need to strengthen public finances alongside ever-increasing public awareness on climate change will trigger a rise in punitive taxes but may also reform tax incentive schemes and broader trade policies.

The most advanced discussions on environmental taxation are in Europe and while many tax policies are still ahead of the environmental policy stage, tax directors at multinational enterprises (MNEs) need to keep abreast of the environmental policy developments that will impact tax liabilities, as well as how the whole business operates and interacts across its supply chain.

Tax will play a key role in helping to protect the environment. Policymakers will need to rethink traditional development and industrialisation models to avoid past mistakes, cooperate on a global tax system to reduce the emissions of greenhouse gases, and overhaul existing tax incentive frameworks to foster innovation.

Efforts must take into the consideration the responsibilities of each component within global supply chains, facilitating the

technology to spark change and pre-empt the litigious provisions that may delay progress.

It has rapidly become clear that tackling the climate problem requires a multilateral solution as punitive taxation within any one territory is likely to prompt businesses to flee to lower environmental tax jurisdictions.

So far, major polluting countries have failed to cooperate on environmental policy. Nevertheless, the European Union is leading initiatives against climate change through its Green Deal, which includes a plastics tax, revising the Energy Taxation Directive, and developing a carbon border adjustment mechanism (CBAM).

The OECD is mainly focusing on measuring effective carbon pricing for G20 countries and extending those frameworks into developing economies. It has also provided practical guidance to prioritise green policy choices that help promote environmental objectives and speed up structural change towards low-carbon transition.

Global decarbonisation must be the focus. However, out of the 57 global carbon taxes or trading systems at regional, national and sub-national levels, prices average \$2 per tonne and even when China introduces its scheme, set to be implemented this decade, these systems

will only cover about a fifth of global emissions.

International solution

Many tax professionals believe that a sustainable international solution is key, highlighting the importance of multilateral bodies such as the OECD and the UN. However, these organisations already have significant resources deployed to research and provide solutions to climate concerns, but they are bound by the willingness of individual governments to cooperate on such environmental matters – particularly when leaders such as former US President Donald Trump dismiss them.

However, US President Joe Biden has committed to tackling climate change. His administration is more open to implementing a carbon tax and backing green tax credits than the previous one. With the US engaged on climate change, a multilateral agreement is more likely, but far from certain. Each country will try to protect its own interests in the climate debate.

In the meantime, businesses are likely to see a movement towards environmental taxes. Measures such as plastics taxes are already being finalised and will be implemented soon. The EU is also developing CABM to incentivise greener industrial practices. Heads of tax need to inform themselves of what is coming.

While the world may be several years away from an international agreement on taxing pollution, individual national measures and targets pave the way for a greater shift. The seeds were planted in 2020 and the first shoots could come in 2021. Tax professionals will soon have to consider environmental taxation in their decisions. ■



Mette Frederiksen and Mateusz Morawiecki

Prime Minister of Denmark and Prime Minister of Poland



Danish Prime Minister Mette Frederiksen and Polish Prime Minister Mateusz Morawiecki helped to start a global trend in 2020 when they decided to impose a COVID-19 relief ban on companies based in black-listed tax jurisdictions.

In a strange twist of fate, the right-wing Polish government and the centre-left Danish government found themselves on the same page when it came to the issue of tax havens. When Poland announced the policy in April 2020, Morawiecki declared: “Let’s end tax havens, which are the bane of modern economies.”

The Danish government soon made it policy to deny COVID-19 relief to companies based in one of the EU’s blacklisted jurisdictions. The decision got a lot of headlines in newspapers and was of notable interest in tax policy circles.

“Companies seeking compensation after the extension of the [COVID-19 relief] schemes must pay the tax to which they are liable under international agreements and national rules,” said the Danish finance ministry.

“Companies based in tax havens in accordance with EU guidelines cannot receive compensation, insofar as it is possible to cut them off under EU law and any other international obligations.”

Many governments like Belgium, France, Italy and the Netherlands have since followed this lead. Argentina was the

first non-European country to adopt the policy.

It has been a quick win for these governments. The headlines all make out the policy will crack down on all businesses operating through tax havens. However, this is far from the case and yet this trend fits a bigger picture of rising opposition to tax avoidance.

Problems of definition

The EU compiled its blacklist to incentivise governments around the world to enact reforms and become more transparent. In one instance, the UAE found itself on the list and introduced economic substance requirements in order to clear its name.

On the other hand, NGOs have criticised the blacklist for not going far enough. The question of what constitutes a ‘tax haven’ is contested. A strict interpretation of the concept would list jurisdictions with a zero tax rate, but tax campaigners argue this lets too many governments off the hook.

This is partly why the jurisdictions listed by the EU that have not implemented certain internationally accepted standards. The result is a blacklist of low-tax jurisdictions with high secrecy that have failed to implement certain policies. By the end of 2020, the list included the following 12 jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, and Vanuatu.

However, the Caymans News Service has suggested the Cayman Islands could be put on the EU’s tax blacklist once again in 2021 after the list is reviewed in February.

There are alternatives to the EU blacklist approach. By contrast, the Tax Justice Network has its own criteria for what counts as a tax haven and regularly rates jurisdictions in its Financial Secrecy Index. This would be a much tougher list to enforce.

Alex Cobham, chief executive of the Tax Justice Network, says: “For years, the corporate tax havens like the British Virgin Islands, the Netherlands and Luxembourg have fuelled a race to the bottom, handing over wealth and power to the biggest corporations and taking it away from nurses and public sector workers risking their lives today to protect ours.”

The COVID-19 pandemic has reignited the debate on tax avoidance since the same governments that have favoured light-touch regulation and low taxes have struggled to tackle the crisis. The growing fiscal cost of the pandemic may mean this approach to tax havens is just a start.

In the meantime, tax havens continue to be a source of controversy. Governments around the world will be considering their options in the months ahead and low-tax jurisdictions outside the EU will be looking to stay off this list by any means they can. ■

Paolo Gentiloni

European Commissioner for Economy

As Commissioner for Economy, Paolo Gentiloni has put tackling tax avoidance high up on the agenda to ensure EU economies recover from the COVID-19 pandemic.

Gentiloni was setting out to build on the work of Pierre Moscovici, former European commissioner for economic and financial affairs, taxation and customs, when the coronavirus outbreak swept the EU. Commission President Ursula von der Leyen turned to Gentiloni to find fiscal solutions to the economic fallout of the health crisis.

Gentiloni's first move was to waive VAT and customs duties on medical supplies from non-EU countries. However, the long-term challenge was to find ways to recover the huge costs of preventing businesses from going bust during the pandemic.

He sees tackling tax avoidance as a key part of raising more revenue to manage COVID-19 expenses. "Addressing aggressive tax planning is crucial if we want to have a level-playing field in the single market," Gentiloni said in a September 2020 interview with the Financial Times.

"We must use all the tools at our disposal to address aggressive tax planning, especially now that we are working on the guiding principles for the implementation of the Recovery and Resilience Facility."

The European Commission floated the idea of invoking Article 116 of the Treaty on the Functioning of the European Union (TFEU) to crackdown on 'sweetheart' tax deals. This could be a controversial move for the Commission despite the global move towards tax morality, but it is not the only initiative on Gentiloni's agenda.

The Commission is also looking to remove obstacles to EU-wide tax reform. Gentiloni himself complained that the EU legislative process "can make the adoption of tax proposals extremely lengthy".

"I'm committed to explore the possibilities offered by the treaties allowing us to move from unanimity to qualified majority voting and the ordinary legislative procedure in taxation," says Gentiloni.

The EU Commission proposed to do away with member states being able to veto tax proposals on January 15 2019. If the measure is approved, tax policy proposals will only require 55% of support to pass. In addition, proposals must be supported by member states representing at least 65% of the total EU population.



Source:
European Parliament

Ireland is one of the countries against the move, but Dutch member of the European Parliament Paul Tang supports it. He has previously said a move to majority voting is necessary to make progress.

Gentiloni's reputation as a persuasive mediator could allow him to win over opposing member states. Before joining the Commission, Gentiloni had a long career in Italian politics. He was the last prime minister of the Democratic government, taking over from Matteo Renzi in 2016 until the 2018 elections forced the Democratic Party (PD) from power. Nevertheless, the next Italian government backed Gentiloni to represent the country in the Commission. The PD helped make this happen because of Gentiloni's skills of persuasion. These skills might be about to be put to the test.

Paying for the crisis

After years of wrangling, the European Commission has not managed to secure EU-wide fiscal reforms such as a digital services tax (DST). So the Commission has rolled many of its long-term fiscal

initiatives into an ambitious pandemic recovery package.

The former Juncker Commission wanted to create a common consolidated corporate tax base (CCCTB) and implement a financial transactions tax (FTT) across the EU. Neither goal has been realised, but the Commission still hopes to implement both in the near future.

As part of the rescue package, the Commission has committed to putting forward proposals for a digital tax policy by June 2021. This is on top of a carbon border adjustment mechanism and an emissions trading system as part of the European Green Deal.

The Commission has written the FTT and CCCTB into the package, but with a much longer timeframe. Policymakers have until 2024 to come up with workable proposals and begin to implement them.

The full stimulus package comes with a price tag of €750 billion (\$910 billion) for the EU. The huge cost might push more governments to make concessions in exchange for relief, but it still will not be easy. Countries with low-tax regimes are expected to resist the attempts to forge a digital levy.

Regardless, Gentiloni has his eyes set on the technology sector. "The giants of the digital platforms are the real winners of this crisis, from the economical point of view," he says. "We all experience this in our own lives."

He has reiterated the need for a global solution, but stresses that the EU will have to implement a digital tax policy in the absence of such an agreement.

In the meantime, Gentiloni's team has come up with a separate package of proposals for how governments can raise more tax revenue. As part of this package, Gentiloni recommends expanding tax transparency in the single market by extending reporting rules (DAC7) to digital companies.

"It was high time we updated our tax rules to reflect the growing importance of digital platforms for the European economy," Gentiloni told the press in July 2020.

"Once the new rules discussed today are adopted and implemented, national authorities will automatically exchange information on the revenues generated by sellers on these platforms, and those sellers will benefit from simpler administrative procedures," he continued. "This is good news for the public purse and good news for honest entrepreneurs."

The past year saw Gentiloni keep the Commission's long-term fiscal aims on track despite the pandemic. These initiatives might be the way to fund the recovery, although the Commission will have to win a series of political battles in 2021 to secure them. ■

GTECS

Promoting a discussion on taxation of the digital economy in Latin America for better policymaking.

G *Grupo de Estudos da Tributação da Tecnologia* (GTECS) is a new-comer to *ITR's* Global Tax 50, having been founded in 2019. The group aims to influence tax legislators in Brazil and the wider Latin America (LatAm) region through discussions with all stakeholders.

"The asymmetry of knowledge between different participants in digital economy taxation is the main topic that we want to address," says Rodolfo Araujo, founder of GTECS and head of tax at iFood. "We want to have a better legislature that regulates our taxation."

The organisation has grown swiftly to include numerous tax directors from high-profile technology companies in Brazil and around the world, who are invested in changes to tax policy. GTECS has around 50 active members from nearly all the leading technology companies, offering both local and global insight into the obstacles to digital taxation. Putting this together and streamlining the process has been a key challenge for the organisation in 2020.

Discussions on the taxation of the digital economy only grow hotter while the OECD continues its efforts to find a multilateral solution and GTECS has an increasingly important role in enabling those conversations.

Working alongside other participants in the digital tax debate, GTECS wants to contribute to the improvement of tax legislation, seeking justice, simplicity, neutrality, efficiency, rationality and harmony with the tax rules applicable to the technology sector worldwide.

"We intend to make taxation of the digital economy simpler to understand for regular people and people who work with tax," says Araujo. "As well as taking into account the global discussion and what is applicable to Brazil, as we have a peculiar tax system."

Pre-COVID, this was achieved through monthly meetings between tax directors and external guests to discuss issues in digital taxation. In 2020, these were adjusted to virtual meetings to comply with physical pandemic restrictions.

Feedback from the meetings has highlighted that the manner in which GTECS discussed topics helped stakeholders understand these complex tax issues – often misunderstood by mainstream media and politicians.

In 2021, GTECS will focus on potential tax reform in Brazil, ahead of expectations that a comprehensive overhaul of the country's tax system will pick up pace. Consequently, one of the key challenges for the new year will be staying informed on changes and proposals in



the reform. "We expect that in 2021 this will be one of the main subjects in Brazil," says Araujo. "We expect to have a relevant role in this, discussing this and any digital taxation proposals."

Additionally, the group will need to anticipate how to explain difficulties around different forecasts or proposals regarding the taxation of the digital economy.

GTECS' role will only become more important as unilateral digital tax measures arise from a need to strengthen tax revenue collection. The LatAm region is moving quickly on taxation of the digital economy and communication between all local stakeholders will be necessary for an effective solution. ■

Bob Hamilton

Chair of the OECD's Forum on Tax Administration

Bob Hamilton makes *ITR's* Global Tax 50 for his first year of work as chair of the OECD's Forum on Tax Administration (FTA) since being appointed in August 2020, as well as his leadership of the Canada Revenue Agency (CRA) and services on the board of Tax Inspectors Without Borders (TIWB) during the pandemic.

Like many others, Hamilton spent much of 2020 managing the fallout from the COVID-19 health crisis. As commissioner of the CRA, Hamilton led the organisation as it moved online and pivoted to support Canadian taxpayers by postponing deadlines, minimising audits and

issuing government support through tax breaks.

Meanwhile, the pandemic presented unique problems for TIWB, a joint OECD-UN initiative that supports developing countries to create strong tax systems. In 2020, TIWB was forced to complete its work, usually conducted face-to-face, *in absentia*.

As if that wasn't enough for one person, Hamilton also became Chair of the FTA in 2020. The forum brings together commissioners from 53 tax administrations worldwide, who work to reduce the burden on taxpayers while improving tax compliance and certainty.

Despite these demands on his time, Hamilton is pleased with the way that tax organisations have handled 2020. "This is an exciting time to work in tax, and I enjoy what I do," he tells *ITR*.

Shifting the focus online

Hamilton had been commissioner at the CRA for three and a half years when COVID-19 hit and forced the revenue authority to quickly change focus, rolling out emergency relief programmes to help Canadian businesses and citizens survive the pandemic. Hamilton describes this as focusing "less on collections and enforcement, and more on providing benefits and services to taxpayers".

While this supportive role strengthened the relationship between the CRA and its taxpayers, Hamilton notes that it is "up to tax administrations to retain this goodwill moving forward" in the aftermath of COVID-19.

With governments facing large financial deficits, the commissioner – like others –

believes the tax system will be used to recoup the costs of the crisis. “Government and taxpayer expectations will have to be managed as some benefits that were implemented during COVID-19 come to an end,” he warns.

Meanwhile, tax authorities will face a backlog of cases that were put on hold during the pandemic. “I anticipate that 2021 must see a return to more regular audit, investigation, collection and enforcement activity by tax administrations,” says Hamilton. However, the commissioner is quick to point out that “a return to ‘normal’ does not mean simply a return to the same old way of doing things”.

The abrupt shift to operating online in the spring of 2020 must have created some difficulties for the CRA, but Hamilton points out that remote working also precipitated a rise in “new measures that we previously considered unsecure, impractical, or legally difficult” such as the use of digital signatures. Ultimately, the commissioner is optimistic that continued digitalisation will reduce the burden on taxpayers and improve compliance.

Emerging from the shadow of COVID-19

An interest in digitalisation also permeates Hamilton’s position at the FTA, where he

expects 2021 to yield “an increase in the pace of FTA work on the future of tax administration”. Here, too, Hamilton is optimistic about the opportunities that technology brings.

The FTA’s first virtual plenary meeting under Hamilton’s leadership was held in December 2020, and Hamilton says its online format allowed the organisers to “go beyond the scope of a mere two-day plenary session”. Importantly, the format allowed for a series of smaller meetings, which encouraged groups of commissioners to discuss important topics in more depth.

Another focus for the FTA will be shifting its COVID-19 response away from initial emergency measures and towards supporting tax administrations to provide long-term economic stimulus for countries. Hamilton suggests that an FTA examination of how revenue authorities responded to COVID-19 will be valuable as a “model for managing future crises”.

Tax and international development

Meanwhile, the shift online represented a significant threat to Hamilton’s work with TIWB and the international development community, which relies heavily

on experienced tax professionals traveling to meet their counterparts in developing countries.

However, Hamilton says that TIWB proved “remarkably resilient” in 2020 and even suggests that it may have benefitted from the uptick in the use of online communication technology.

“The effective use of virtual technology broadens the scope of TIWB missions by permitting more frequent engagement, by a greater number of technical experts, at significantly reduced cost,” says Hamilton, who represents the FTA on the board of TIWB.

The efficiency of the internet is particularly valuable at a time when developed tax jurisdictions, like some FTA members, are dealing with domestic problems and are less able to offer support externally. Online resources will also be useful for managing what Hamilton predicts will be an increase in demand from developing countries, not only in the field of auditing but in emerging areas of work for TIWB such as tax crime and the automatic exchange of information (AEOI).

Looking forward, Hamilton believes that the inclusivity of international tax discussions must continue to improve, for the sake of mature tax administrations as much as developing ones.

“The FTA only represents 53 countries from around the world, whereas for international tax standards to be truly effective, they must be implemented on a global scale,” he says. “Ultimately, the work of TIWB benefits us all.”

However, Hamilton is keen to point out that the FTA’s work in assisting developing countries to build tax collecting and enforcement capacity. One such example is the FTA Capacity Building Network (CBN), which coordinates assistance from FTA members and international organisations.

Looking forward

For 2021, Hamilton is optimistic that the disruption caused by COVID-19 offers an “invaluable opportunity to fundamentally redefine the way in which tax administrations operate”. Maintaining trust between the CRA and Canadian taxpayers is high on the commissioner’s list of priorities, as is tax and development work with TIWB.

Meanwhile, the FTA will continue to work on helping to build global tax capacity, using technology to “permit types of collaboration that might not otherwise be possible”. The FTA will also monitor OECD progress towards a digital tax solution, which has a deadline of mid-2021 but may be extended once again.

“All things considered, I anticipate a very busy year in 2021,” says Hamilton, and it is hard to see how he could be wrong. ■



Hamilton is interested in the opportunities that digitalisation will offer after the pandemic

India's Income Tax Department

The India Income Tax Department faces numerous hurdles to overcome in 2021 after a turbulent year

Taxpayers will be keeping an eye on India's approach to a number of international tax initiatives and how it amends domestic policies to promote foreign direct investment (FDI) and build a business-friendly tax environment.

Like all revenue authorities dealing with the economic impact of the COVID-19 pandemic, India will be looking for additional tax revenue over the coming year, but it does have to repair its reputation among the international tax community as it implements measures. It also has the added pressures of dealing with multiple trade matters and ensuring it does not lose its negotiating position in talks about the digital tax reform.

Not only is India one of the most litigious countries worldwide, and a complex country for gaining tax certainty, there appears to be little faith in Finance Minister Nirmala Sitharaman's abilities to manage the country's economy. Despite having degrees in economics, she has often been described as not having the same abilities as her predecessors to steer the country towards economic stability.

Over the coming year, her capabilities will be extensively tested as she has to deliver an economic package that boosts consumer spending and business investment, improves the real estate sector, creates jobs, and manages national debt while raising spending but not inflation.

In a normal year this would be a challenge, but a post-COVID environment makes this quite a feat, all while ensuring the tax system is fit for purpose and aligns with international tax principles.

The woes of Vodafone, Cairn, and Mastercard

The tax department had an important opportunity to repair its reputational damage by accepting defeat in the *Vodafone* case, but it has chosen to fight on. This will be significantly damaging to its pro-business agenda, which involves moving up the World Bank's Ease of Doing Business rankings from 63 to 50th place.

Although the Indian government has implemented a number of reforms to aid its ranking position, the double loss at the Permanent Court of Arbitration in The Hague in the cases of *Vodafone* and *Cairn* in 2020 have not helped matters.

The revenue authority was told that it cannot apply taxation retrospectively. It could have decided to end the decade-long *Vodafone* case at this point and rectify

domestic law – as recommended by two expert committees and India's Supreme Court – but it has chosen to continue the *Vodafone* saga by appealing the case to a High Court in Singapore. A similar fate may await the *Cairn* case too.

Although the arbitration court's decisions offered a momentary glimmer of hope for businesses considering business opportunities in India, companies may continue to avoid Indian investments in favour of other Asian countries until there is certainty and a change in domestic law that ensures fairer taxation.

Another case that is pending appeal concerns Tiger Global. The Indian Authority for Advanced Rulings (AAR) rejected Tiger Global's plea for a withholding tax exemption on the sale of its stake in Flipkart Singapore to Walmart, but the company is reportedly preparing to appeal.

The issues have not been helped by a myriad of other cases that will likely deter businesses in 2021.

However, the end of the *Samsung Heavy Industries* case in July 2020 was welcomed, although the permanent establishment (PE) rule for preparatory and auxiliary activities remains contentious. This *Samsung* may case help foreign companies doing business in India, but they should keep an eye on a pending *Mastercard* case that will determine whether the company has a PE in India and decide if the financial services corporation has to pay India's controversial equalisation levy.

Faceless assessments

In one of the positive changes made by the Income Tax Department, faceless

assessments, appeals and penalties are eliminating the culture of bribery across the tax authority and making tax audits fairer, although adding to the workload of many tax directors.

"A common perception is that litigation in India involves a cumbersome and long-drawn-out process, but the government is trying profusely to change that image," explain Sandeep Bhalla and Ashish Agrawal of Dhruva Advisors. "Both taxpayers as well as the revenue authorities will have to work in synchrony, and the mutual co-operation between them will be of paramount importance to making the scheme successful."

The initiative was accelerated by COVID-19 to eliminate the physical interface between the taxpayer and the revenue authorities.

However, early teething problems have emerged that will need to be resolved. For example, Bhalla and Agrawal explain that where taxpayers were previously able to eloquently demonstrate their tax obligations and payments in person, tax directors will now have to resolve doubts and ensure clarity through "extensive and time-bound written submissions".

"The need for robust paperwork will now be more important than ever," they wrote in an *ITR* article.

In addition, tax directors agree that faceless e-assessments are creating a communication gap, which could see the number of court cases rise. One issue is that the assessing officer, who may be from a different state to the taxpayer, may not understand the business, state tax rules or the specific tax matter being assessed.

Nevertheless, taxpayers are optimistic that, with time, the process of faceless e-assessments will improve.

In the meantime, MNEs must work within the system, respond quickly to requests and plan for a sensible outcome from their anonymous assessing officer.



Tax directors should take the time to set up efficient systems for answering queries.

Vivad se vishwas

In another initiative that is attempting to improve litigation in India is the vivad se vishwas scheme.

The Indian government implemented the vivad se vishwas scheme in early 2020 to settle cases pending at various levels of litigation across direct tax matters by allowing corporates to pay their disputed tax bill with the penalties and interest waived. Cases settled under this scheme cannot be reopened under any law. The success of sabka vishwas, a similar scheme for indirect tax matters, led the government to expand the dispute resolution process to direct tax cases as well.

The scheme is applicable to all the appeals filed by taxpayers or the income tax department and pending in the judiciary system, including Commissioner of Income-tax, Income-tax Appellate Tribunal, the high courts, and Supreme Court.

Business participation has been mixed as tax directors support the scheme but face budget, time, and other resource constraints that limit participation under the deadlines. Clarifications issued in December 2020 by the Central Board of Direct Taxes (CBDT) to make the scheme more accessible and transparent have helped but the deadlines are still a struggle. However, the rising corporate cost to continue Indian tax disputes for years may incentivise further participation.

APAs and MAPs

While the government's efforts to rid itself of its litigious reputation are commendable, there is still a lot of work to be done on dispute prevention.

If India wants to make dispute management easier for taxpayers and compete with China, Indonesia and Vietnam for FDI, it will need to work on its advance pricing agreement (APA) programme, improve mutual agreement procedures (MAPs) and offer effective arbitration solutions.

There are three key challenges for the APA programme: one is the rigid negotiating process, second is the lack of support and third is the disadvantage of a unilateral model. The programme allows for bilateral APAs, but these agreements are not as common. Although some changes were introduced in 2020, the work is incomplete.

Nevertheless, Suchint Majmudar, advisor to NASSCOM and partner at Deloitte Haskins & Sells, said the APA programme has been progressing well.

"The MAP experience has also been good, but limited to eliminating double taxation. Businesses require a constructive approach," he said at the OECD January

Sri Mulyani Indrawati

Minister of Finance of the Republic of Indonesia

Sri Mulyani Indrawati has led the Ministry of Finance in Indonesia since 2016. She won her spot in this year's Global Tax 50 for introducing a digital levy in 2020 to protect its tax base, but which may dampen investment and trade in Southeast Asia's largest economy.

The digital economy is increasingly intertwined with the traditional economy in Indonesia, and advisors say attempts to segregate the two for tax purposes, whether direct or indirect, is highly complicated.

However, the Ministry of Finance started with a 10% VAT on digital products and services from internet-based firms under Article 6 of Emergency Bill GR 1/2020 that was approved on May 18 2020 to address lower government revenues during the COVID-19 pandemic. The bill also introduced income tax liabilities on businesses with a significant presence in the country based on consolidated gross turnover of group sales and total active users on platforms in Indonesia.

Asia-based advisors expect Indonesia will grow into one of the world's largest digital economies surpassing Canada

and most EU countries in the next decade, but its path is complicated by corporate tax concerns around over-regulation and disputes. Additionally, rising trade tensions stemming from unilateral measures such as the digital tax will only add to uncertainties.

Many countries with unilateral digital levies, including Indonesia, have agreed to avoid tax collections in 2020 while the OECD works on a multilateral approach to taxation in the digital economy. However, Indrawati confirmed that Indonesia will continue taxing digital companies on the income they generate from the country if the OECD fails to reach a consensus on a multilateral solution to address cross-border tensions by mid-2021.

"Of course we hope for a global taxation agreement, it would be so much better as it gives certainty," said Indrawati. "But it does not mean we cannot collect the taxes. The difference is we will not be doing something that is based on a formula advocated by the OECD," she explained.

Indrawati has been active in recent discussions with the Inclusive Framework, including the meeting between finance

2021 consultation meeting. "The objective is to attain certainty for businesses on where they pay taxes and how much."

E-invoicing and anti-profiteering

On indirect tax matters, a lot has changed since the goods and services tax (GST) regime was introduced in 2017, but more still needs to be done.

An area of contention is the country's anti-profiteering rules. Indian multinational enterprises (MNEs) claim that GST legislation to prevent profiteering from rate changes is unreasonable and leads to unnecessary litigation.

The legislation prescribes that any benefit arising out of change in tax rate and incremental tax credit after the introduction of GST would need to be passed on to the consumers. The law does not provide a specific methodology as to how to calculate the benefit from rate changes, or whether the benefit should be considered at the broader company level or for each individual product.

"The general feeling in the industry is that this provision is too arbitrary and

harsh," says an indirect tax director at a multinational manufacturing conglomerate.

The issue has led to numerous investigations against companies believed to have illegally profited from the GST. Most recently, Procter & Gamble (P&G) was fined INR 2.41 billion (\$32.7 million). Other major companies include Hindustan Unilever, McDonald's, Starbucks, Phillips, Whirlpool, Samsonite, Reckitt Benckiser, Samsung, and Nestle.

Over the coming year, the matter will be reviewed by the Delhi High Court to determine whether the anti-profiteering rules are constitutional or not after 50 companies filed petitions arguing that the measure goes against the Indian Constitution.

Meanwhile, in more positive news, India's digital transformation continues with the introduction of e-invoicing. COVID-19 delayed the full roll-out of the initiative in 2020, which was introduced to combat tax fraud. However, as the first phase only targets large companies, many tax directors argue that its objective is not being achieved.

ministers and the OECD on January 27 2021 about taxing the digital economy. However, many taxpayers do not think the OECD will find a consensus on its solution if the US delays its input under a tight deadline.

While negotiations with the OECD continue, the US Trade Representative (USTR) has launched an investigation into the Indonesian digital services tax and shared its concerns about possible discrimination against US businesses. The USTR also noted inconsistencies between the tax and international tax principles on permanent establishments and extraterritoriality.

The digital tax has drawn corporate criticism too, but other measures under Indrawati's emergency stimulus in 2020 such as tax cashbacks have been welcome state aid responses for taxpayers.

"Even though the conditions in 2020 are heavily influenced by COVID-19, we see signs of recovery in various ways," said Indrawati about the business outlook in Indonesia over the coming months.

She has led the Indonesian government's swift response to deliver incentives to ensure a strong business environment with plenty of legal advisors and tax practitioners, especially as tax authorities also increase the number of audits, particularly desk-based audits. Advisors tell *ITR* that more tax disputes are coming from tax assessment notices with sanctions on any underpaid taxes.

The revenue authority will have to roll out this measure to a larger group of taxpayers if it hopes to effectively combat fraud at a time when it is seeking more tax revenues to manage costs created by the pandemic.

DSTs and tariffs remain a worry

In the international tax arena, India's version of a digital services tax (DST), the equalisation levy, could cause numerous problems for businesses operating cross-border or with global supply chains.

The 2% equalisation levy on the e-commerce supply of goods or services, was expanded to include non-resident companies in 2020 that took the Indian industry by surprise during the difficult times of a global pandemic.

Given the stated policy of the Indian government to adopt a non-adversarial tax regime and a more proactive approach to clarify issues associated with various tax levies like the GST to bring certainty, this was an unexpected change that has affected tax compliance.

It may also get tougher for taxpayers as



Source: Patrick Tsui/FCO

"The tax reform agenda should be strengthened and continued, particularly by expanding the tax base," said Indrawati. She recently also helped oversee improvements to the central tax accounting system such as adding real-time reporting capabilities in July 2020 after the Supreme Audit Agency discovered irregularities in corporate reporting.

Earlier in her career, she was the managing director and chief operating officer at the World Bank, where she was

responsible for global operations. Her experience inspires confidence in Indonesia's business environment, despite the rise in audits coupled with tax breaks focused on cash savings.

Indrawati will continue to support large businesses in growing their operational investment in the region, but balancing those corporate expectations may be challenging as she is also determined to protect the tax base in the near-term and improve local compliance and audit activity. ■

the Indian government is considering a new version of this levy, according to comments made at the OECD consultation on pillar one in January 2021.

Making the situation worse is the risk of tariffs that could be imposed by the US in 2021 after the United States Trade Representative (USTR) said on January 6 2021 that India's DST discriminated against US businesses.

US tariffs on Indian imports will not happen until the USTR has concluded all its Section 301 investigations into DSTs and decided on its action, but this is just one element that is impacting tax, trade and investment involving India.

Changes to customs measures and amendments to the Customs Act during a pandemic year have not helped companies operating in India. The situation may not get any easier as trade tensions mount around the world.

For example, Australia, India, Japan and the US have increased their strategic cooperation through the Quadrilateral Security Dialogue (Quad), potentially raising trade tensions with China in the

Indo-Pacific region. Add to this the DST retaliations from the US and international business could get difficult.

Nevertheless, there could be a silver lining through multilateral efforts. If the OECD is able to agree on a digital tax framework in 2021 and the UN implements its proposed Article 12B in the Model Tax Convention, global relations involving India could improve. Progress at the OECD and the UN could also mean the US retreats on the threat of tariffs.

This may ease the anxiety among businesses and facilitate the government's ease of doing business agenda, but it will not solve them. The long-term impact of the COVID-19 global pandemic means the department needs to mop-up government revenues to overcome the economic downturn, while attracting FDI and soothing trade tensions.

Finance Minister Nirmala Sitharaman and the leadership at the Indian Tax Department will have a difficult path to navigate. Let's hope this does not lead to punishing the taxpayer or the government's ease of doing business agenda. ■

The Joint Chiefs of Global Tax Enforcement

A group of five revenue authorities committed to tackling transnational tax crime

The Joint Chiefs of Global Tax Enforcement, known as the J5, is expanding its work in 2021 to uncover more professional enablers of tax fraud and investigate crypto-assets after its success over the past two years.

Unlike many other governmental groups focused on tax policy and debate, the J5 sets itself apart with a focus on operational success by actively solving problems and pursuing criminal tax investigations.

Since its launch in 2018, the tax authorities of the UK, Australia, Canada, the Netherlands, and the US have come together to work on various “challenges” to solve problems, sort through data, yield dozens of new leads to follow-up and begin investigations. This concept is a big part of the J5’s long-term success.

For example, ‘challenges’ set by the J5 held in the Netherlands and the US have focused on professional enablers of tax evasion and tax and money laundering investigations involving cryptocurrency. Members of each country were put into teams and tasked with generating leads and identifying non-compliance using various ways to sort through and manipulate data.

“These events brought together criminal investigators, cryptocurrency experts, and data scientists from each J5 country, with the mission of optimising data from a variety of open and investigative sources available to each country, including offshore account information,” Jim Lee, US chief to the J5 and chief of the US Internal Revenue Service (IRS) criminal investigation department, tells *ITR*.

Over the coming year, the organisation will be improving its data and technological capabilities in a way that maximises the potential of shared tax information. In addition to expanding its work streams dedicated to tackling professional enablers on tax evasion and money laundering and improving data and technological capabilities, the J5 expects cryptocurrency tax crimes to grow in importance and focus.

“We’ve seen crypto-crimes move from just money laundering to pure tax crimes,” says Lee. “I expect this area of non-compli-

ance to increase for quite a few years to come, but as law enforcement, our job is to address this issue while also keeping an eye on the next evolving trend of non-compliance.”

Building on 2020 achievements

The first significant operational activity for the J5 occurred on January 23 2020, when it carried out a globally coordinated enforcement in the five participating countries. The work was part of a series of investigations into an international financial institution in Central America whose products and services were believed to be facilitating money laundering and tax evasion for customers across the globe, using the institution’s sophisticated system.

“This operation involved gathering evidence and intelligence and executing search warrants, interviews and subpoenas,” Lee tells *ITR*. “That investigation is ongoing.”

Initial results of these efforts emerged in October 2020, when news broke of Westpac Banking Corporation, the Perth Mint and individual taxpayers being caught up in the global tax evasion probe.

The J5 investigation into Puerto Rico’s Euro Pacific Bank showed it had connections to some of Australia’s biggest financial institutions, according to news reports. Euro Pacific, owned by US financier Peter Schiff, was suspected of being used by Australian and international organised crime syndicates to launder money and evade tax.

Schiff and Euro Pacific have denied any wrongdoing, but it was not the first time Westpac had been caught on the wrong side of the law, after being fined for breaching money laundering laws in an Australian Federal Court case that ended on October 21 2020.

J5’s two-year anniversary also brought the reward of the first guilty plea in one of its cases. In July 2020, a Romanian man was arrested in Germany and admitted to conspiring to engage in wire fraud and offering and selling unregistered securities in connection with his role in the BitClub Network, a cryptocurrency mining scheme worth at



Jim Lee



least \$722 million. This guilty plea stemmed from one of the ‘challenges’ undertaken by the organisation in Los Angeles in 2019.

“To see real results in a court of law just two years after the inception of the J5 was a watershed moment for this group,” says Lee.

“While we are starting to see real enforcement actions around the world and even our first pleas, it is important to remember that this group is still in its infancy. A typical tax investigation can take 2-3 years to complete. We continue to learn from international best practices to find ways to share and analyse information more efficiently within existing laws and regulations.”

Nevertheless, the group’s work has led to numerous convictions across the five countries. In the US, for example, the CEO of a multibillion-dollar software company was indicted for decades-long tax evasion and wire fraud schemes.

In other cases, a former US attorney pleaded guilty to tax fraud charges, and a South Korean national, as well as hundreds of other offenders, were charged with operating the largest darknet child pornography website, which was funded through Bitcoin.

Uncovering privacy

One of the biggest challenges the J5 faces in its investigations is getting to the real activities. “The J5 is a group that is focused on global tax cheats and anytime you deal with tax information, you add a layer of complexity and privacy to the information involved in an investigation,” explains Lee.

“Add to that the different laws and regulations that govern the international sharing of information and the task can be so daunting that many before us have not pursued the types of relationships and investigations that we do,” he adds.

Nevertheless, the group has found a few best practices that have helped it navigate these difficulties. Containing only five member jurisdictions allows the organisation to be “nimble” and “agile”, according to Lee.

Although the J5 will not expand to include other jurisdictions in its membership just yet, it is working closely with the

OECD and non-affiliated countries to share best practices.

“We’ve learned that if we individually focus on person X or company Y at the start of an investigation, rather than concurrently looking at a particular phenomenon or dataset, the mindset makes international cooperation somewhat easier and clearer,” says Lee. “We have gotten so good at sharing information that more information was shared between this group in our first year than in the previous 10 combined.”

He adds: “We are improving our knowledge about international cybercrime, the use of cryptocurrencies and the enablers of tax crime and use this knowledge to take effective action to disrupt these criminal attacks on global financial systems. The number of active cases the J5 has in the pipeline is impressive and I expect that you will see significant enforcement actions around the world in 2021.”

Growing in 2021

The J5 has grown its understanding exponentially in areas such as how professional enablers facilitate tax evasion and the ways in which cryptocurrencies are used to hide assets. It has learnt how to unravel complex webs of data to uncover very large sums of money, establishing a good foundation for its work ahead.

“I expect we will see a year of unprecedented action from the J5 this year,” says Lee. “With the number of cases in the pipeline in both the professional enablers and the cryptocurrency areas of focus, I expect more days of action are in the near future, public charges are imminent, and continued success from this innovative group.”

However, the J5 has not escaped the impact of the COVID-19 pandemic. “The lingering effects of the global COVID-19 pandemic will continue to challenge law enforcement around the world,” says Lee.

“Everything from interviewing witnesses to travelling internationally to reviewing records are impacted by this pandemic,” he continues. “While we have done a phenomenal job as an organisation adjusting to these new realities, continuing to push the envelope with this innovative group will be the challenge we all must overcome.”

Nevertheless, regular exchanges and the trust among the teams of experts that make up the J5 has created a unique group of innovators for the revenue authorities. As criminals continue to change their tactics, Lee says the organisation must be at the cutting edge of technology to adapt and stop them in their tracks.

No doubt the J5’s work will only become more important in a post-COVID world as governments try to capture more revenue and tackle the growing popularity of cyber tax crimes. ■

Bruno Le Maire

Minister of Finance of France

France’s finance minister is spearheading digital taxation measures against multinationals and 2021 is set to be an important year for Bruno Le Maire ahead of the 2022 elections.

Bruno Le Maire has been vocal in his support for digital taxes and has challenged the US throughout the negotiations being held at the OECD over how to tax the digitalisation of the economy. Le Maire features once again in *ITR*’s Global Tax 50 for his impact on the work on pillar one, international trade and for standing firm on French tax policies as impatient countries take unilateral action, despite the backlash from the US.

At the beginning of 2020, sideline talks at the World Economic Forum between Le Maire and former US Treasury Secretary Steven Mnuchin led to a temporary agreement. The US pledged that it would suspend tariffs of \$2.4 billion on French goods and France agreed that it would stop collecting its digital services tax (DST).

Shortly after this, Le Maire noted that talks with the US on the taxation of digital companies “remained difficult” despite the agreement between the two countries to avoid a trade war until at least the end of 2020.

Then, COVID-19 spread to Europe, prompting France to introduce relief measures for businesses to ease the compliance burden. These included postponing, without penalty, payments of direct taxes due in March, April, May and June 2020. This applied to corporate income tax (CIT) and payroll taxes, but not to indirect taxes, the withholding of employees’ personal income tax levied by employers, or social solidarity contributions.

In return, France demanded that “large companies” must not distribute dividends in 2020 and must not be established in a non-cooperative state or territory in tax matters. Additionally, Le Maire declared in April that France would not provide emergency cash injections to businesses based in tax havens.

“If your headquarters is located in a tax haven, it is obvious that you will not be able to benefit from public aid,” Le Maire said on France Info radio. “If you have benefited from the state’s cash flow, you cannot pay dividends and you cannot buy back shares.”

France’s list of tax havens included Anguilla, the Bahamas, Fiji, Guam, US Virgin Islands, British Virgin Islands, Oman, Panama, American Samoa, Samoa, Seychelles, Trinidad and Tobago, and



Source: Bruno Le Maire/Flickr

Vanuatu. However, other tax favourable jurisdictions such as the Netherlands, Luxembourg or Malta were not included, adding to discussions over using the EU blacklist as a benchmark for tax policy, which is often criticised for not including low tax jurisdictions in the EU itself.

Le Maire’s focus quickly turned back to digital taxation as he urged the European Union to introduce a bloc-wide DST in case OECD discussions were to fail in 2021, while also confirming that France would restart levying its DST from mid-December 2020.

This statement came at the G20 summit in October 2020, after the US paused negotiations to focus on the pandemic and the presidential election in November. Le Maire acknowledged that the outcome of the US election, even if it resulted in a Joe Biden victory, would be unlikely to change the US position, although he noted that a new government might take a softer stance on trade disputes.

“Either one accepts an extension again for months, maybe years, or one considers that fair taxes on digital activities are urgent and in this case Europe sets the example,” said Le Maire. “We consider it indispensable that Europe sets an example and adopts digital taxation as soon as possible.”

His criticism of the US position risks inflaming trade disputes between the US and France, but also with the wider European bloc. The transatlantic relationship remains tense after a number of disagreements.

In early December 2020, Le Maire also pressured French insurers to commit to freezing premiums in 2021 on companies in sectors hardest hit by the pandemic. He threatened insurers with a €1.2 billion (\$1.45 billion) tax if they did not keep premium increases on hold in 2021.

2020 was a busy year for Le Maire and 2021 may prove the most important yet in his tenure. His actions on a national scale will have international consequences, potentially good and bad. With the French presidential elections looming in 2022, the year ahead will be crucial for the finance minister. ■

The Libor transition

The rise of alternative rates with transfer pricing implications

The London inter-bank offered rate (Libor) is due to disappear at the end of 2021. This might not matter if Libor were not the key reference rate in capital markets, underpinning approximately \$400 trillion of financial contracts worldwide.

The end of Libor will have far-reaching implications for transfer pricing (TP) arrangements around the world. All future inter-company loans will need to be pegged to a new rate. There are still many agreements that will outlive Libor where fall-back options will come into play. But there is a problem with the fall-back clauses.

Financial centres around the world have been trying to identify and switch to alternative risk-free rates (RFRs) for the eventual end of Libor and its equivalents. The different rates include:

- The secured overnight financing rate (SOFR) in the US;

- Sterling overnight index average (Sonia) in the UK;
- The Swiss average rate overnight (Saron) in Switzerland;
- The Tokyo overnight average rate (Tonar) in Japan;
- The Singapore overnight rate average (SORA) in Singapore.

The UK is pushing ahead with plans to phase-out Libor before the end of 2021. In many ways, the UK is leading the way with its fast-tracked transition to Sonia. However, this is not the case everywhere.

The biggest financial market of all is stalling the transition. The US government announced a “reprieve” in December 2020. The planned transition to SOFR will not be complete until June 2023, which is 18 months later than planned.

“New contracts entered into before December 31 2021 should either utilise a reference rate other than Libor or have

robust fall-back language that includes a clearly defined alternative reference rate after Libor’s discontinuation,” wrote the Federal Board of Governors in a joint statement with the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

“These actions are necessary to facilitate an orderly – and safe and sound – Libor transition,” the agencies stressed in their joint statement.

All around the world businesses have been considering their options for replacement interest rates that cut through their TP structures. Many companies will have to change their documentation because of the rate change and sometimes with just one or two months’ notice. This means a lot of work for tax functions and their advisors.

There is still limited guidance, particularly in Asia, to explain how companies can manage the taxation and transfer pricing aspects of this transition.

Stan Hales and Ralf Heussner from Deloitte note that the ongoing COVID-19 pandemic, and the resulting market volatility and liquidity issues, has diverted attention from the IBOR transition.

Zayda Manatta

Head of the Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes

Zayda Manatta has had a tough first year as the head of the Global Forum, but she has not let COVID-19 deter her from what she wants to achieve for the international body of 161 member countries.

“In the past year, despite operational challenges caused by COVID-19, we have made further progress in pursuing the effective implementation of the exchange of information on request (EOIR) and automatic exchange of information (AEOI) standards,” Manatta tells *ITR*.

However, the pandemic remains a challenge in 2021 for the former IMF senior economist. “It manifests itself on many different levels and has to be managed accordingly,” she says. “We had to prove that we created a robust framework that can withstand global shocks and we did so.”

The Global Forum achieved a number of goals over the past year since Manatta



took the reins in October 2019, despite not being able to visit its member jurisdictions because of the pandemic-related restrictions on travel.

Over the past year the Global Forum has completed the peer reviews of AEOI legal frameworks put in place by 100 jurisdictions, as well as continued peer



Although regulators have acknowledged the challenges, there are no indications of any plans to delay the transition or upcoming deadlines, with the exception of the US.

The rise and fall of Libor

The UK launched Libor in January 1986 after two years of work by the British Bankers' Association (BBA). This was just in time for the 'Big Bang' when the rules of the London Stock Exchange were overhauled to allow a boom in trading.

More than 25 years later, the Libor scandal sent shockwaves around the world. It turned out that the rate was being manipulated. Some banks had been reporting artificially low or high interest rates to the benefit of their derivatives traders.

Several traders have acknowledged misreporting, including Douglas Keenan who claimed it was "common practice since at least 1991". The scandal spelled the end of Libor.

However, the 2012 scandal raised further questions about the financial sector. The BBA set up Libor as a self-reported

rate depending on the reliability of the rates reported by a small number of international banks such as Barclays Bank, Credit Suisse and JP Morgan Chase.

Some banks used Libor to make themselves appear stronger than they actually were by reporting fictitious rates, giving some financial institutions an edge during the financial crisis.

After the scandal, the UK government introduced laws to prosecute those who make false or misleading statements in regards to benchmark-setting. The Financial Conduct Authority (FCA) took over the responsibility for Libor from the BBA.

As the financial world moves on from Libor, the implications are starting to play out for businesses depending on the rates in TP planning. The fear is that the shift to alternative rates will see a fall in basis points, if not more volatile fluctuations in the future.

Since the financial crisis hit, Libor has been kept at a low but stable level but everything comes to an end eventually and markets are all about change. The ripple-effect is only just going to start in 2021 and it will continue for years to come. ■

reviews of the EOIR standard. During the pandemic, at least 75 Global Forum members reported introducing special measures to continue effective exchanges of information.

The organisation also developed innovative ways to deliver its technical support, build capacity on transparency and exchange of information, as well as maintaining strong engagement with member jurisdictions through digital platforms.

Some of its virtual training events have included more than 400 participants and the Global Forum intends to continue this momentum using an e-support system and numerous digital tools that will remain useful in post-pandemic interactions.

"Virtual trainings, e-learning, toolkits and remote assistance have been successfully used," says Manatta. "Nearly 70 jurisdictions benefitted from our support in 2020 and over 7,000 officials from practically all member jurisdictions were trained, almost exclusively remotely."

"We developed a capacity building strategy, which aims at formalising our approach to technical assistance and training, and so better communicating it internally and externally," she adds.

Being virtual over the past year also gave the Global Forum its biggest audience at the December 2020 annual plenary meeting.

"Despite a virtual format, over 800 participants from almost 140 jurisdictions, 11 international organisations and regional groups attended," says Manatta.

As with all organisations and institutions, however, the prolonged impact of the novel coronavirus remains a concern.

"Whilst in 2020 we were able to rely upon the relations created over the years, the lack of ability to meet in person for a long time has been a challenge and may have a more profound effect that we are yet to fully understand. For instance, if the pandemic does not allow us to visit some jurisdictions, it may be more difficult to build or sustain political support over time," says Manatta.

Although different modes of virtual meetings and interactions allowed the Global Forum to engage with its members, it cannot replace the importance of physical interactions. "Some of the understanding and friendship found in face-to-face meetings are more difficult to build in virtual meetings," says Manatta.

"For our peer review work, it will be a challenge of ensuring that the disruptive impact of the COVID-19 pandemic does not interfere with our ability to identify structural deficiencies in the regulatory and enforcement systems," she says about the year ahead. "I suspect it may be challenging to adjust to jurisdictions at different moments of the pandemic

and find the suitable ways of reconciling the differences, but I am confident we will find a solution."

Post-COVID opportunities

COVID-19 has created opportunities for the Global Forum, which Manatta believes will enable the organisation to "come out of this difficult period even stronger than before".

"With governments around the world having to address an acute need for additional revenues, the tolerance to tax evasion and avoidance is set to reach its lowest point in years," she says. "This creates a momentum for making further progress on transparency and exchange of information."

This demand may offer the trigger to rapid progress on information exchange and new initiatives to tackle abusive tax strategies.

One such area is beneficial ownership, described as a "hotspot" during round two of the EOIR peer reviews. A large number of jurisdictions are working on beneficial ownership recommendations made during the reviews, including both legal aspects and effectiveness in practice.

In 2022, the Global Forum will publish final results of the peer reviews and Manatta expects the availability of quality beneficial ownership information worldwide to have significantly improved by then.

More widely, Manatta stresses that it will be important to use the opportunities created by the pandemic wisely and ensure that cooperation meets the needs of tomorrow's world.

The Global Forum will be keeping implementation of the EOIR and AEOI at the top of its agenda in 2021, with implementation reviews taking place over the next two years. At the same time, the forum is developing proposals for the post-2022 peer review process, which aims to exploit the synergies between the EOIR and AEOI standards once a strategy has been agreed.

However, taxpayers also have an important role to play in this process to understand how the initiative operates.

"The OECD has created information channels to gather and improve intelligence on actual and perceived weaknesses of the AEOI standard. Interested persons who have identified potential shortcomings can report those to the OECD through the AEOI portal," explains Manatta.

"Such inputs are collected and carefully analysed to improve the operation of the AEOI standard in practice. Working together, we can ensure that the space for offshore tax evasion is diminishing and the tax burden is shared equitably," she stresses.

In addition to the peer review work, the Global Forum's capacity-building programme will reach its 10-year mark in 2021. This is a good time for the organisation to take stock of its achievements and reflect on the future.

"The main objective will be to improve the effectiveness of the support provided to members, taking into account their diversity and needs, resources available and the impact of actions on the ground," says Manatta.

There will be a stronger focus in the coming year on tax transparency in developing countries to support them in post-pandemic revenue mobilisation.

In addition, reviews of the effective implementation of the AEOI standard will be a key focus in 2021 and 2022, as well as taking a closer look at the remaining and new challenges to the implementation of the transparency and exchange of information standards through a task force.

Despite the barriers created by COVID-19, the pandemic has provided a trigger for a wider use of digital tools to drive tax transparency and information exchange. The Global Forum still has considerable work to do in these areas. The forum's work will remain important in the coming year as it guides governments into a more robust cooperative framework. ■

Maria Jesus Montero Cuadrado

Minister of Finance of Spain

Finance Minister Maria Jesus Montero Cuadrado is spearheading tax reforms in Spain that could lead to an EU-wide financial transactions tax (FTT) as governments search for ways to increase tax revenues.

Taxpayers and policymakers are monitoring Spain's digital services tax (DST) and FTT to see how it impacts the economy, businesses and investment. Montero secures a place in *ITR*'s Global Tax 50 for the work on these two measures, plus recent budget proposals that set the course for the post-pandemic recovery in 2021, as well as her pro-environment plans.

Legislation on the DST and FTT was published in the Official Gazette in October 2020 with effect from January 16 2021.

Spain joins France and Italy in FTT implementation

Although progress on an EU-wide FTT, often referred to as a 'Tobin tax', has been discussed for many years and some expected the German presidency of the EU Council to progress matters last year, the proposal has not moved forward. Without enhanced cooperation, Spain has decided to follow France and Italy to implement its own FTT, but at a rate of 0.2%.

The indirect tax is charged when shares are acquired in Spanish companies with market capitalisation of more than €1 billion (\$1.2 billion) and admitted to trade on the Spanish market, or on a regulated market of another EU member state or third country. The tax is also applicable when certain securities or depositary receipts are issued.

The FTT was implemented to raise revenue, but the market reaction to the FTT has been less than positive. US investment app Robinhood and other financial services companies have limited their services and trade of Spanish assets such as equities in Ferrovial, ACS Group, and Amadeus IT Group.

French and Spanish taxpayers have also raised concerns about FTTs limiting the free movement of capital in the EU. However, this concern was addressed by the Court of Justice of the European Union (CJEU) in case *C-565/18 Société Générale*.

Nevertheless, Sebastián Albella, president of the National Stock Market Commission CNMV in Spain, has said the FTT is harmful for the Spanish market, especially at a time of so much competition between different financial centres.



Source: Ministry of the Presidency, Government of Spain

If the Spanish FTT does manage to raise tax revenues to help fund COVID-19 spending, it may put pressure on other EU countries to introduce similar measures.

"All governments are desperate for revenue," says one head of tax at a UK bank. "With Spain joining France and Italy in imposing an FTT, more countries may follow."

Such a trend could also expedite EU-level efforts for a bloc-wide FTT that France and Germany continue to support. However, advisors fear that an EU-wide FTT could multiply the problems that exist under national levies, have negative effects on capital markets and introduce a variety of distortions into capital markets, including increased transaction costs, lower trading volumes, and lower asset prices.

"The difficulty is how to share the revenue because the transactions will be via London and Frankfurt," says one tax director at a European bank. "It's how you share that revenue with a country like Latvia for transactions that affect them too."

The Spanish economy will see slower growth in financial services compared to other major international capital markets because of the FTT, but this has not deterred it from introducing the tax.

The woes of the financial transactions and shipping sectors has also not been helped by the European General Court's September 23 2020 decision that found that the Spanish tax lease system amounted to illegal state aid. The court ruled in favour of the European Commission, deciding that the tax lease scheme was granting a 'selective advantage' to investors and economic interest groupings in the Spanish shipping industry.

Nevertheless, the government does recognise the burdens the FTT places and has delayed the payment and submission deadlines for 2021. FTT returns for January and February 2021 that were due by February 20 and March 20, respectively, have been delayed until April.

Companies are now required to submit the January and February returns with the March returns by April 20.

On the country's DST, similar filing deadlines have been offered. DST returns and payments for Q1 2021, which were due by April 30 2021, have been changed to July 31 2021 and have to be filed with the Q2 returns.

Spanish DST to raise consumer costs and stall investment

Spain is one of a number of countries across the EU to have implemented a DST. It joins France, Italy, Belgium, Austria and others that have introduced the unilateral measure as delays at the OECD on an international framework continue.

Similar to the FTT, businesses and tax professionals say that Spain's DST will make the country less competitive and could hinder future investment as well as increase litigation.

"The 'digital tax' will lead to a strong loss of competitiveness in Spanish companies, producing the fracture of the digital single market, the paralysis of investment in our country and the isolation of Spain from the global digital context," said the Spanish Digital Economy Association (Adigital) when the measure was approved by the Cabinet.

"MNEs are threatening with stopping investment in Spain. It's a relevant barrier in their business," said Diego de Miguel, head of tax at CMS Spain, and Ricardo Héctor, counsel at CMS Spain.

Although many companies have not pulled out of the Spanish market, prices charged on digital services have increased for consumers. For example, Amazon has increased the fees charged to Spanish Companies that use its platform because of the DST, which is something the online retailer is doing in a number of countries with a DST.

The DST also poses further risks to the Spanish economy if the US moves ahead with tariff sanctions. The Section 301 investigations being undertaken by the Office of the US Trade Representative (USTR) said in a report released on January 6 2021 that the DST is discriminatory against US businesses and inconsistent with principles of international taxation. Tariff sanctions may be imposed later in the year once all DST investigations are complete.

Montero, however, has not shied away from the revenue risks that both the FTT and DST could cause in their first year of operation. To counter this impact and address the economic realities of COVID-19, the 2021 national budget will offer some buffers.

Recovering from COVID-19

Montero has claimed that 2021 efforts will translate into an increase in tax collection through measures that support small and medium-sized enterprises (SMEs), support healthy living habits and develop green taxation policies.

The 2021 budget includes personal income tax increases that will affect 0.7% of taxpayers, a rise in the wealth tax rate, and a higher tax on income from capital and savings as recommended by the OECD. For companies, the 100% exemption on capital gains tax and dividends generated by subsidiaries will be reduced to 95%, affecting 1,730 companies.

In addition, sugary and sweetened drinks will be subject to VAT at a rate of 21%, although drinks served in bars and restaurants will be taxed at a lower rate of 10%. For the first time in more than 20 years, the tax rate on insurance premiums will rise from 6% to 8%.

On environmental taxation, the tax discount on diesel will be repealed, although the price per litre will remain lower than petrol, in a bid to "gradually bring these two hydrocarbons in line as a clear message that we want to change our consumer habits regarding the automotive sector, and focus this on more sustainable mobility". A tax on non-reusable plastic containers is also planned, although not included in the 2021 budget proposals.

"This is the budget the country needs at this exceptional time," Montero said when presenting the measures in October. "These measures, together with the fight against tax fraud, will lead to a rise in tax revenue of €4.22 billion, which will be essential to maintain the welfare state," Montero claimed.

Even after the economy recovers from the pandemic, Montero will not be taking a break. She has expressed the government's intention to address a far-reaching tax reform when the health crisis is over and there is economic stability. The changes will aim to align Spain's tax system with those of other EU member states and implement a digital transformation fit to serve the digitalisation of the economy.

Montero's plan for Spain should not be underestimated. If the DST and FTT become successful measures and her government is able to significantly increase tax revenues in 2021 in preparation for a wider tax reform, her measures will be followed by neighbouring countries. ■

Will Morris

Chairman of the BIAC tax and fiscal affairs committee

Will Morris has frequently been part of *ITR's* Global Tax 50, and this year is no exception. Influencing international corporate tax for many years, he is highly respected for being able to ensure the views of large businesses are listened to during the political and technical development of tax policies.

His latest contributions focus on the OECD's work on a multilateral two-pillar tax solution that can accommodate the limited treatment of intangible assets in a



Will Morris is chairman of the Business and Industry Advisory Committee (BIAC) to the OECD

growing digital economy, a landmark project that concludes in mid-July 2021.

“The amount of work that has gone into this is literally Herculean, but it is obviously also very difficult right now to predict how the project will go,” says Morris about the outlook of the OECD’s work. “Failure is a real possibility, and it will bring serious consequences. This is worth working for, because if you think it looks like winter in the international tax world right now, just wait.”

As PwC’s deputy global tax policy leader and chairman of the Business and Industry Advisory Committee (BIAC) to the OECD, Morris has been closely involved in helping guide and monitor the progress of the OECD’s BEPS agenda over the past few years. He continues to lead a strong lobbying force for the international business community in advocating for predictable, stable and transparent tax frameworks to eliminate double taxation and other barriers to cross-border trade and investment.

“This work will fundamentally reshape the international tax rules, and we [BIAC] are grateful that stakeholder engagement continues to be sought,” says Morris about the OECD’s digital tax agenda. He adds that businesses can keep their momentum by being constructively involved in the discussions and putting pressure on their own governments to “make it work”.

More than 137 countries may introduce these novel OECD tax rules to reallocate more corporate tax revenues to market jurisdictions if an agreement is reached by mid-July. Morris continues to influence the project by advocating for businesses to participate in its consultation phase and identify a variety of sector-specific concerns. His efforts may limit the compliance costs that can hinder business operations such as cloud-computing services that have rapidly grown amid remote working conditions during the COVID-19 pandemic.

His committee offers a balanced view on the technical and political elements of many international tax measures, and Morris continues to maintain a significant part of the business community’s voice in discussions on the OECD’s digital tax agenda.

Some of the most critical parts of pillar one and two that remain unsolved for Morris include questions around scope, segmentation, and the treatment of losses. There are also outstanding concerns over tax dispute resolution mechanisms, including whether the review and determination panels suggested under Amount A in pillar one will receive enough resourcing from tax authorities.

OECD Global Relations and Development Division

The OECD tax division for supporting developing countries

The OECD is often criticised for favouring developed economies, but the work of the OECD Global Relations and Development Division and the power of technology has created long-term changes.

This division has supported developing tax jurisdictions throughout 2020 to deal with the economic fallout of COVID-19. Meanwhile, the team capitalised on the benefits of technology to reach six times as many tax officials from the developing world as they do in an average year.

Another major focus has been involving developing countries in every part of the OECD’s tax work. “I can confidently say that at the end of 2020 there is no part of the substantive tax agenda where developing countries are not involved in some way,” says Ben Dickinson, head of the Global Relations and Development Division.

This is reflected in the division’s chosen name. Sometimes referred to as the ‘tax and development programme’, the team is moving away from this label to reflect the fact that developing countries are no longer siloed in a separate department but central to all of the OECD’s tax work.

Dickinson has now spent 10 years working on tax and development at the OECD and has seen an enormous amount of change in that time. An initial team of three employees has expanded to more than 40 people with Dickinson at the helm.

Varsha Singh, former deputy head of the Global Relations and Development Division at the OECD and now a senior advisor at the African Tax Administration Forum (ATAF), credits Dickinson with “bringing the tax and development communities together, battling some vested

interests against change in conservative quarters, raising the millions of dollars required to deliver the work and lobbying for the OECD to constantly take the needs of developing countries seriously”.

It seems to have paid off, as Dickinson has steered his team, and the countries it supports, through the COVID-19 crisis, improved outreach, and finally reached a position where he says the OECD’s tax work is fully inclusive.

Working under COVID-19

Unsurprisingly, the global pandemic features high on the list of difficulties that 2020 threw at Dickinson and his team. The first problem was trying to help developing countries deal with the health and economic impacts of the pandemic, and the team worked with regional tax organisations, like ATAF, to disseminate survey work in the form of policy dialogue and experience sharing.

The second problem was carrying out this additional supportive work under global travel restrictions. “Prior to the pandemic, our work depended on face-to-face meetings throughout the developing world,” says Dickinson. That had to change as everything went online.

However, Dickinson is positive about the consequences of working remotely. He says that the division’s capacity-building service managed to cover more than 30,000 tax officials from the developing world, compared to 5,000 in a typical year. Perhaps nobody could have predicted a benefit of this scale, but now that the opportunity has been highlighted there is no going back. Post-COVID, Dickinson believes the division will operate through a combination of face-to-face meetings and remote communication.

“The biggest problem with Amount A is the lack of a clearly articulated reason for reallocating income to market countries,” says Morris. “Amount A has become subject to significant horse trading without that principle.”

While the OECD digital tax plan is the topic of the year for Morris, he has also contributed to other key projects in 2020 that will continue in 2021, including

drafting business recommendations for COVID-19 tax adjustments and contributing to the advancement of tax dispute resolution mechanisms at the OECD.

Earlier in his career, Morris helped lead General Electric’s (GE) tax department, renowned in the industry as the “Harvard of tax departments” at that time in 2005, according to a profile published in the Financial Times. GE’s tax department was



In 2021, this OECD division will need to combat the longer-term consequences of COVID-19

Improving inclusivity at the OECD

Dickinson is rightly proud of the success his team has achieved in bringing developing countries into OECD tax discussions, despite the disruption caused by COVID-19.

“Even five years ago there were many topics where only OECD countries (or with a few other G20 countries) benefited,” says Dickinson. Efforts to improve the inclusivity of tax work have paid off, and the main tax bodies at the OECD now include some of the lowest-capacity countries in the world. For example, Dickinson points out that the Inclusive Framework on BEPS and the Global Forum on Tax Transparency now include more than 60 developing countries.

“Our aspiration to transform the OECD’s work on tax, covering a relatively narrow set of countries, now to a global approach... has truly materialised in 2020,” says Dickinson.

The division accomplished this via multiple avenues. One task was to unlock the experience of the developed OECD countries and enable developing countries to benefit from this, via schemes like Tax Inspectors Without Borders (TIWB). The division also worked to “include developing countries in empirical work that allows them to compare themselves to their peers”, says Dickinson. This includes reports like Revenue Statistics in Africa, which compiles information on sources of state revenue in 30 African countries.

Meanwhile, Dickinson notes that BEPS implementation among the countries he works with has been strong. The division has assisted more than 30 countries in making legislative changes, upgrading organisational practices and building skills.

Looking to 2021

As for 2021, Dickinson – like others – is invested in the OECD’s work on taxing the digital economy, led by the Director of the OECD’s Centre for Tax Policy and Administration Pascal Saint-Amans. Clarity on digital tax, even without a full agreement among countries, will inform the division as it investigates how developing countries can implement and benefit from the international tax rules.

However, there are questions about the inclusivity of the digital tax talks, with some suggesting a UN convention would more accurately represent developing countries’ interests.

Meanwhile, Dickinson thinks that the pandemic will precipitate changes in the focus of tax policy. “The COVID experience is squeezing fiscal space, putting a spotlight on relatively underutilised tax policy tools,” he says. Like Saint-Amans, Dickinson predicts an uptick in environmental taxes as international bodies look to finance the United Nations’ Sustainable Development Goals. For Dickinson, this will mean more work on carbon taxes and fossil fuel subsidies, two areas in which his team already sees demand for support from developing countries.

COVID-19 may be forever associated with the year 2020 but there remains a long way to go to get the pandemic under control, and tax work in 2021 will continue to feel its effects. For Dickinson, while remote working allowed his team to access a far larger pool of people, it also created difficulties that will continue this year.

“A big challenge is to sustain the momentum on tax cooperation for development without face-to-face contact, which we miss for some of the work that requires negotiations,” says Dickinson. “We will need to innovate and invest more in remote working tools, particularly when sharing confidential information.”

Dickinson will also focus on tax transparency in 2021. “After a decade of debate, the OECD donor countries have agreed to make the exemptions they claim on aid-funded goods and services fully public and transparent,” says the division head. The OECD will look to create a “transparency hub” to share this information publicly.

Against the odds, 2020 has been a successful year for the Global Relations and Development Division at the OECD. In 2021, the challenge will be working on the longer-term social and economic consequences of the COVID-19 pandemic, while continuing to push for developing countries to be represented at talks on the digital economy and environmental taxes. Lessons from 2020, such as the power of technology to improve outreach and efficiency, are likely to come in very useful. ■

later integrated with PwC in 2017 in the first deal of its kind to last five years. He has even received an award from UK tax authority, HM Revenue and Customs, for informing the public debate on large business and tax and condemning tax evasion and abusive tax arrangements with no commercial purpose.

As a former in-house tax director at GE, Morris has insights into the chal-

lenges business leaders face in planning for the international tax changes to come. He has encouraged businesses to stay active in international discussions in 2019 and 2020 by highlighting potential risks to them in the OECD’s work on its digital tax agenda and COVID-19 response.

He has been closely involved in all aspects of the BEPS project, including follow-up and implementation, participating in public

consultations, coordinating and filing comments on behalf of businesses, and meeting with many formal and informal OECD groups, as well as national governments. Morris plans to continue in that capacity in 2021 as the final stages in producing a multilateral tax solution for the digital economy take place at the OECD. His influence will remain important to ensure the concerns of businesses are not ignored. ■

Oil price shock

The sudden collapse of oil prices impacting the 'race to the bottom' on corporate tax rates



The 2020 oil price collapse may be a catalyst for long-term tax policy changes as governments seek to recuperate from the fiscal impact.

US oil producers faced an unprecedented crisis in April 2020 when the value of crude oil was suddenly less than zero. Producers were forced to pay customers to take away barrels of oil to avoid running out of storage space.

Worse still, the oil price collapse generated more pressure to reverse the so-called 'race to the bottom' in corporate tax rates worldwide. Not just because oil is such a lucrative source of tax revenue in itself, but because it is fundamental to the global economy. This happened at the same time as the coronavirus was spreading across the world.

All of this created a fiscal problem for governments that have depended on lowering taxes to drive economic growth, while enjoying revenues from oil. Few politicians have the good fortune to be able to make the kind of tax cuts they have in the past because the race to the bottom has resulted in lower rates in most countries.

Corporate tax rates used to be set at rates above 40% and even 50%, but these have fallen over the past 30 years to below 30% today. The standard for what counts as a high-tax jurisdiction has changed dramatically.

The costs of the COVID-19 pandemic could mean the era of big tax cuts may have peaked. At the same time, the growing calls to address climate change mean governments will be more likely to raise taxes on the oil industry itself.

Governments will hold off on tax increases until the worst of the crisis has passed, although higher taxes will be a necessary part of future attempts to get national debts under control.

Why the price crash?

Oil prices had already been falling for several years, but the COVID-19 pandemic forced international airlines to cancel flights as borders closed around the world. This resulted in the biggest global slump in demand for fuel in 25 years.

In addition, Russia and Saudi Arabia locked horns in an oil price war. In March and April 2020, the two nations cut prices and raised production to hurt the competition and flood the market with cheaper petrol. This crashed the West Texas Intermediate (WTI), bringing the WTI price of oil to an all-time low of -\$37.6 per barrel on April 20.

At the time, US President Donald Trump called it "the greatest tax cut". Yet this came as petrol sales were falling everywhere, except in large populous nations like China and India, where cheaper fuel came in handy for millions of people.

By mid-April the US government had changed its view. Trump threatened to block Saudi oil shipments, and even warned that he might withdraw military aid to the country if it did not cut back production.

Eventually, Saudi Arabia curbed production as part of a deal with Russia. Even though the price of oil has stabilised since May, the US oil industry was hit hard by the price collapse, while the cost of the price war has increased Russian and Saudi debt.

Furthermore, the oil price has not returned to the levels at the start of 2020. The oil price may not fully recover until the pandemic is over, which leaves a gaping hole in government budgets around the world.

History repeats, but in reverse

There are often unforeseen consequences to dramatic oil price fluctuations. The fall-out of price shocks can play out over years, or even decades.

Rewind to October 1973 when the Organisation of the Petroleum Exporting Countries (OPEC) raised the price of oil by 70% in retaliation to US support for Israel in the Yom Kippur war. The 1973 oil price spike sent shockwaves around the world. Yet the result changed tax policy rather than amending US foreign policy.

The oil price helped create the 'stagflation' crisis in Western economies like the US and the UK, where governments struggled to deal with rising unemployment and inflation. The effects of the economic crisis of 1973 would play out for several years.

A second oil price shock came with the Iranian revolution in 1979. Global production fell by 4% and the price of oil surged by 200%. The resulting economic turmoil made it possible for governments to consider new growth strategies based on lower taxes and lighter regulations.

In the UK, Prime Minister Margaret Thatcher embarked on austerity and cut taxes. When she came to power in 1979, the UK corporation tax rate was 52%. By 1986 it was 35%. In the US, under the Reagan administration, the corporate tax rate fell from 46% in 1981 to 34% by 1989.

Oil prices finally began to stabilise and then decline in the 1980s. However, the trend towards lower corporate tax rates continued for more than 30 years. In 2020, the average corporate tax rate in OECD countries was 23.6%.

Since the 1973 price shock had such long-term effects, the oil price collapse in 2020 may turn out to be a key economic factor pushing the other way in the near future. The race to the bottom might come to an end as governments scramble to find a new economic strategy. ■

The Platform for Collaboration on Tax

A joint initiative of the IMF, the OECD, the UN, and the World Bank Group

The Platform for Collaboration on Tax (PCT) often gets forgotten amid the high-profile organisations it brings together. But the PCT has secured a spot in *ITR*'s Global Tax 50 for uniting the efforts of its four partner organisations to support countries with medium-term revenue strategies (MTRS) during an unprecedented year.

The PCT, launched in April 2016, is a joint initiative of the International Monetary Fund (IMF), Organisation for Economic Cooperation and Development (OECD), United Nations, and the World Bank Group to strengthen collaboration on domestic resource mobilisation (DRM). It fosters collective action for stronger tax systems in developing and emerging countries.

The PCT facilitates regular exchanges of views to ensure the work done by its four partner organisations avoids a duplication of efforts while being transparent and offering the necessary support to governments to produce tax laws and implement reforms.

"The PCT has become an effective platform for the exchange of views, promoting transparency and cooperation among the four major multilateral organisations," the PCT spokesperson tells *ITR*.

Over the past year, the PCT delivered its key action items, despite having to turn to virtual platforms to deliver its assistance and analyses to governments and stakeholders worldwide. Some of its notable work included releasing the final version

its offshore indirect transfers toolkit and the draft version of the tax treaty negotiations toolkit (including a web-based version), guidelines on the taxation of government-to-government aid, a stand-alone PCT website, and the online integrated platform (OIP).

Developing countries have welcomed the toolkit on offshore indirect transfers after several draft versions in 2017 and 2018 led to a refined package to be better aligned with the countries' policies and legislation.

"The toolkit provides sample domestic legislation for two approaches to tax offshore indirect transfers of assets and provides the basis, with some modifications, for some of the recent legislations by developing countries to bring to tax such transfers," the spokesperson says.

"The development of this toolkit has also impacted standard setting in that both the OECD Model and the UN Model Tax Conventions have incorporated Article 13(4) providing taxation rights to source countries in cases of offshore indirect transfers of assets," the spokesperson adds. "Moreover, the BEPS MLI has included Article 9 to facilitate early incorporation, or strengthening as the case may be, of these provisions in treaties where both parties to the treaty agree to do so."

However, the PCT's work did not end in 2020. It started 2021 with another toolkit on effective transfer pricing documentation requirements, released on January 19.

The year 2021 marks the PCT's five-year anniversary. It has recently approved an ambitious revised work programme for the next two years that will see it increase cooperation in MTRS, tax responses to the COVID-19 crisis, international taxation, tax measures related to the UN Sustainable Development Goals (SDG) and improve coordination among the four partner organisations.

"In the coming five years, the PCT aims to further its agenda of better collaboration among development partners, developing countries and other stakeholders to strengthen domestic resource mobilisation by countries," the spokesperson says.

Nevertheless, the PCT and its partners had to face the challenges of the COVID-19 pandemic in 2020.

"The COVID-19 pandemic and the concomitant containment measures have severely affected tax revenues of most countries due to a slowing down of economic activity and, in some cases, due to tax policy and administration responses targeting immediate relief to taxpayers," says the spokesperson.

However, as countries try to bounce back from the economic impact of the pandemic, the PCT and its partner organisations will have an important role to play.

"In our view, once the containment phase is over, turning to recovery and sustainable growth goals will require sustained international cooperation including in the field of tax system reform," says the spokesperson. "PCT partners are gearing up to meet the challenges through the release of knowledge products on DRM responses for the recovery phase."

Supporting countries in adopting comprehensive tax system reforms in the medium term, and increasing its technical assistance for "a greener and more equitable recovery" will shape the PCT's work for the year to come. ■



Achim Pross

Head of the International Cooperation and Tax Administration Division at the OECD Centre for Tax Policy and Administration



Achim Pross is one of the central figures in creating tax certainty, transparency and effective global cooperation on tax matters. He is also an important individual in the OECD's efforts to find an agreement on how to tax the digitalisation of the economy.

A regular in *ITR's* Global Tax 50, Pross retains his position as an influencer in the tax community for his work on the digital tax reforms and successfully moving the International Compliance Assurance Programme (ICAP) from a pilot programme to one endorsed by the Forum on Tax Administration (FTA).

As a voluntary programme, ICAP brings together a multinational enterprise (MNE) with several tax authorities to gain multilateral tax certainty on activities and transactions in a time-efficient way. Over the coming year, a new ICAP handbook will be released, online events will be held for stakeholder feedback and discussion, and more MNEs will be invited to join the programme in autumn 2021. After that, MNEs will have the opportunity to join the initiative in spring and autumn each year.

In addition, Pross has been busy advancing efficiencies in mutual agreement procedures (MAPs) and advance pricing agreements (APAs), as well as work on BEPS Action 5 (harmful tax practices) and BEPS Action 13 (country-by-country reporting) reviews and public consultations, transparency, the adoption of the OECD model reporting rules, and working with tax administrations to help facilitate and coordinate tax responses to the

COVID-19 pandemic. "The Forum on Tax Administration really proved its worth in this crisis," Pross tells *ITR*.

Delivering on digital tax

The majority of Pross's work is focused on delivering on the OECD's objective to reach an agreement on the taxation of the digital economy.

Following the publication of the pillar one and pillar two blueprint in October 2020 and subsequent consultations on the document, a number of issues remain. Areas such as scope, business line segmentation and the elimination of double taxation in pillar one need to be resolved. Pillar two, although the less contentious part of the proposal, still needs to be simplified and questions remain on how the global anti-base erosion (GloBE) proposal will interact with the US global intangible low-taxed income (GILTI) rules, which carve-outs to include and what the minimum tax rate will be.

"[The blueprints] are by no means perfect and I have sympathy for the comments by stakeholders in the public consultation process, but getting the pillars into this shape during a pandemic, working remotely and with over 130 members with often divergent views was no small feat either," says Pross about the work done over the past year. "I think we have managed to advance the technical work substantially recognising that we do need to reduce complexity further."

Nevertheless, Pross is certain the OECD does have a basis for a solution

that avoids double taxation and increases tax certainty.

"If we can resolve the key political questions, in particular around the scope of pillar one, then we should be in a good position, with another push, to get to a meaningful agreement within the extended G20 timeline of summer 2021," says Pross.

"Pillar two will keep us busy, both on the technical and political side," adds Pross. "Against the background of the pandemic and the level of government support provided, many members now also see pillar two as an important element in eventually returning to sustainable government financing."

MAP: A victim of its own success

In addition to the digital tax work, Pross has been integral to making MAPs more efficient.

Covering 105 jurisdictions and almost all MAP cases worldwide, the OECD's 2019 MAP statistics released on November 18 2020 showed an average of seven MAP cases submitted each day, but many cases were taking more than the 25-month average timeline to complete. There were almost 2,700 new cases in 2019, showing a 20% increase in TP cases and about a 5% rise in other matters compared to the previous year.

However, Pross points out that competent authorities are closing more transfer pricing and other tax cases than ever before, with a 50% increase for TP cases and 70% for other cases compared to 2016.

"This became possible thanks to additional resources dedicated to the MAP function as well as other changes, including to the organisation and operation of the MAP function and related processes," says Pross. "But then, and here competent authorities are in part victims of their own success, the MAP pipeline is growing even faster than they are able to close cases, which then translates into increasing inventories. That is why we realised early that simply doing MAP better and faster, while a must, can never be the whole answer."

Countries are using recommendations in the peer reviews to improve MAPs by, for example, adding further resources for the competent authorities, issuing clear and comprehensive MAP guidance and granting access in all eligible cases.

In addition, the impact of COVID-19 identified several possible improvements, including the need for a commonly accepted platform for secure communication. "[This] is why the December Plenary of the Forum on Tax Administration decided to work on this issue and come up with a common platform or standard(s) to

simplify and streamline secure tax administration to tax administration communication,” explains Pross.

Work has also commenced on a manual on multilateral MAPs and APAs, which will deal with globally integrated supply chains that result in triangular or multilateral MAP situations. The coming year will also see further improvements made to BEPS Action 14 as consultations and meetings take place to act on the proposals and consultation responses for the 2020 review of the Action 14 minimum standard.

“Building on recent experiences in cross-border tax administration cooperation, including ICAP, we are exploring how we can streamline the APA process including on multilateral APAs,” says Pross. “For 2021 we plan to issue a handbook with best practices for an efficient APA process and recommendations on how to improve the process, as well as a manual on how to deal with multilateral APAs. And, of course, one of the proposals in the review of the BEPS Action 14 standard is to require that jurisdictions

with a certain level of MAP cases have an APA programme.”

Dispute management

As tax certainty and transparency remain important, Pross believes the trend towards dispute prevention and more multilateral approaches will continue.

“We are also putting a lot of work into risk assessment beyond the work on ICAP,” says Pross. “For instance, we are mapping ways in which different countries currently risk assess and detect certain TP risks. This will help in the identification of good practices and drive greater consistency in risk assessments, and, where differences remain, the basis for these will be better understood. This should help prevent TP disputes from arising in the first place.”

Separately, a software tool to support tax administrations in using CbC reports in risk assessments, which builds on the CbC risk assessment handbook, will be another way to prevent disputes from arising.

Last year, work on joint audits was progressing well but has since been stalled

because of COVID-19. Nevertheless, there is still a focus on mandatory binding prevention or resolution tools, despite being politically controversial in a number of jurisdictions.

Looking ahead, the work on a digital tax reform will remain the priority, as well as agreeing a framework for the exchange of information on crypto assets.

However, Pross stresses that the Tax Administration 3.0 agenda will be another game changer to watch as a roadmap is prepared in time for the next – hopefully physical – plenary meeting in Singapore.

“Tax Administration 3.0 on tax administrations going digital has huge potential,” he says. “There are some real transformational things in the pipeline which could fundamentally change tax administration as we know it – and that will benefit tax administrations and taxpayers alike.”

No matter what the coming year holds, Pross’s hope is to get an agreement on digital taxation within the timelines set by the G20. “How do I expect to manage it? Not badly I hope,” he says. ■

Pascal Saint-Amans

Director, OECD Centre for Tax Policy and Administration

The director of the OECD Centre for Tax Policy and Administration needs no introduction. The global tax community has its eye on Pascal Saint-Amans as the OECD pursues a solution to taxing the digital economy. Public consultation meetings on the pillar one and pillar two blueprints were held in January, but a lot of work remains.

While the UN is snapping at the OECD’s heels on a digital tax solution, Saint-Amans’ influence extends far beyond one project. Other areas of focus include environmental taxes, tax transparency, and taxation and development. Reshaping the tax world is not easy.

However, it is pillars one and two that are causing the most headaches for Saint-Amans. “Work on the taxation of the digital economy has been extremely tedious given the political and technical circumstances with COVID-19,” Saint-Amans tells *ITR* while discussing his experiences of 2020.

Like many organisations and individuals impacted by the global pandemic, the OECD has struggled to achieve its 2020 goals. An agreement on taxing the digital economy was expected by the end of 2020, but this has been extended to mid-2021 – and even this is a soft deadline.

Progress was difficult because countries were distracted by emergency domestic action and delegates were unable to meet in person for discussions.

“How do you bridge the gap between delegations when you do not have physical meetings? Zoom is great but it doesn’t provide coffee, and it’s the coffee break that makes the difference,” says the OECD tax chief. “You have two people who don’t agree, you bring them to the same room, you start talking and, with the body language, you bridge the gap. On Zoom, you just read the statement. In a difficult negotiation, it is a very big challenge indeed.”

“In spite of these circumstances, we have been able to deliver blueprints on pillar one and pillar two. We failed to deliver a consensus but it’s not the end of the story because we have a solid basis for an international agreement in 2021,” adds Saint-Amans.

A lot of work ahead on tax, the environment and inclusivity

Saint-Amans admits that some key OECD initiatives have been “hijacked” by the digital tax talks. Nevertheless, there is a catalogue of other projects that demand his attention, including BEPS implementation



Saint-Amans predicts that environment taxes will become a global priority in the next decade

and transparency, tax administration, and tax policy.

Multinational companies’ perceptions, behaviours, and reputational risk management are changing as the BEPS Action Plan, the exchange of information and other transparency measures are enacted. The most aggressive schemes have been dismantled, and treaty shopping has been curbed to a large extent by the Multilateral Instrument.

However, Saint-Amans says that there is more to be done, and pillar one and pillar two offer a way forward.

“Have we killed the use of tax havens? No. Have we killed tax avoidance? No. Have we reduced it drastically? I think yes. However, we need to go further and finish the work,” the OECD tax director says.

Looking ahead, Saint-Amans says that in light of the US election result, he anticipates a lot of work on tax and the environment. The Democratic Party under President Joe Biden made the environmental crisis a key touchstone of its campaign, and there is likely to be movement from the US on environment taxes under the Biden administration. “If I had to bet, I would say that in the next 10 years, this

will be the lead project of the OECD and other international organisations,” predicts Saint-Amans.

“Another big challenge ahead of us is inclusivity,” he continues. “The election result in the US doesn’t mean that multilateralism is at its best. We need to leverage what we have built – inclusive bodies like the Global Forum and Inclusive Framework – and keep countries together. Working together towards a common goal is extremely important and a big challenge ahead of us.”

OECD global digital tax solution remains the focus for 2021

The OECD global digital tax solution has been delayed until mid-2021 and there are still obstacles to achieving a consensus.

“There are two critical points. One, can we agree on a scope? This has been the roadblock for the past three years. There are strong opinions against ring-fencing – and ring-fencing the digital economy would not be a good policy. But extending the scope beyond digital brings a whole lot of complex political and technical issues,” says Saint-Amans.

The other point is simplification. “I fully recognise that the pillar one blueprint is extremely complex and must be simplified. The question is: how can we streamline to have a chance for this to be implemented with tax certainty and limited compliance costs?” he asks.

Addressing these points could lead to at least a partial resolution in 2021, but it will not be an easy journey. ■

Saudi Arabia

Tax and transfer pricing policies in Saudi Arabia gained momentum in 2020 and they have opened a door to unilateral measures in neighbouring Arab countries too.

Gulf Cooperation Council countries are expanding their tax bases, transfer pricing (TP) policies, and transparency requirements after Saudi Arabia paved the way by unilaterally raising its VAT rate.

Saudi Arabia is part of the Gulf Cooperation Council (GCC), which is a political and economic union with Bahrain, Kuwait, Oman, Qatar, and the United Arab Emirates (UAE). These countries had coordinated their VAT regimes under agreed conditions and tax rates until May 2020, when Saudi Arabia increased VAT from 5% to 15% to fight revenue losses from depressed global commodity prices amid the COVID-19 pandemic. The move signalled the start of unilateral measures and early signs of fragmented tax policies in the region with a break in cross-border cooperation.

“Each jurisdiction is going its own way,” says one head of tax at a Saudi conglomerate with operations across GCC countries. “We are treating each country separately, with their own rules and regulations. This is quite difficult because it’s quite an integrated economy in the region.”

Saudi Arabia’s VAT increase even exceeds the IMF recommendation from 5% to 10% in 2017. The notable tax hike has already started a discussion in the UAE about implementing a corporate tax regime across all the Emirates.

It is another highly anticipated development that advisors say may be legislated in late 2021.

“It may take a year, [but] with the current knowledge ... I think it’s a good time,” says Habib Al Mulla, executive chairman and partner at Baker McKenzie UAE, who is often consulted to draft and advise on federal and Emirate-level laws in the UAE.

The concern for large multinational businesses with entities in any of the GCC countries and with cross-border operations in the region is that there will be far more unilateral measures aimed at tackling tax revenue losses, which is likely to mean costs in terms of investing in different systems and talent that can work effectively with various local tax authorities in Arabic.

“Increasing tax rates and adding new tax measures will have a big negative impact on the economy [across the GCC countries],” says one Middle East head of tax for an automotive company. “Corporate taxes introduce more economic competition in the region, which seems like it may come at a very bad time for businesses.”

Nauman Ahmed, Deloitte Middle East tax leader, says that with a number of transfer pricing regulations being introduced in the Middle East and North Africa region over the next few years, this should be viewed as “an opportunity to introduce a structured intra-group pricing framework to align with investment strategies and overcoming risks by implementing technology solutions that align with existing business systems”.

Taxpayers also say that the UAE, Oman, and Bahrain are likely to follow Saudi Arabia in ending tax cooperation to recover lost revenues from the recent economic downturns during the pandemic.

Oman will be the next GCC country to implement a VAT regime in April 2021, and this may come with some hid-



VAT and TP policies in Saudi Arabia may lead to unilateral tax measures in other GCC countries too

Olaf Scholz

Finance Minister and Vice Chancellor of Germany

German Finance Minister Olaf Scholz secures a spot in *ITR*'s Global Tax 50 for contributions to the global digital tax debate and efforts in advancing key tax measures in Germany and the EU.

One of Scholz's notable contributions is his negotiations on the OECD's digital tax agenda. He has made it clear that his government wants to cut a deal with the Biden administration by July 2021 on

den costs. For example, it is difficult for in-house finance and tax teams in the region to know how aggressive authorities will be with regards to non-compliance and issuing penalties.

Saudi Arabia was the first country in the region to restart transfer pricing audits in late 2020, including desk-based audits, following the initial fallout from the pandemic. Taxpayers tell *ITR* that auditors in Saudi Arabia and the UAE are among the toughest on tax audits, and businesses are already preparing for similar enquiries in Oman too.

However, one of the challenges in the region is the lack of experienced tax professionals who can help in-house teams with compliance processes and setting up systems for long-term success. Local talent that can balance the language, customs, and tax rules across the GCC countries is limited, and many in-house teams rely on international advisors who are still getting to grips with the fast-paced changes of the local laws and technologies. Advisors who have been in the region since the early discussions on VAT say that the market for local tax talent is set to mature between 2023 and 2025.

While taxpayers and advisors are more concerned about complying with unilateral measures and broader tax regimes in the region, Saudi Arabia has also opened the door to tax incentives. Riyadh has already started introducing tax holidays, visa exemptions, and relaxed quotas on employing Saudi nationals to encourage businesses to relocate their regional operations.

Tax harmonisation in the region is unlikely following Saudi Arabia's unilateral tax changes, and other GCC countries may also turn to tax incentives to manage their economic recoveries. ■

the OECD's two-pillar proposal, a multilateral solution to digital tax that will raise approximately \$100 billion in global tax revenue and collect 4% more in global corporate tax.

"We must act decisively, quickly and together," said Scholz in a joint statement with other EU finance ministers, including French Finance Minister Bruno Le Maire. "If this is not acted upon now, this will lead to fragmentation of the global tax system."

Meanwhile, Germany held the presidency in the EU Council in 2020, during which Scholz supported the EU Council in expanding the Directive on Administrative Cooperation (DAC) to include information relating to digital platforms (DAC7). The legislative proposal was approved in December 2020, and the regime will allow EU countries to automatically exchange information on revenues made by sellers on digital platforms from 2023.

He also backed other notable measures that are moving through the EU's legislative process, including a carbon border adjustment mechanism, digital levy, and a financial transaction tax.

However, the German finance minister was criticised by tax justice campaigners for "squandering opportunities" to deliver on some other big tax measures such as public country-by-country reporting (CbCR) and a financial transactions tax.

"We will support any debate and a decision-making process," said Scholz at a public hearing of the Economic Affairs (ECON) Committee of the European Parliament in September 2020.

However, advancing certain initiatives in the Council were challenging because the German government coalition did not have a unified position internally on key issues such as public CbCR.

Despite setbacks at the EU, Scholz has been a reassuring presence in Germany while dealing with the economic impact of COVID-19.

Scholz acted quickly in launching a second economic stimulus package in Germany in July 2020 that cost approximately €100 billion (\$122 billion). However, the cost of state aid to address the pandemic exceeded €400 billion, which has led some politicians to brand Scholz as the "debt king" because no German finance minister has run more debt in a two-year timeframe.



The German finance minister supports a multilateral solution on digital tax

"This is the gold standard, this is what you have to do when you fight international crises," said Scholz about Germany's generous stimulus measures in December 2020.

The finance minister also delivered on OECD-backed recommendations to improve digitalisation in Germany through stimulus measures that cost around €2.3 billion, and included full deductions on the costs of digital assets like computers and software.

"I want to make quick, targeted contributions to this with the tax law," he said about supporting stimulus and digitalisation efforts amid the pandemic.

However, advisors were surprised Scholz did not change Germany's application of the EU DAC 2018/822 (DAC6) rules, especially the controversial July reporting deadline, which was postponed in most EU countries by six months following EU parliamentary approval.

"This won't just adversely affect German businesses though, as I expect most multinationals will have a German entity and groups in all member states will feel this," said one head of tax at an asset management firm.

The German finance minister and vice chancellor has had mixed successes from his tax agenda in 2020, especially on big ticket items such as DAC6 and public CbCR. In terms of his outlook for coming tax changes in 2021, Scholz is optimistic for an international agreement on OECD-led discussions on global minimum taxation and a working blueprint on a multilateral solution to digital tax. With upcoming federal elections in Germany in 2021, advisors expect Scholz to advocate for tax measures that support demand, stabilise incomes and stimulate investment. ■

Prem Sikka

Tax justice campaigner

The UK House of Lords is not the place you would expect to meet a tax justice campaigner. And yet this is exactly where you will find Prem Sikka, emeritus professor of accounting at Essex University.

Former Labour leader Jeremy Corbyn nominated Sikka for a life peerage in recognition of his work. Sikka has spent more than 30 years campaigning to reform the UK tax system, corporate governance, accounting standards and the audit market, just to name a few areas of his expertise. However, the peerage was a surprise to him because he has long opposed the House of Lords.

“I never saw it coming,” Sikka tells *ITR*. “I never sought it and when it came I was not very keen on it. “I want to see an elected second chamber. I still believe in that and I can vote for that in the lords.”

Sikka joined the House of Lords in October 2020, but describes the experi-



ence so far as “strange” because all the peers are not physically meeting in the chamber due to the coronavirus pandemic.

The majority of peers are attending votes remotely, just 30 peers can go to the chamber in person. This makes it difficult to network, but working remotely is not the only reason why this is a “strange” experience for Sikka.

“When you look at the House of Lords or the House of Commons, just look at the number of people connected to big business and the big accounting firms,” says Sikka. “There is a built-in lobby for these organisations.”

Nevertheless, Sikka says his peerage gives him a voice on the tax issues he cares

about most. “I can intervene in debates in the lords. I can push for emancipatory change that makes a real difference to people’s lives,” says Sikka.

Audit reforms: ‘The dark side of capitalism’

As a campaigner, Sikka has taken on many causes over the years but a consistent focus has been the accounting industry and the audit sector. He once described his research into this area as “the dark side of capitalism”.

“The audit firms have been doing audits for 100 years and yet they are still struggling to deliver high quality audits,” says Sikka. “Between 25% and 50% of audits may be deficient and the Financial Reporting Council found that up to 80% of audits may be deficient.”

“We would not allow carmakers to stay in business if 25% to 50% of the cars they produced were defective,” he stresses.

In 2018, Sikka chaired an independent investigation into the audit sector and produced a report on the industry. The report recommended that the UK government go much further to tackle the problems in the sector.

Anton Siluanov

Minister of Finance of the Russian Federation

Anton Siluanov makes the Global Tax 50 for presiding over Russia’s push to amend its bilateral double tax agreements (DTAs) in 2020. Cyprus, Luxembourg and Malta have signed protocols agreeing to the amendments, which will increase the withholding tax (WHT) rate to 15%, raising the tax burden on interest and dividends leaving Russia.

Since his appointment as finance minister in 2011, Siluanov has overseen Russia’s implementation of the OECD BEPS project, introduced the so-called ‘Google tax’, and increased the VAT rate from 18% to 20%. The past year proved to be another big one for Siluanov, but it did not start off so well.

Back in January 2020, Siluanov was demoted from his job as Russia’s First Deputy Prime Minister in a cabinet shuffle, but retained his post as the finance minister. In this capacity, Siluanov led Russia’s fiscal response to the COVID-19 pandemic, introducing tax breaks and payment deadline extensions for companies.

Yet COVID-19 did not stall Russian efforts to overhaul the country’s DTA network. In fact, the need to protect against the economic effects of the pandemic may have catalysed the decision to increase the WHT rate.

Russian President Vladimir Putin announced in March 2020 that interest and dividends payments leaving Russia would be taxed at 15%. The rate was already 15% for countries with which Russia had no DTA. However, entities operating from the 80-plus countries in DTA partnerships with Russia had enjoyed lower rates of 5% or 10%.

Putin said the measure was primarily aimed at countries that see significant resources of Russian origin pass through them, such as Cyprus. The Netherlands, Malta and Luxembourg were also high on the list of targets. If any foreign partner did not accept the proposals, Putin warned that Russia would unilaterally withdraw from the existing DTA.

Some publicly listed companies and regulated entities, such as pension funds and insurance undertakings, are exempt and can continue to access a lower WHT rate of 5%. Nevertheless, the WHT hike could hit multinational enterprises (MNEs) operating between Russia and its tax treaty partners.

Tax professionals told *ITR* that jurisdictions like Cyprus are in danger of losing their attractiveness for international



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Siluanov led the initiative to amend Russia’s double tax agreements in 2020

business because of the changes. However, some Cypriot tax professionals are optimistic that the changes will improve the quality of business transactions by reducing the incentive to use shell companies.

The report laid out a series of recommendations, including statutory separation of service lines and a five-year restriction on members of the audit team joining the client company's staff. Yet one of the biggest concerns was the need to create more competition in the audit market.

"Auditors need more competition. So the Big Four can be challenged and they can't just dominate the market," says Sikka. "Right now, new players can't enter the audit market because currently any entity which offers audit services must be controlled by individuals licensed to carry out audits."

"We wanted to remove the barriers to entry. The government-backed reports do not deliver this. And that's why there will be no durable reforms," he adds.

The report favoured a 50% market cap for FTSE 350 contracts and a 10-year 'cooling-off' period for audit firms after they have fulfilled their contract with a client. The recommendations included a proposal for a Companies Commission, a new independent regulator, to oversee the industry.

The proposed commission would monitor the audit sector and license the auditors, but it would also oversee all aspects of company law. These reform proposals have been shelved like so many other ideas and the UK government is unlikely to reach for them any time soon.

"You need someone in government who is willing to save the industry from itself," says Sikka. "If the accounting industry is left to itself, the conflicts of interest, the lack of transparency and the lack of accountability will continue."

Consumer rights revolution

The UK government commissioned three reports into the audit sector following the scandals, but Sikka argues that these reports failed to address "fundamental issues".

"We argued that auditors need certain pressure points to improve quality," says Sikka. "One example is liability. Auditors are not held liable when they should face the threat of a lawsuit for getting things wrong."

Sikka offers the example of the audit of UK department store chain BHS, which went into liquidation in 2016. The partner

overlooking the audit only spent two hours on the job. "The audit team was under the control of someone with just one year's experience," he tells *ITR*.

Meanwhile, company directors attending an annual general meeting will not necessarily have the information they need to scrutinise the audit service.

"You don't have the information about the audit or the quality of the work. There is virtually no transparency or public accountability," says Sikka. "We called for more transparency to keep the corrosive culture of accounting firms in check."

"The consumer rights revolution has completely bypassed the audit industry. Whether the government will act on this, I very much doubt," he continues. "The government tends to deliver very cosmetic reforms because the accounting industry is very powerful."

Until the right government comes along this is unlikely to change. However, Sikka has no intention to wait for that day. He will continue his campaign for reform of the accounting industry and the tax system. Now he has an additional platform to do this. ■

Following the announcement in March, Siluanov forged ahead with plans to amend the DTAs. Russia signed the protocols to amend its DTA with Cyprus in September, Malta in October and Luxembourg in November. The Russian Finance Ministry calculated that from 2021, Russia will gain an additional RUB 130-150 billion (\$1.6-1.9 billion) per year due to the increased tax on interest and dividends in Cyprus.

Unfortunately for Russia, the Netherlands is less compliant. With talks in a deadlock, Russia is threatening to scrap the DTA between the two countries. This could be the exception that proves the rule, but perhaps other countries will prove equally difficult to impress upon. Russia is reportedly pursuing DTA amendments with Hong Kong and Switzerland.

If Siluanov seriously intends to amend each of Russia's 80-plus bilateral DTAs, this story will rumble on for many years to come, and the Ministry of Finance might run out of steam before it reaches the bottom of the list.

However, in a year when Siluanov could have been forgiven for dropping everything to focus on the COVID-19 crisis, the finance ministry made significant progress on pushing through DTA amendments. The changes are expected to be a significant revenue booster for the Russian state, and MNEs should brace themselves for more of the same in 2021. ■

Yoshihide Suga

Prime Minister of Japan

Having promised continuity and stability throughout the COVID-19 pandemic, Yoshihide Suga has immediately pushed for the digitalisation of tax and the economy in Japan. This has received a warm response from Japanese multinational enterprises (MNEs). The influence of Japan's businesses and government on the global stage earns him a place in *ITR*'s Global Tax 50.

Shinzo Abe, Japan's long-standing prime minister, officially tendered his resignation on September 16 2020 for health reasons. Yoshihide Suga, the former chief cabinet secretary was elected as his successor by the Japanese Parliament, the Diet. Suga previously played a behind-the-scenes role, focusing on mobilising the country's bureaucracy, which raised doubts over his ability as a frontman. However, those concerns may be unfounded.

"Many people have doubted how Suga will perform, but he is a decisive man and takes a strong approach. Tax is not an exception," says Hiroshi Makuuchi, manager of tax policy at Keidanren, the Japanese business federation.



Source: kantei.go.jp

Businesses in Japan have faced an unprecedented downturn since the coronavirus outbreak and consumer demand has nosedived, following other significant factors such as the consumption tax increase and the fallout from Typhoon Hagibis, both in October 2019. This has led to changes to the net operating losses system in the 2021 tax reform package, which allows a deduction of tax losses to be brought forward for 100% of current taxable income under certain conditions.

The impact of the novel coronavirus has also revealed the cracks in Japan's tax procedures and the fragility of its digital economy. Many tax processes rely on manual input, such as stamps and face-to-face interactions. For example, if a non-resident company wants to enjoy tax treaty benefits,

they have to sign and send physical documents to a Japanese company, which then needs to check and stamp the document and bring it to Japan's tax authority.

Suga has emphasised the need to modernise tax procedures and has introduced a special tax break to encourage the digitalisation of the economy. Additionally, the tax credit system will be expanded soon, so that a percentage of research and development expenditure can be deducted from income tax, within a limit. The Suga administration will increase the limit from 25% to 30% in certain conditions. This should push forward investment in R&D.

"Overall, big MNEs welcome the moves taken by the Suga administration," says Makuuchi. "This is the only way for Japan to move forward. This will boost our productivity and competitiveness."

Japan's prime minister has also made commitments to environmental protection, announcing in a policy speech to the Diet that Japan will aim for carbon neutrality by 2050. The administration is likely to introduce tax measures to help environmentally-friendly development and reduce carbon emissions. However, this is a hotly debated topic.

"Our key stance is that the Japanese government should incentivise companies to make investments that continue to reduce carbon dioxide emissions, but we don't want to see it impose a carbon tax to penalise activity," says Makuuchi.

Suga faces many obstacles. Tax policy will be a key factor in ensuring the health of Japanese multinationals in 2021. He will have to look inwards as well as outwards, as taxation of the digital economy will be a point of contention globally. ■

TaxWatch UK

UK charity and investigative think tank for tax

TaxWatch has existed for just over two years but, in that time, it has made a big name for itself. With investigative journalist George Turner at the helm, 2020 saw TaxWatch give evidence to a parliamentary select committee on disguised remuneration schemes. The think tank also published a report on how the James Bond movie franchise takes advantage of cultural tax incentives, and a major investigation into the streaming giant Netflix's use of tax havens. Both reports attracted international media

Paul Tang

Chair of the European Parliament Sub-Committee on Tax Matters

Paul Tang, a Dutch member of the European Parliament (MEP), has been vocal about his opinions on corporate tax matters for several years. In September 2020, he made headlines in the tax world when he was appointed chair of the European Parliament's (EP) permanent sub-committee on tax matters (FISC).

FISC, which falls under the committee on economic and monetary affairs, is the first sub-committee of its kind to be introduced as a permanent fixture. Similar working groups were set up following tax scandals such as the LuxLeaks and Panama Papers, but these were dissolved after their reports were submitted. Investing in a permanent sub-committee says a lot about the EP's commitment to tackling tax issues.

"I have been lobbying for a committee on tax matters for the past year, because I think we should have this debate in the open and not just on a national level," Tang tells *ITR*. Crucially, Tang adds that the committee "will help the EP to play a role in the European debate across national borders".

It appears that Tang intends for FISC to become a watchdog that can hold the EU to account on tax havens. The sub-committee chair has said he is happy for FISC to be the "bad cop" to deal with



"Companies get support from the EU. What do you do for Europe?" asks Tang

the "hardened crooks" that practice tax avoidance.

Tang does not shy away from accusing the EU of hypocrisy, noting that according to a Tax Justice Network report, countries on the EU tax haven blacklist

account for less than 2% of global tax losses. Meanwhile, two of the five top-offending countries – the Netherlands and Luxembourg – are in the EU.

"I am proud that I was able to make the EP say that there are EU tax havens, including my own country, the Netherlands. It has had the effect that the Dutch now see themselves as part of a tax haven," Tang continues.

With its 30 members, the sub-committee will be responsible for the fight against tax fraud, tax evasion and tax avoidance, as well as financial transparency for taxation purposes.

Tang wants the committee to "become a European hub" to support countries in ensuring that tax avoiders pay up, rather than returning to the "usual recipe of austerity and reforms". The MEP expects to see more political momentum for changes in corporate and wealth taxation and wants the committee to help national parliaments that are "in a relatively weak position because they are not as well informed as the EP".

So far, the committee has spoken to tax experts and leading academics from the OECD, European Trade Union Confederation and University of Lisbon to discuss how to secure tax revenues in a fair and sustainable way following the economic impact of COVID-19. The committee is also exploring whether harmful tax practices within and outside the EU create distortions of competition in the single market, and the legislative or non-legislative tools to tackle them.

Tang believes a coordinated effort on tax at the EU level among the bloc's 27 member states can help alleviate the COVID-19 crisis and support the green

attention and, by the end of the year, Netflix had announced that it was moving to local billing.

“In a relatively short space of time we’ve managed to build a huge amount of credibility through our research. Hopefully we’re bringing something new to the table in terms of the research we do,” says Turner, TaxWatch’s executive director.

Like the rest of the world, TaxWatch had to adjust to the global COVID-19 pandemic in 2020. However, you would not know it when looking at the think tank’s output. The organisation published six reports in 2020, criticised UK supermarkets for accessing tax relief despite booming profitability, and got heavily involved with the UK revenue authority, HM Revenue and Customs (HMRC) and the UK Parliament.

TaxWatch started the year with a bang with the publication of *No tax and chill*:



TaxWatch has monitored UK government aid for corporations throughout the pandemic

Netflix’s offshore network, which detailed how the streaming service used a base in the low-tax Netherlands to avoid taxes elsewhere. The report was picked up by the international media and Netflix was forced to respond to TaxWatch’s investigation

and digital transitions. “You don’t have to be a loony left to have a form of digital taxation. People find it simply unfair that the biggest companies in the world do not pay their share of taxes,” says Tang.

Discussions are ongoing to recalibrate corporate taxation, while eco taxes and a financial transactions tax are a real possibility.

“What you have seen in the last years – and that will only accelerate with the COVID-19 crisis – is that taxation is high on the agenda. The EP is organised to make sure this is a very political debate, as it should be,” says Tang.

“I am looking forward to making the debate really European,” Tang adds. “I do not want to have the debate in a Brussels bubble but to bring it to the capitals and the national parliaments. That is the task we take up. We are in a good position because we have members from all European nationalities on board.”

“The world has changed, and we have changed accordingly. The FISC working programme is set up to tackle tax avoidance, reform the corporate tax system, and move towards green taxes. The committee will try to exert political pressure on the member states to make sure the debate is public and open,” says the MEP.

The biggest challenge of 2021

One of the big challenges in 2021 is to find an international agreement on stamping out tax avoidance, according to Tang.

“This is the time to start tackling tax avoidance for good,” he says, but notes that not all member states will like this course of action. EU cohesion will provide much-needed momentum.

“A strong European position will push the OECD negotiations forward. For example, it is always difficult for the US to act unless they really fear the European position. The fact that the Europeans were even considering a digital services tax is what brought the Americans back to BEPS and led to BEPS 2.0. We need a European proposal – what will the EU do if the OECD fails?” he says.

Money laundering is also part of the committee’s mandate, and Tang is vocal about the lack of resources dedicated to tackling fraud. The MEP says that COVID-19 recovery and resilience plans offer “a perfect instrument” to put pressure on member states to invest in anti-money laundering.

“It’s not just about imperfect legislation, it is also about the effort countries put in to make sure that the current legislation works,” says Tang. “Companies get support from the EU. What do you do for Europe? That’s basically the question. Tax is a crucial element of economic politics and still it is very well hidden.”

Tang has big plans for the future of FISC and, despite the challenges ahead, is optimistic about the potential for significant progress. “I think Europe is an economic and political superpower but doesn’t always use that. The EU list of non-cooperative jurisdictions is an example of how you can use this power to contribute to change, but it could be much more effective than it is right now,” concludes the MEP.

Under Tang’s determined leadership, FISC will put pressure on the EU to strengthen its stance on international tax matters, and this could produce ripple effects reaching far beyond its 27 member states. ■

after a request from the UK House of Commons’ digital, culture, media and sport (DCMS) committee.

In November 2020, Netflix announced that it would report the revenues from its European customers to their local tax authorities. This was a big U-turn from the streaming platform and a big win for TaxWatch and its fellow whistleblowers.

Subsidies via tax relief

Tax relief measures and cultural tax incentives will continue to be a focus for TaxWatch in 2021. According to Turner, “the tax system is being used more and more as a way of distributing government subsidies as well as collecting taxes”.

In the UK, film tax relief (FTR) promotes British culture by allowing productions that pass a cultural test to access tax breaks. Turner is concerned that large corporations like EON Productions, which makes the James Bond films, can benefit from these subsidies while funnelling profits into low-tax overseas jurisdictions.

“My suspicion is that much of the subsidy is being hoovered up by large profitable multinationals, subsidising research and development that will increase their profits, whereas none of that profit is brought back to the UK that is providing for it,” says Turner.

This is a particularly apposite point at a time when governments around the world are considering broader tax relief and aid measures for companies that have suffered during the pandemic.

In 2020, TaxWatch pivoted to monitor the COVID-19 financial aid offered to corporations, suggesting that the UK government share data with the public on “which companies are accessing support schemes and on what terms”.

The concern is that support may be offered to corporations that do not pay back into the system. “With HMRC there’s been almost no transparency about who is getting the money, which is highly problematic,” says Turner, adding that TaxWatch is interested in “who gets those credits and whether they meet the policy goals that are intended”.

Richard Brooks, who came up with the idea for TaxWatch and chairs its editorial committee, agrees. “Showing that tax and tax compliance remain critical, even when the government is throwing hundreds of billions of pounds at COVID, regardless of tax revenues” will be the biggest challenge of 2021, says Brooks. “It would be too easy to neglect the tax system as a public policy priority, which would have consequences way beyond the current crisis,” he adds.

International agreements and tax fraud

As well as tax relief initiatives under COVID-19, Turner has his eye on the debate over international tax reform to address the digitalisation of the economy, and OECD efforts to achieve a consensus on BEPS 2.0, but he is not optimistic.

“The idea that people can come to some kind of amicable agreement on principles is just impossible,” says Turner. “This is about trying to claw back some of the tax lost from mainly US corporations. The US is not going to do that willingly.”

The other big item on the agenda is tax fraud, and Turner is vocal in his criticism of HMRC for its approach to tackling fraudsters.

“There is increasing academic research to show that tax authorities are more interested in the collection of money than they are in the rule of law. If they can recoup money through the civil legal process, they will ignore some of the underlying criminal activity or allegations,” says Turner.

However, the TaxWatch director believes that failing to prosecute tax fraudsters sends the wrong message that people can get away with illegal behaviour. “If HMRC chooses not to investigate people for criminal behaviour, it doesn’t mean they’re not criminal,” says Turner.

“There are lots of tax avoidance schemes that at their core are dishonest and rely on dishonesty. And yet because HMRC makes the choice to pursue those things under either anti-avoidance rules or anti-avoidance legislation, it provides people with the excuse that this stuff isn’t illegal when in fact, it probably is. It just hasn’t been pursued as such.”

The past year has been a busy one for TaxWatch, with COVID-19 disrupting its plans and introducing a raft of new tax activity to investigate. The fall-out from this will extend into 2021 and perhaps beyond. The pandemic has also highlighted global inequalities that link to tax systems, raising public awareness of artificial tax planning and putting pressure on international bodies like the OECD to reach a multilateral solution.

With so much change in the tax world, it is a safe assumption that TaxWatch will have even more on its plate in the years to come. ■

Trade and customs

US tariffs in retaliation to digital services taxes (DSTs), US-China tensions, and the difficulties created by Brexit made 2020 a tough year for trade and customs.

With a new US President in power and new alliances forming among countries, things are set to be no less exciting in 2021.

Much of the international trade news in 2020 revolved around the US, as it continued to impose import tariffs on China and fought with France over a DST that Washington viewed as discriminatory against US technology companies.

The US suspended the tariffs it had threatened against France, but the United States Trade Representative’s office (USTR) continues to churn out reports accusing other countries of the same offence. The situation is becoming something of a pressure cooker and the new US administration under President Joe Biden is unlikely to materially change matters.

However, Biden could have an impact on other areas of trade by rebuilding the US’s relationship with the World Trade Organisation (WTO) and introducing environmentally-focused tariffs in line with the Paris Agreement, which the US re-joined on the first day of Biden’s presidency.

Meanwhile, the US-China trade war and a possible trade deal with UK after Brexit leave the new president with plenty to be getting on with.

Biden: The WTO, environmental taxes and DSTs

A major challenge in 2021 will be repairing the US relationship with the WTO, and first on the agenda is the issue of the WTO’s next director general who will serve until August 2024. The organisation has been without a leader since August 2020 when Roberto Azevedo of Brazil resigned. WTO members favour Ngozi Okonjo-Iweala, Nigeria’s former finance minister, but the US prefers Yoo Myung-hee, the Republic of Korea’s minister for trade.

The Biden administration’s stance on the environmental crisis will also have trade implications. Biden’s immediate move to re-join the Paris climate agreement implies that the US may also be open to environmental taxes such as a carbon border tax adjustment and a tariff on goods like steel that are imported from countries without a carbon price. Such a move would likely gather domestic support for giving local goods an advantage over foreign imports. There are also suggestions that the US and EU



Biden must make decisions about the US stance on DSTs, China, and the environment

could join forces on such tariffs in a joint effort against climate change.

Meanwhile, Biden inherits the USTR, a trade body that is strongly opposed to unilateral digital DSTs. In early 2021, the USTR found DSTs in countries including India, Italy, Turkey, Austria, Spain and the UK to be discriminatory against US companies such as Facebook and Apple. The USTR is still looking into similar levies in a number of other countries, including Brazil, the Czech Republic, Indonesia and the European Union.

This follows the long-running dispute between the US and France over the French DST, which saw Washington threaten to impose a 25% tariff on imports of French goods including handbags and makeup. In January 2021, the US agreed to suspend the tariff on France while it investigates other countries’ DSTs and decides on its course of action against all the jurisdictions.

As unilateral DSTs increase in proliferation, it is likely that the US will create a cohesive system of sanctions against offending countries. The Biden administration has thus far remained tight-lipped on its stance, but the Trump administration’s determination to protect the US technology companies from foreign taxation is likely to be a bipartisan position.

US-China trade war

President Biden also inherits the trade war with China that former President Trump began in 2018. The Trump administration imposed Section 301 tariffs on Chinese imports into the US, many of which remain in place, despite being criticised for

penalising US importers and consumers rather than their target: Chinese exporters.

The US and China signed a bilateral trade deal in January 2020, in which China agreed to buy an extra \$200 billion worth of US goods throughout 2020 and 2021, but the Peterson Institute for International Economics, a US think tank, estimated that China's purchases only reached 58% of the target.

It has been suggested that the US and China could use a *force majeure* clause to scrap the deal as fulfilling the terms has been difficult due to the COVID-19 pandemic. However, the Biden administration is expected to take a tough approach to China, particularly as the country looks set to soon surpass the US as the world's largest economy. In December 2020, the Centre for Economics and Business Research (CEBR) said that due to the economic effects of COVID-19, the Chinese economy will overtake the US by 2028, five years earlier than was previously forecast.

Biden is therefore unlikely to be soft on China and may not be willing to waive the terms of the trade deal. The friction between the countries could be compounded further by the Quadrilateral Security Dialogue (Quad), of which the US, along with Australia, India, and Japan, is a member. Chinese state media criticised the four countries for carrying out naval

exercises in the Indian Ocean in November 2020 and, while the Quad may prove invaluable to the US for maintaining influence in Asia, the partnership could harm the China-US trading relationship further.

Meanwhile, the UK is looking to agree a trade deal with the Biden administration after splitting from the EU on January 1 2021. An attempt to resolve a 16-year long dispute between aerospace companies Boeing and Airbus failed in December 2020 but, while the UK is keen to continue talks under the Biden administration, US Treasury Secretary Janet Yellen has made it clear that she will prioritise a domestic economic recovery over foreign deals. The UK's unilateral DST, which Washington has explicitly denounced, complicates matters further and could be used as a bargaining chip by the US.

Brexit

While a UK-US trade deal seems to be on hold, the UK is looking to trade in another direction. For companies that operate between the UK and the EU, the talk is of Brexit and the implications of the trade and cooperation agreement, published on December 24 2020, for transporting goods across the border.

The rules of origin mean that companies' products must meet certain requirements if they are to access zero-tariffs. The

rules have been criticised for their complexity, and some UK business-to-consumer companies stopped shipping to the EU in January due to fears of double taxation and goods being caught in transit due to incorrect paperwork. Companies were also concerned about unexpected VAT or customs duties being charged to the customer upon receipt of the goods.

The Northern Ireland sea border creates another complication, and companies importing from the UK into Northern Ireland are required to prove that goods are not at risk of subsequently entering the EU via the Republic of Ireland. New technology systems are also being trialled at the border. While some requirements are being waived to allow companies to get acquainted with the systems, this will not last forever, and the compliance burden for MNEs is set to increase throughout 2021.

The coming year will be an important one for international tax and, by extension, global trade. As the OECD's self-imposed deadline for reaching an agreement on taxing the digital economy by mid-2021 approaches, the fate of unilateral DSTs is uncertain. Uncertainty creates disputes which inevitably lead to tariffs and trade wars. Meanwhile, the consequences of Brexit will make themselves felt this year while Sino-US relations, already tense, are unlikely to materially improve. ■

The UN Committee of Experts on International Cooperation in Tax Matters

A move to amend the UN model tax treaty could give developing countries more taxation rights in an increasingly digitalised economy, particularly over income from automated digital services.

The UN Committee of Experts on International Cooperation in Tax Matters published its treaty-based proposal on August 6 2020 to address some of the challenges developing countries face under the OECD pillar one approach. The main suggestion was to increase the tax take for developing countries by applying a gross-based tax that targets redistributing some routine profits along with residual profits to market jurisdictions (Article 12B).

While simplicity is a strong point in the UN proposal, some taxpayers are disappointed that the technical scope and political sensitivities included in the OECD proposal seem to have been overlooked or

ignored in this alternative approach. Some key digital activities within the scope of the UN proposal would include online advertising, platform services, social media, cloud computing services, and user data sales.

"There are fundamental problems here and I don't think that this is overall a feasible alternative approach," says one VP of global tax at a large investment management company. "It can also only be levied if all tax treaties of the countries in question are updated."

Article 12B allows a contracting state to tax income from certain digital services paid to a resident of the other contracting state on a gross basis at the rate negotiated



The UN introduces its own proposal on digital taxation

bilaterally but recommends having a "modest" rate of 3% or 4% to prevent excessive or double taxation.

The provision does not require any threshold, such as a permanent establishment, fixed base, or minimum period of presence in a contracting state as a condition to tax income from automated digital services.

During the 21st session of the Committee of Experts in October 2020, country representatives discussed Article 12B's inclusion in the UN Model. However, 10 countries opposed it and no final decision was made. The committee will reconvene in 2021 to allow those

opposed to explain the flaws they see with the proposal.

Some taxpayers have welcomed the latest UN proposal too because it is unclear whether the OECD will meet its timeline to finalise its digital tax solution. The UN approach still seems preferable to the last option of a range of unilateral tax measures designed to target digital services.

“This will be an interesting dynamic,” says one head of global tax at a large food and beverage manufacturing company. “It is hopeful that both proposals will have a similar framework, avoiding a natural clash in methodology prone to dispute.”

UN tax committee member Rajat Bansal, who is also joint secretary for foreign tax and tax research for the Indian Department of Revenue, helped spearhead the proposal and said its framework creates two routes for countries to tax cross-border

payments on digital services. One is a gross-based tax at a rate agreed by two treaty partners, while the other is based on net income and formulary apportionment.

A gross-based tax as the default option under the UN proposal veers away from the OECD pillar one approach and may risk businesses passing the cost of the tax to consumers by raising prices on goods, as Amazon has proposed to do in the UK with regard to its digital services tax (DST). However, other businesses, such as eBay, have chosen to avoid the same price hike to retain market share.

The UN proposal is already more appealing to developing countries because of its simplicity in approach and limited resource administration. The UN tax committee also aims to use existing treaty-based tax dispute prevention and resolution tools to avoid double taxation risks. The main benefit with

the UN tax proposal is that it is easier to add on top of the existing international tax framework, which the OECD proposal continues to struggle to accomplish with a more detailed set of rules to account for sector and regional tax differences.

“The fault lines between developing and OECD countries are ever so clear,” says Tommaso Faccio, head of secretariat at the Independent Commission for the Reform of International Corporate Taxation.

The contrast between the UN and OECD digital tax proposal highlights the differences between developing and developed OECD countries, and the contrast poses the latest challenge in finding a global consensus. It creates a clearer divide on tax priorities that will play out this year through debates at the OECD, UN, regional membership groups and countries choosing to take unilateral action. ■

Unilever

The tax team has been influential in international tax debate

The company's tax team earns its spot on *ITR's* Global Tax 50 for appearing in a number of key tax news stories, including ongoing negotiations on the OECD's two-pillar solution to digital tax challenges and Dutch withholding tax liabilities tied to corporate relocations that may change tax laws in the Netherlands and create another precedent-setting EU tax case.

Janine Juggins, executive vice president of global tax and treasury at Unilever, and Sebastiaan de Buck, vice president of tax strategy, co-lead the tax team at Unilever, the UK's largest company by market capital at £113.85 billion (\$156.2 billion) in 2020.

They frequently contributed technical business insights towards the OECD's multilateral solution on a tight deadline for mid-2021, including important simplification suggestions on the global anti-abuse erosion (GloBE) proposal under pillar two. Their outlook is to limit tax uncertainty and remove complexity ahead of widespread changes to the international tax system as some changes risk double taxation.

“One of the key simplification measures to look at is the country-by-country reporting safe harbour work that has the potential to reduce duplicative efforts,” the two heads of tax wrote to the OECD in their consultation response regarding GloBE rules.

“A further simplification opportunity would be to exempt any legal entity which calculates its taxable income using a



The Unilever tax team has featured in discussions on the OECD's digital tax agenda

statutory rate of tax that is at least equal to the minimum tax,” they added on GloBE.

The GloBE rules, including the income inclusion rule, switch-over rule, under-taxed payments rule, and subject to tax rule, create a lot of complexity that most businesses prefer to limit. The OECD is paying close attention to these concerns from Unilever and other large companies, but any minimum tax model will have to account for different factors across sectors, which adds complexity.

While the Unilever tax team has been in the spotlight on the OECD's digital tax agenda, the multinational consumer goods company found itself in the middle of more international news in 2020 with the expansion of the Dutch withholding tax regime. The company is facing heavy tax liabilities under recently proposed exit taxes after opting to consolidate its dual tax residence in the UK.

The Netherlands proposed a 15% dividend withholding tax levy on profit reserves shortly after the company announced its corporate relocation in mid-2020. The company obtained a legal

agreement and merged its dual-headquarters in the UK in November 2020.

However, Unilever may be liable to pay €11 billion (\$12.94 billion) in exit taxes because of the move. The Dutch tax proposal is still going through a parliamentary approval process, and may be implemented in early 2021 depending on an opinion from the Court of Justice of the European Union (CJEU).

Unilever released a statement in August regarding the pending Dutch proposal. It said: “The boards have received legal advice that, if enacted in its current form, application of the bill to the unification proposal would be in manifest breach of the obligations the Dutch state has assumed under international law.”

Some international tax advisors expect the controversial Dutch exit tax proposal to be challenged at the CJEU under an infringement procedure because it may impose restrictions on the free movement of capital. They point to the *National Grid Indus BV* case as a relevant example that addressed the issue of exit taxes on corporate migrations when a company is resident within the EU.

Exit taxes have been through the CJEU on a number of occasions, and earlier cases have shown exit taxes are allowed and some designs are even required under the EU's Anti-tax Avoidance Directive. The company's €11 billion tax bill from the Netherlands may rest on an opinion from the CJEU.

Largely, Unilever's global tax team had a busy year in 2020 and saw added pressure on its department to manage operations during the pandemic, but continue to act as a notable business presence in ongoing technical tax discussions at the OECD and tax developments in the EU. ■

Vodafone v. India

One of the longest tax disputes in India could change the course of retroactive taxation policies in the country and open up investment opportunities for large businesses.

Vodafone's win against the Indian revenue authority at the Permanent Court of Arbitration reinforced treaty protections for investors and put pressure on India to amend laws that allow the government to seek retroactive taxes. This long-running dispute also set the precedent which paved the way for Cairn Energy to win its battle with India three months later, securing the *Vodafone* case a place on *ITR's* Global Tax 50.

The Permanent Court of Arbitration in The Hague ruled on September 25 2020 in favour of the UK-headquartered telecommunications company and rejected the Indian government's retrospective demand for back taxes in a unanimous decision. The ruling was a setback for the country's retrospective taxation policies, which were found to be in breach of the guarantee of fair and equitable treatment under the bilateral investment treaty with the Netherlands.

However, the Indian government has appealed the arbitration court's decision to award Vodafone a reimbursement of some of its legal costs and delayed any amendments to the law that would revoke the tax administration's powers to seek retro-

spective payments on offshore transfers.

Ajay Rotti, partner at Dhruva Advisors in India, says: "The *Vodafone* issue is perhaps the most discussed tax controversy in India that has garnered attention from investors across the globe."

Vodafone has been fighting the Indian government on retroactive taxes for more than a decade, and the saga continues in 2021 through India's appeal to a high court in Singapore.

A case of 'tax terrorism'

The case goes back to 2007 and the primary question was whether gains made by Hutchison on the sale of an Indian telecom network to Vodafone through an offshore share transfer deal are taxable in India and whether Vodafone had an obligation to withhold Indian taxes on payment to Hutchison.

The Indian Supreme Court ruled in favour of Vodafone in 2012, and explained that the Indian tax laws did not have any enabling provisions by which such offshore share transfer deals could be taxed in India. In response, the Indian government retrospectively amended the law by issuing a clarification that offshore transfers were

intended to be taxed in India if those shares derived their value from assets in India.

The dispute highlights taxpayer concerns over retrospective taxation policies in India, which overshadowed Vodafone's growth plans and soured wider business attitudes toward increasing foreign investment in the country for more than a decade.

Similarly, in the *Cairn* case, the Indian tax authorities lost their argument at the arbitration court in December.

In a statement on December 23, Cairn Energy said the claim it brought against the Indian tax authorities under the terms of the UK-India bilateral investment treaty was found in its favour. The clash between the two parties stemmed from the British oil company's restructuring in 2006 that involved floating Cairn India on the stock exchange and transferring assets to the new entity.

"The tribunal ruled unanimously that India had breached its obligations to Cairn under the UK-India bilateral investment treaty and has awarded to Cairn damages of \$1.2 billion plus interest and costs, which now becomes payable," it said. The company had previously said it was seeking at least \$600 million in damages from the Indian government over its lengthy tax dispute, which began in 2015.

One head of tax at an asset management company focusing on energy says: "Pursuing money under retrospective laws amounts to tax terrorism, and [works] in stark contrast to the Indian government's aim of fostering a business friendly tax regime."

There was widespread hope across the international business community that



Vodafone has one of the longest running disputes with India tied to retroactive taxation

Prime Minister Narendra Modi's government would rectify the issue when the Bharatiya Janata Party (BJP) took power in 2014. BJP's election manifesto criticised the former government for unleashing tax terrorism and promised to provide a "non-adversarial and conducive tax environment" and "create investor confidence". However, no such action has been taken against the retrospective tax laws.

It seems that the BJP's criticism of 'tax terrorism' and promise for change, the Indian Supreme Court's ruling in the *Vodafone* case, two expert committees saying that retrospective taxation goes against fair taxation, and the arbitration court's 2020 decisions in both *Vodafone* and *Cairn* have not been enough to make the Indian government correct the laws.

Ex-Vodafone Counsel Harish Salve, a barrister as Blackstone Chambers who represented the telecommunications company at the Indian Supreme Court, has previously said that Indian bureaucracy still has a long way to go in "changing its old mind-set of obstinacy" and is yet to show political maturity. Sadly, this still applies today.

Damaging consequences

India's position may continue to harm deal-making activity in the country as tax directors are a bigger part of the decision-making process during the COVID-19 pandemic. Some large companies may be dissuaded from acquiring less expensive pandemic-battered businesses in India to expand their supply chains.

"The government is already on record that it is beyond the arbitration panel's prerogative to adjudge the scope of its tax laws," says Mukesh Butani, managing partner at BMR Legal Advocates. "However, the outcome of investment treaty arbitration has generally not been favourable to India. 'This will surely get the government thinking of revising its legal strategy.'"

India risks losing other treaty-based disputes too, including a second case with *Vodafone* under the UK-India investment treaty.

Following weak outcomes from these treaty-based disputes, India started negotiating a protocol to its tax treaty with the Netherlands in 2019. This spells less tax certainty for corporate investors in the long-term if treaty protections need to change, but the Indian government is in a weaker negotiating position with the Netherlands due to the *Vodafone* case.

Investors will closely follow the outcome of the appeal in Singapore, because if Vodafone wins again that will put more pressure on the Indian government to amend its retroactive taxation laws. This case is not over. ■

Ursula von der Leyen

President of the European Commission

A global pandemic was probably not what the German centre-right politician Ursula von der Leyen had in mind for her first year in Brussels. Yet the European Commission's (EC) President stepped up and became instrumental in coordinating the EU response to the COVID-19 pandemic.

Von der Leyen's considerable achievements in 2020 included brokering an agreement for a €750 billion (\$915 billion) recovery fund to support the worst-hit countries in the EU. Meanwhile, the EC continued work on the Directive on Administrative Cooperation (DAC), the European Green Deal, and the taxation of the digital economy.

The EC President took office on December 1 2019, with a tax agenda picking up where her predecessor, Luxembourgish Jean-Claude Juncker, had left off. Von der Leyen's priorities included taxing the digital economy, combating tax avoidance, and focusing on creating a common consolidated corporate tax base (CCCTB).

However, in 2020 these goals had to be partly shelved in favour of urgent work to help EU countries through the COVID-19 crisis.

COVID-19 response

From March 2020 onwards, von der Leyen was busy trying to shield the 27 EU member states from the worst of COVID-19, while encouraging cohesion at a time when countries were turning inward to protect their own interests.

Italy, the first EU country to suffer badly from the pandemic, suggested "coronabonds" and debt mutualisation, but Germany and the Netherlands blocked the proposal, leaving Italy disillusioned with the bloc. Meanwhile, the Brexit deadline was looming, a constant reminder for member states that it was possible to leave the union. As far as existential crises go, COVID-19 was a pretty big one for the EU, and von der Leyen was responsible for navigating it.

The EC President was ultimately successful in uniting Europe under the NextGenerationEU initiative, a temporary instrument to boost Europe's recovery from COVID-19 worth €750 billion. The need to repay this debt is likely to accelerate tax reform, and the EC has set out measures including a carbon border adjustment mechanism, a digital levy, a



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Von der Leyen may have to lead an EU digital tax solution if the OECD talks fail

financial transactions tax (FTT) and the CCCTB.

In the shorter term, von der Leyen presided over the vaccine tax relief measures, including relief from customs duties and VAT on protective and medical equipment from non-EU countries. The EC also scrapped VAT on vaccines and testing kits to assist the vaccine roll-out.

Paolo Gentiloni, von der Leyen's Commissioner for the Economy, said: "The successful roll-out of these vaccines is crucial for Europe to emerge from the shadow of the pandemic: it will be the number one priority for the coming months."

Meanwhile, work continued on environmental tax and tax transparency initiatives.

EU Directive on Administrative Cooperation (DAC)

The sixth iteration of the Directive, DAC6, was due to begin implementation in July 2020, with the deadline for reporting historical arrangements (from June 25 2018 onwards) set at August 31 2020. Due to the pandemic, the EC pivoted to offer countries an extension of up to six months, and countries including

Ireland, Cyprus, and the UK accepted the offer.

Meanwhile, the EC was working on DAC7. The EU Council voted in December 2020 to approve a legislative proposal to expand the Directive to include information relating to digital platforms. The EC said in a press release that this will “reduce the administrative burden placed on platforms, who often have to deal with several different national reporting requirements”.

Not content with working on DAC6 and DAC7, von der Leyen’s team also started pursuing iteration number eight. In November 2020, the EC published a roadmap for extending the Directive once again to include crypto-assets and e-money under what will become DAC8.

Digital taxation

When von der Leyen first took office in December 2019, she said that the EU “should act alone” if an OECD global solution on taxing the digital economy had not been reached by the end of 2020. As the OECD did not reach an agreement in 2020 and, while von der Leyen showed some flexibility, she made it clear that the EU is tired of waiting.

In December 2020, the EC President said: “If there is no consensus-based solution on a digital tax in the OECD or the G20 by mid-2021, Europe will act.”

Von der Leyen has followed through on that promise, publishing a consultation on a proposed EU digital services tax (DST) in January 2021.

European Green Deal

Von der Leyen has always been vocal about her determination to help the EU transition to a sustainable way of operating. As such, the European Green Deal was adopted by the EC just 10 days after she took office. Any major taxation changes in 2020 as part of this may have been stalled by the global pandemic, but a proposal for revising the Energy Taxation Directive is pegged for June 2021.

However, von der Leyen did make progress on a plastics tax, included as part of the COVID-19 recovery package. The tax is calculated at a rate of €0.80 per kilogram of non-recyclable plastic packaging waste, and came into force on January 1 2021.

Brexit

On top of everything else, von der Leyen found much of her time in 2020 commandeered by Brexit negotiations with UK Prime Minister Boris Johnson. The trade and cooperation agreement (TCA) was finally announced on December 24 2020, after months of gruelling negotiations.

The agreement covers state aid, tax transparency, and environmental measures. It also provides for zero tariffs on goods crossing the EU-UK border that comply with the rules of origin. Businesses are pleased to have a deal, but the first weeks of 2021 were clouded by confusion at British ports, and tax teams expressed annoyance that the legislation had been published with so little notice.

For a first year in the job, von der Leyen has not had an easy time of it in 2020. Managing to hold the EU bloc together while navigating the turbulence caused by COVID-19 and Brexit is no small achievement. Meanwhile, under its president’s leadership, the EC continued work on pressing global tax issues including environmental taxes, taxing the digital economy, and the implementation and extension of DAC6.

In 2021, much of this work will continue, and von der Leyen will need to deal with the fallout from the pandemic and Brexit while refocusing on the longer-term tax reform that continues to be a priority for the EC. Much depends on the OECD’s attempts to broker an agreement on taxing the digital economy by the summer. Depending on the level of success, the EU could face increasing pressure to progress its own DST, which would add yet another unwieldy task to von der Leyen’s list. ■

Wang Jun

Commissioner of the China State Taxation Administration

Although 2020 was a turbulent year for the China State Taxation Administration (STA), it has achieved some notable milestones and will be pursuing several tax reform initiatives in the coming year as part of the government’s 14th five-year plan.

Under STA Commissioner Wang Jun’s leadership, the STA is showing tax authorities worldwide how to navigate the post-COVID tax landscape, securing him a place on *ITR*’s Global Tax 50 for another year.

Faced with the complicated international situation and dealing with the impact of the COVID-19 pandemic, Commissioner Wang describes 2020 as an “extraordinary year”.

The STA implemented four specific measures last year, including rolling out a number of tax and fee cuts that exceeded \$386 billion in 2020, promoting contact-free taxpayer services, using data analysis and digital tools to advance the tax administration.



At the same time, the STA has introduced measures to reduce contact and contain the health and economic fallout of COVID-19. Tax return and payment deadlines were also extended several times to support struggling taxpayers.

“The STA had successfully stood the ‘ultimate test’ of the pandemic, making positive contributions to the coordination of the COVID-19 response and economic and social development,” Commissioner Wang tells *ITR*.

Big data and digital transformation

As with many tax authorities around the world, the digital transformation was a large part of the STA’s work in 2020. These efforts will be increased over the coming year.

During the pandemic, Chinese tax authorities vigorously promoted contact-

free services, allowing more than 200 tax matters to be processed online, including paperless filings for tax refunds. Export tax refunding was also sped up by 20% in 2020 compared to 2019, from 10 working days to eight, to ease the financial strain for affected businesses.

“As of now, nearly 90% of tax-related matters, as well as 99% of tax filings can be dealt with through different online channels,” says Commissioner Wang.

In addition, one notable development that will be a more globalised trend in the coming year is the use of big data.

“A coordinated and interactive analysis mechanism across the STA headquarter and provincial, municipal and county tax services was established by taking full advantage of tax-related big data,” says Commissioner Wang.

Chinese tax authorities submitted more than 20,000 reports regarding tax economic analysis in 2020 to support governments at all levels in decision making. VAT invoices were also monitored daily to analyse the health of the economy and understand how businesses were operating during the pandemic. Tax-related data is increasingly becoming a “bridge” for the STA to support the integration of supply chains.

Big data also allowed the STA to screen taxpayers eligible for the tax cuts and use a range of channels to inform them of the policies they could utilise. Intelligent analysis was also conducted using big data to provide more targeted services.

“The implementation of tax and fee cuts across all regions and industries was tracked, monitored and analysed using big data and thus targeted measures were taken accordingly to help market players to fully enjoy policy dividends,” explains Wang.

China’s technological advancements have also helped it manage tax fraud and identify tax evaders. With governments around the world needing to boost their funds, closing the tax gap would be a winning solution as it does not impose a higher tax burden on legitimate taxpayers. Some countries will be looking at China’s approach to see if they can achieve similar success.

The STA explored ways to make “panoramic profiles” of taxpayers based on gathered information of corporate and individual taxpayers.

“Ex-ante alerting, in-process prevention and control, and ex-post facto inspections were carried out by designing algorithm models, establishing risk indicators and developing case-selection tools to facilitate the building of an intelligent and accurate tax supervision mechanism,” explains Wang. For example, in 2020, invoice-related risks were monitored, and responsive and targeted measures were taken to combat VAT fraud under the mechanism. The accuracy rate of risk identification hit 94%.

STA pushes ahead with individual income tax (IIT) reform

Digital advancements also helped the STA achieve the last step of its individual income tax (IIT) reform, which began in 2018. Although COVID-19 made this harder to achieve, Commissioner Wang says the tax authority did well to complete the first annual reconciliation.

Reconciliation of the IIT regime was due to begin on March 1 2020. Under this, more than 100 million of China’s taxpaying population were required to complete their own tax returns for the first time.

Yet the local tax authorities lacked the experience to directly communicate with them. In addition, numerous government departments had to work together to ensure accurate tax payments and refunds, making this a complex task.

In February and March of 2020, all the plans were disrupted because of COVID-19. “The planned preparatory work, including whole-chain simulation,

test run, training and education, etc., came to a standstill,” explains Wang.

Nevertheless, with some adjustments to the STA’s working practices and exempting lower earners from the scope, the task was achieved.

“600,000 tax staff were mobilised remotely to participate in the trial run of annual reconciliation, testing and verifying the entire process from tax filing to tax refunding or making supplemental tax payments, and emerging problems were solved rapidly,” says Wang. “Moreover, taxpayers were provided with online training and education.”

This effort was followed by a range of measures that supported taxpayers in their filings. In particular, big data played a significant role in its success as it allowed pre-filled tax returns to be sent to taxpayers for easier completion through the IIT smartphone app. The efforts were supplemented by the use of third-party platforms such as Wechat and Alipay.

“During the process of annual reconciliation, the number of registered users of the IIT smartphone app exceeded 163 million, making the app become the biggest mobile application regarding government service, and nearly 80% of taxpayers completed annual reconciliation using the smartphone app and pre-filing service,” says Wang.

In one day, the app was able to support more than 6.8 million taxpayers completing tax filings and almost 3.6 million tax refund reviews.

“Although there were ‘rapids and dangerous shoals’ in the process, the first annual reconciliation went smoothly and was successfully completed,” says Wang.

A ‘complicated’ year ahead

The year 2021 marks the start of China’s 14th five-year plan, requiring the Chinese tax authorities to roll out various tax reforms, optimise tax enforcement and collection, and continue to modernise tax administration.

Under guidelines approved on December 30 2020, the STA’s objectives include:

- Effectively strengthening accurate law enforcement;
- Promoting targeted services;
- Scientifically conducting precise supervision; and
- Advancing dedicated joint governance.

Big data and digital transformations will underpin a lot of this work.

For example, the STA’s eighth ‘Spring Breeze Project’, focusing on a smart service, smart administration and smart platform, will involve streamlining administration and optimising services.

The STA will also explore the application of new technologies such as artificial intelligence, cloud computing, and deep learning to facilitate taxpayers’ dealing with tax matters.

Using big data, the STA plans to “crack down on tax crimes by promoting scientific, targeted and coordinated tax auditing, maintaining zero tolerance for tax-related wrongdoings including fraudulent invoice issuance and export tax frauds,” says Wang.

Plans to introduce e-invoicing will also be advanced, as will data sharing among governmental departments.

On the international tax landscape, there will be a second Belt and Road Initiative Tax Administration Cooperation Forum, the China-EU Investment Agreement will be implemented and the tax treaty network will be expanded.

In addition, the country will continue opening up its borders to more foreign direct investment (FDI). In 2020 China became the world’s largest FDI recipient. On trade, China signed the Regional Comprehensive Economic Partnership (RCEP) agreement on November 15 2020.

The trade agreement covers 14 other Asia-Pacific countries, including Japan, South Korea, Australia, New Zealand, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

Lewis Lu, head of tax and legal at KPMG Asia Pacific and KPMG China, says that this agreement – the largest free trade deal in the world – will facilitate the ongoing integration of these economies, including in the technology and digital spaces.

The STA also plans to join tax authorities of other countries in response to the impacts of COVID-19, making contributions to the better development of the global economy.

“It is foreseeable that the world economic situation in 2021 will still be grave and complicated with an unstable and unbalanced recovery, and the risks caused by the impact of COVID-19 should not be overlooked, which remains a major challenge facing countries around the globe that needs to be addressed side by side,” says Wang.

“I know deeply that the tax-related work will inevitably encounter foreseeable and unforeseeable challenges as the world economy recovers from the pandemic,” he says. “But I am even more confident that as long as the tax authorities of all countries pull together with joint efforts, we can surely overcome difficulties and challenges to embrace a better future.” ■

Logan Wort

Executive Secretary of the African Tax Administration Forum (ATAF)

Logan Wort leads the African Tax Administration Forum (ATAF) as executive secretary. As economic growth accelerates in the region, more multinationals have expanded their operations into Africa.

This raises a number of tax challenges for businesses in a region where tax administration and policy is still developing. The ATAF helps to bridge the gap. Its growing influence and role in developing and providing support to African countries places it in *ITR*'s Global Tax 50.

Wort reflected on that past year in a conversation with *ITR* and discussed what is on the horizon for 2021.

ITR: What has been your highlight over 2020, and why?

Logan Wort: We have had a number of highlights in terms of the impact we set out to achieve. At the global level is the intensity of our work on the global framework for the taxation of the digital economy.

ATAF seems to be the only organisation who writes responses that are technical analyses, as well as looking at the impact for developing countries. These have been used and looked forward to by developing countries in other regions.

Our work is having an impact on the UN Tax Committee (UNTC). ATAF has been providing support to the African delegation of the committee. We think the agenda of the UNTC has shifted to a broader tax policy that is more reflective of the global framework agenda.

Additionally, the African Union Commission has for the first time really put tax on the agenda; there are preparations for the African Union ministerial meeting dedicated to illicit financial flows and the taxation of the digital economy. Global discussions are great but there has not been continental discussions on these issues. That has been an important highlight.

The ATAF publication on drafting digital services tax legislation has come at a time when the discussion at the OECD has not reached a conclusion and African countries have been given measures to put in place. And of course COVID-19 – it is not a direct highlight but we've had conversations with heads of tax administrations in African countries, discussing the impact, looking at immediate response possibilities, and understanding the challenge.

It was an exciting and busy year.



ITR: What was the biggest challenge to overcome?

Logan: The biggest challenge as an organisation, but also for different countries, was COVID-19. The new working methods and working environments have shown the importance of investment in IT.

One of the biggest challenges other than the economic impact, in our experience and certainly in my experience, was that those countries that have invested in IT for their tax system have been those that have come out better.

One of the ways in which we dealt with this is that we conducted continental-wide interventions with heads of tax administrations, attended by 30 countries, where we shared key interventions and types of measures. Countries such as South Africa, Uganda, Kenya, and Mauritius played a huge role in developing these instruments.

Based on that experience, we were able to produce guidance for member tax administrations in response to the pandemic.

Those interventions were crucial in helping our members overcome some of these challenges.

I think we also have to continue work on broader industrial resources. We produced a paper in 2020 on the roadmap on the future of resource taxation.

Finally, there is more work to do through cooperation with various stakeholders at all levels. We have to continue to find revenue sources, especially in the wake of COVID and revenue losses.

ITR: What will define 2021 for you? What are you most looking forward to, and why?

Logan: Some very specific things will define 2021. Firstly, a global and continental post-COVID recovery programme. In our area, post-COVID revenue mobilisation and tax systems recovery will be a focal point. They played a crucial role, not just in revenue collection but also distribution of health-care and social services.

Also, the finalisation of Inclusive Framework work on the taxation of the digital economy, because it must agree on the taxing rights issue. The discussion at the Inclusive Framework is not dealing with it – now it is a scramble for who can get the most. If it does not do that, it risks the validity and credibility of the intuitions involved.

Third would be the consolidation of the African Union's attempt to create a political platform for tax policy and administration that can plug into the Inclusive Framework.

Finally, we believe that a fundamental part of our efforts must be a close cooperation of African agencies. That means we see a strategic role for the African Union, the wider African region, the African Development Bank, and ATAF in leading tax administration and reform. It is important for sustainable growth.

I would add that ATAF has been requested by its members to start looking at a digital platform for tax administration for the whole continent. That is something that is going to be crucial to the sustainability of tax administration.

ITR: Will there be any other challenges?

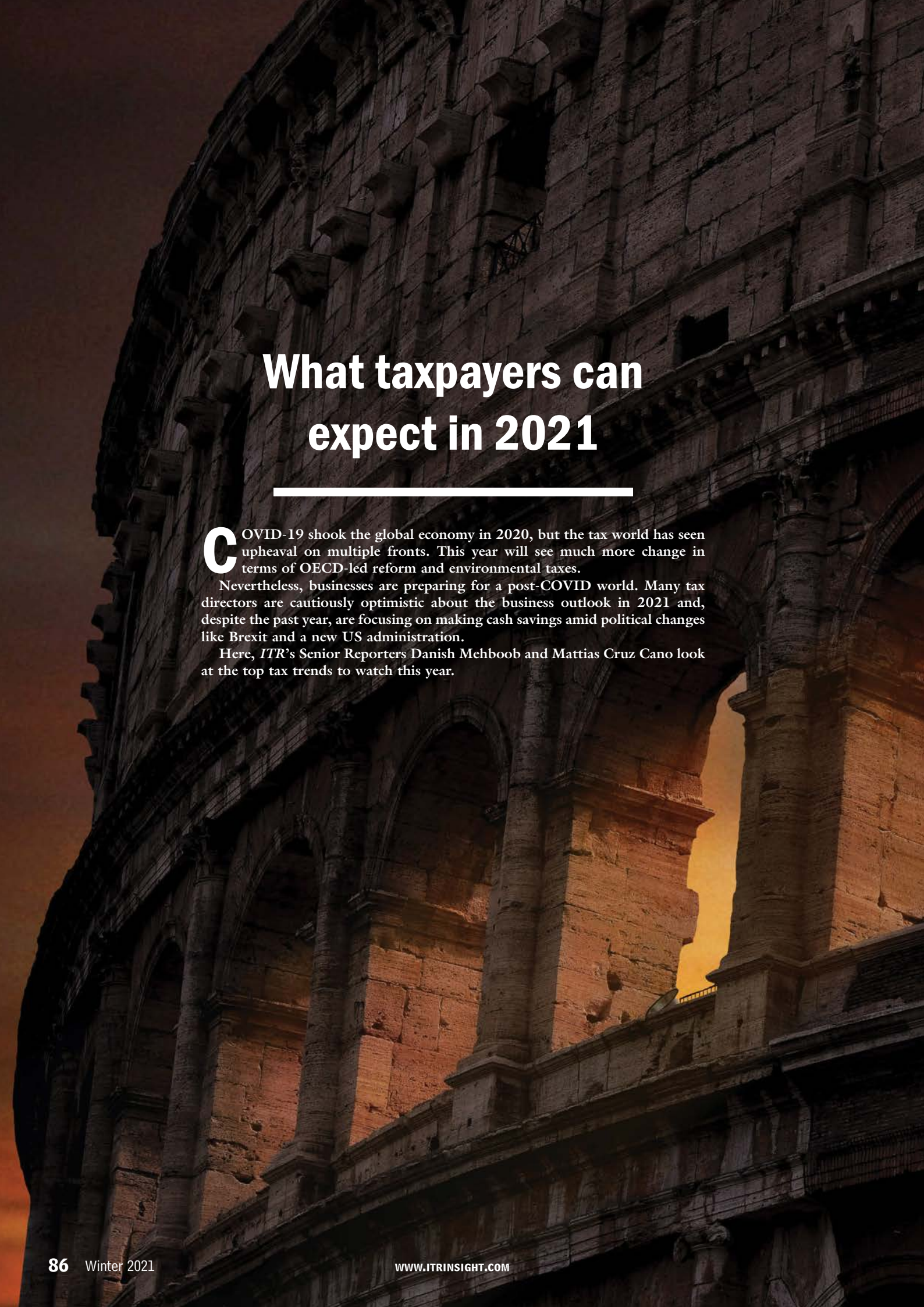
Logan: Post-COVID priorities and economic need will be one of the biggest challenges, and linked to that, which is not exclusive to Africa, social impact. Economies will change and we will possibly see an increase in political instability.

Part of the priority we will need to manage will be an investment in tax systems. There is a massive deficit and governments do not fully understand it.

Traditionally taxation has been a conversation for a few. I find that, in any conversation, whether social or a corporate environment, if you are the tax person, the conversation tended to shift away from you. However, in the last five years, the conversation of taxation is changing to be more inclusive.

The tax conversation is becoming more technical. Part of the work that ATAF champions is thought leadership, we do that through our African Tax Research network.

It is not about just collecting and filing, it is a broader conversation of understanding and contributing. ■



What taxpayers can expect in 2021

C OVID-19 shook the global economy in 2020, but the tax world has seen upheaval on multiple fronts. This year will see much more change in terms of OECD-led reform and environmental taxes.

Nevertheless, businesses are preparing for a post-COVID world. Many tax directors are cautiously optimistic about the business outlook in 2021 and, despite the past year, are focusing on making cash savings amid political changes like Brexit and a new US administration.

Here, *ITR*'s Senior Reporters Danish Mehboob and Mattias Cruz Cano look at the top tax trends to watch this year.

2021 set to put higher direct tax burdens on large businesses

Tax directors are scrutinising their cash-flow models, while some large businesses are outsourcing more of their tax functions to the Big Four accounting firms to help with incoming tax and legal changes in the US, UK, and EU.



Danish Mehboob

Tax directors are largely positive about the business outlook in 2021, but many are focusing on cash savings as political and technical tax changes loom in the aftermath of Brexit, the US presidential election, and the OECD's digital tax negotiations.

A lot of the recent outsourcing is still routine work on filing tax returns, managing audits, and publishing financial reports, but there is a notable rise in tax deferral strategies too.

Greg Engel, global vice chair of tax at KPMG said: "CFOs are facing higher management costs, and if the tax function is able to deliver what they need at less money then there's a high interest in that."

Large businesses are still likely to face changing tax rules and aggressive audits from many tax authorities globally trying to recover revenue as governments continue to feel downward pressure on capital while increasing emergency stimulus spending, which has already exceeded \$11.7 trillion in 2020 according to Oxfam.

"Things that generally weren't a high focus became a priority because of what the businesses were faced with, and the need to help their other entities," added Engel.

In-house tax directors told *ITR* that higher tax liabilities following the US presidential election and changing tax legislation in the UK following Brexit are some of the biggest



The 2021 outlook is higher direct tax burdens on large businesses

factors that tax directors at large businesses are considering.

A Biden administration and the digital tax negotiations

Many in-house tax directors are following progress on the proposed OECD multilateral digital tax solution because the outcome can impact long-term corporate tax liabilities, particularly from mid-2021 when more than 15 unilateral digital service taxes (DSTs) enter into effect.

One reason for the delay in reaching a multilateral solution is the US presidential election and the level of commitment to negotiations expected from President-elect Joe Biden.

Pascal Saint-Amans, director of the OECD's Centre for Tax Policy Administration, said that with six months left to find an agreement, the organisation is, in a sense, in "waiting mode for signals from the US".

In the meanwhile, many taxpayers, including

Microsoft, suggest ring-fencing Amount A under pillar one to sustain the OECD's digital tax plans since wider agreement does not look promising while the political and technical details continue to miss stakeholder expectations. Key components still under discussion include scope, segmentation, nexus, and allocation of losses.

Procter & Gamble, GlaxoSmithKline, Unilever and 46 other companies also want the OECD to clarify how the global anti-base erosion (GloBE) proposal under pillar two will interact with the US global intangible low-taxed income (GILTI) rules. Many US companies want the OECD to recognise the GILTI regime as a different form of the same set of rules, particularly the income inclusion rule (IIR), since tax burdens from the GILTI regime are likely to rise under the Biden administration.

Higher GILTI burdens will incentivise large businesses to bring operations back into the US for job growth, and it raises significant US tax revenue amid the economic fallout from the pandemic while the OECD finalises a simple approach to GloBE.

While waiting on Biden's stance on the digital tax debate, companies are also dealing with exacerbated trade tensions and multiple taxation risks, made worse by the Office of the US Trade Representative's (USTR) section 301 investigations. The USTR concluded in January that DSTs from Spain, India, Turkey, Italy, Austria, and the UK are discriminatory against US companies.

Separately, a Biden administration also promises to increase the corporate tax rate from 21% to 28% after the congressional election results were finalised in early January. The big question is how quickly this rate rise may happen, especially when the outgoing US Treasury just finalised all the regulations under the US Tax Cuts and Jobs Act.

The direct tax outlook after Brexit

On the other side of the Atlantic, advisors do not expect significant changes to UK direct taxes in 2021, since the legal effects of Brexit are minimised by the European Union Withdrawal Act in 2018.

However, some legal changes will come from cases such as *Volkerrail Plant Ltd and others v HMRC*, where the UK High Court may exercise legal freedoms that depart from the Court of Justice of the European Union (CJEU) and provide some of the earliest examples of the consequences of Brexit.

Additionally, some international tax advisors said EU member states are continuing to pressure Brussels to renegotiate provisions on financial transparency and corporate taxation with the UK following the EU-UK trade deal to prevent a 'Singapore on Thames' model in Europe. The EU's main leverage is granting the

UK limited access to the single market for financial services that may progressively improve with the imposition of stricter rules on tax dumping and financial transparency.

“Any action from the EU is unlikely in the short term, but the EU may very well keep floating this as an option that becomes a reality later if the UK goes on a deregulation spree,” said one head of tax at an asset management service in the UK.

“This isn’t going to happen,” said Dan Neidle, partner at Clifford Chance UK. “It would be in extraordinary bad faith for the EU to sign a deal with the UK that permits tax divergence and then use regulatory measures to punish the UK for tax divergence.”

Courts in the UK seem keen to remain compatible with EU law, and may opt to discontinue certain domestic tax provisions to remain compliant with the EU. However, UK courts will no longer be able to refer questions about the application of EU law to the CJEU, and there is scope for conflicting applications that puts companies at risk of multiple taxation and heavy compliance costs.

One example of divergence is the UK tax authority, HM Revenue and Customs (HMRC), removing many EU mandatory disclosure requirements ahead of the January 30 filing deadline, and announcing plans to adopt the OECD’s mandatory disclosure rules to replace the European Council Directive (EU) 2018/822 (DAC6) in coming months. Removing significant parts of DAC6 at this late stage will create more work for businesses that have been preparing for the regime.

“Given the UK government’s recent behaviour when it comes to the EU, particularly passing legislation that would potentially breach international law on parts of the agreement with the EU, it would be a bit rich for the UK to complain about bad faith,” said the head of tax.

The changes send large businesses back to their advisors

with questions on how to manage varied disclosures within a reporting chain that still involves stakeholders in multiple EU jurisdictions.

Compliance burdens and penalties under DAC6

Many EU countries are also preparing to start collecting corporate reports at the end of January, since the deadline was postponed by six months in most countries following an EU Parliamentary vote in mid-2020.

The full DAC6 guidelines for EU member states require intermediaries to report certain cross-border tax arrangements with an EU nexus, which tax authorities are required to regularly collect and share. Large businesses that are part of such cross-border arrangements are more focused on limiting their reporting obligations because DAC6 provisions are starting to appear in inter-company contracts too.

“This is worrying for us as a taxpayer,” said Raisa Nowab, head of global tax operations at BMI Group, referring to the high penalties for wrong reporting or missed deadlines under DAC6 rules in the Polish tax regime. In some cases, mistakes could lead to a criminal offence charge, she added.

In-house tax directors are also wary about over-reporting in EU jurisdictions in order to remain compliant, since mismatched disclosures may build friction between taxpayers and other tax authorities in the reporting chain. All parties, especially large taxpayers with cross-border operations with an EU nexus, need to be cautious about the significant penalties and challenges from authorities scrutinising their tax arrangements in 2021.

While Brexit and the US elections results represent some of the biggest political events to impact the outlook of tax liabilities and administrative burdens for large businesses in recent weeks, they are not exclusively going to influence in-house tax directors’ decision making this year.

2021 will bring a major shift in indirect tax policy

Taxpayers should prepare for a wave of indirect tax policy changes in 2021. Governments will focus on unwinding crisis relief measures, removing tax exemptions, and introducing digital and environmental taxes.

C OVID-19 has devastated the global economy. Countries are still managing this fallout and many are feeling the consequences of the downward pressure on tax revenues alongside the jump in emergency spending. In 2020 alone, the pandemic has cost the world economy an additional \$11.7 trillion, with 83% of that spending from 36 countries, according to international NGO Oxfam.

“I would expect that the more the country spent, the more they are going to recoup,” said one tax director at a logistics company. “Look at Europe. This is where we have had the most intense social protection and support. These countries are going to be the ones that will have the highest need to recoup these costs.”

In these more economically mature jurisdictions, the bulk of tax revenue comes from indirect tax. VAT is the largest source of taxes on consumption, accounting for 6.8% of GDP and 20.4% of total tax revenue in OECD countries in 2018 on average, the OECD said in a report.

While economists agree that new consumption taxes or higher rates can damage the post-COVID recovery, some countries have decided to increase rates or introduce indirect taxes amid the crisis, such as Saudi Arabia’s rate rise. Others will be considering how to broaden the tax base while remaining politically popular.

“At some point, when the health crisis has passed and the



Mattias Cruz Cano

economic recovery is underway, governments will need to reconsider whether their tax systems are up to the challenges of the post-pandemic environment,” said Pascal Saint-Amans, director of the OECD Centre for Tax Policy and Administration.

A delicate balance

It is clear that 2021 will see the unwinding of COVID-19 reliefs. Governments will seek a delicate balance as to how quickly they can remove all the indirect tax pandemic support. While most multinational enterprises (MNEs) have chosen not to take advantage of tax deferrals, they have used VAT reliefs and wage subsidy arrangements – such as the UK’s furlough scheme.

Alongside this reversal of government support, there will be little tolerance for what tax authorities consider aggressive tax positions from MNEs.

“There has been a history where companies have received government assistance in hard times and questions have been raised after that about their overall level of tax compliance. MNEs will need to ensure, more than ever before, that they are adopting responsible tax positions because tax authorities will clampdown on that very hard,” said Lachlan Wolfers, head of global indirect taxes at KPMG.

One of the key issues is that the level of tax revenue from consumption taxes is lower and proportionally lower, meaning COVID-19 is having an additional impact. Consumers are shifting their consumption behaviours; instead of buying events or luxury goods, which have higher VAT rates, they are spending more money on necessities that have lower VAT or zero rates.

One way to combat this will be to remove exemptions, following a New Zealand-style model that has a 15% GST rate that applies to almost everything and a very narrow range of exemptions and zero rating.

“We expect to see reduced reliefs and exemptions. Kenya knocked down the headline rate, but they also swept away a lot of reliefs and exemptions. Countries are asking themselves if they need to be offering those tax exemptions?” said one African head of tax at a telecommunications company.

One key area for exemptions to be removed could be in the traditional energy sector, as public opinion on climate change has strengthened and

eliminating exemptions of favourable rates for polluting activities will be politically easier to pass. Other exemptions, such as those for the financial services sector may also be reconsidered in an attempt to recoup tax revenues.

“Generating income to support the post-pandemic recovery will be a priority for every government and tax increases seem inevitable with the huge increase in global borrowing. Any increases are likely to be met with tension and discord from businesses and individuals who handle the burden, and the governments implementing these changes are unlikely to be popular,” said Stefano Giuliano, partner at CMS.

Targeting digital and environmental taxes

Taxpayers should also prepare for an acceleration on digital and environmental taxes. Both climate change and digital services are not confined to geographical borders, presenting huge challenges in taxation. In the absence of multilateral agreements, countries will move forward with

introducing measures that capture much-needed revenue.

“I would expect a flurry of activity on digital taxation and a huge amount hinges on the OECD achieving consensus quickly,” said Wolfers.

“European countries will be most active in going after the digital economy superstars. The battle is ongoing and it will only intensify,” tax director at a logistics company, noting that because they had rolled comprehensive COVID-19 relief they would be aggressively seeking new tax revenue. The EU has also been urged to introduce a bloc-wide DST in case OECD negotiations fail by mid-2021.

However, the proliferation of unilateral digital taxation measures is also picking up pace in other parts of the world.

“There are opportunities around DSTs for taxing large tech businesses. Lots of countries in Asia are introducing DSTs and it will only increase because they are new and justifiable,” said one APAC head of tax at an asset management company.

“We have already seen Kenya and Nigeria make moves in the digital taxation space; they tend to be more advanced than other countries. The DST is a feature of the future African tax landscape,” said the African tax director.

On the environment, Europe is mostly leading the charge through its Green Deal, but a change in the US presidency bodes well for international cooperation on climate change. Taxpayers, particularly those in polluting industries in Europe, should consider the future impact of changes in environmental tax policy as it may have a direct impact on longer-term investments.

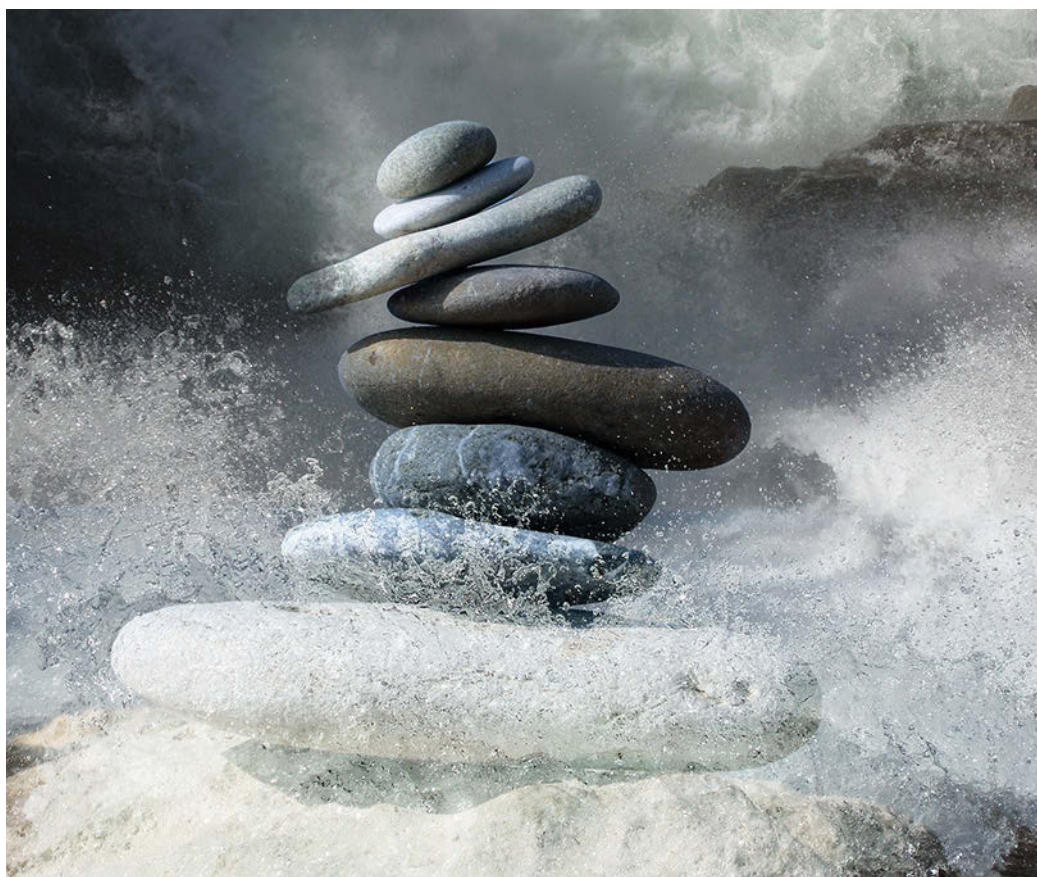
Other regions may be slower to move on climate change as heavy industries account for large amounts of investment and economic development.

“In this part of the world [APAC], with the exception of Australia, does it even make sense to talk about environmental taxation in places like China, Indonesia, and Thailand? They are not there yet. It may not be compatible with Western principles that sit behind this stuff,” said the asset management tax head.

Furthermore, the most advanced environmental tax policy measures are still being negotiated and any concrete targets and goals will have to satisfy various interests across jurisdictions. The environmental tax obstacles have yet to trickle through to tax departments, but when they do it will be a significant change for businesses.

“Environmental taxation is at a very policy-oriented phase at the moment, and as a result it is mainly being dealt with by corporate affairs departments. It will need to move over to the tax team once it comes into implementation,” said Wolfers.

2021 will be a defining year for indirect tax policy, accelerating many pre-pandemic trends. Additionally, a need to balance national debt and an opportunity to rebuild provides governments with a unique set of circumstances. Taxpayers must be ready for changes on indirect tax.



The indirect tax landscape will change significantly

ITR Awards 2021 and World Tax/World TP rankings now open for submissions

Companies, firms and individuals can now submit for the 2021 ITR Americas Tax Awards, Asia-Pacific Tax Awards and Europe, Middle East and Africa Awards. Awards Editor, James Wilson explains the process.

The launch of *ITR*'s global awards research is an opportunity to nominate your firm, tax team and respected tax professionals. The deadline for entries is March 31 2021.

ITR will host three awards in 2021:

- The Americas Tax Awards;
- Asia-Pacific Tax Awards; and
- Europe, Middle East and Africa Tax Awards.

After a tough year, we are looking forward to celebrating the 2020 achievements, hard work and ingenuity of tax and transfer pricing firms, teams and individuals across the global tax landscape.

The three awards will take place later in the year (see the schedule below) and *ITR*'s team remains hopeful that these can be hosted – and celebrated – in person.

What's new?

As ever, the awards will be led by the submissions received. However, there are some important changes to how *ITR* has structured its research.



James Wilson

Building on experience of past awards and the benchmarking research carried out for the World Tax/World TP rankings, the research for both the awards and rankings has been streamlined into a single submission form, with one submission portal and a single deadline.

The form is simple, allowing tax firms and service providers to focus on one process, rather than splitting their efforts between different templates and schedules.

The Practitioners' Survey being launched soon will also give leading lawyers across all regions an opportunity to recommend work, teams and individuals that they feel should be worthy of consideration in the awards.

In addition, the recognition of in-house counsel teams is being expanded, with new award categories for diversity and inclusion and compliance



and reporting. These will complement the existing in-house categories for tax team, TP team and indirect tax team. Separate forms for in-house teams and service providers will be released soon. Do get in touch if you are interested or if you want to recommend an in-house team for their work.

Remember, the award categories in each region do vary, so please check the relevant methodologies.

To help with the new process, the *ITR* and World Tax/World TP teams will be hosting a webinar on

February 23 to talk through the submission form and the way research works.

For more information about the ITR Awards process, please contact Awards Editor James Wilson:

james.wilson@legalmediagroup.com

If you have any questions about the World Tax-World TP research process, please contact World Tax-World TP Editor Jon Moore:

jmoore@euromoneyplc.com

For any commercial enquiries relating to the rankings research or ITR awards, please contact Head of Business Development Maggie Varela-Christie: margaret.varela-christie@euromoneyplc.com

Schedule of ITR Awards

	Nomination deadline	Shortlist revealed	Ceremony
Asia-Pacific	March 31 2021	July 8 2021	August 26 2021
Europe, Middle East and Africa	March 31 2021	July 29 2021	September 15 2021
Americas	March 31 2021	August 12 2021	September 23 2021

All the categories, eligibility criteria, and judging process for each awards, as well as how to submit, can be found on the ITR website (www.internationaltaxreview.com) and on the World Tax/TP website (www.itrworldtax.com).

Ensuring effective AEOI

Global Forum's peer reviews set direction for 2021/22

Head of the Global Forum **Zayda Manatta**, along with **Radhanath Housden**, head of the AEOI Unit, and **Adrian Wardzynski**, policy advisor, outline the results of the 100 AEOI peer reviews and the upcoming work to ensure an effective AEOI Standard.

Automatic exchange of information (AEOI) between tax authorities on financial assets and accounts held offshore is now a reality. The world has come a long way since 2009, from banking secrecy, to widespread exchange of information in response to a specific request and, more recently to the routine automatic exchange of financial information under the AEOI Standard.

Following the completion of the reviews of the AEOI legal frameworks, the Global Forum wants to see participating jurisdictions improve any shortcomings identified and to ensure the exchanges are effective in practice, in advance of compliance ratings being issued in 2022 on how effective each jurisdiction's implementation is. This is alongside OECD work to strengthen the AEOI Standard, such as extending it to crypto assets.

The significance of the AEOI Standard is demonstrated by the latest available exchange figures. In 2019, information on 84 million financial accounts with a total value of around €10 trillion (\$12.1 trillion) was exchanged between almost 100 jurisdictions (see Figure 1). These already highly significant figures are set to grow even further, as by 2020 the network of exchange relationships has expanded by 15%, to around 7,000, and the number of participating jurisdictions has increased to 105.

The increase in the information available to tax authorities to ensure tax compliance enabled by the AEOI Standard is especially important at this time, when national budgets have been strained to respond to consequences of the COVID-19 pandemic, following which there will be a search for ways to mobilise domestic revenue.



Zayda Manatta



Radhanath Housden



Adrian Wardzynski

Figure 1: Scale of AEOI exchanges over the past three years

	2017	2018	2019
Exchanging jurisdictions	48	96	97
Exchange relationships	2,600	4,500	6,100
Accounts (million)	11	47	84
Assets (EUR trillion)	1.1	4.9	10

The global impact has been considerable. To date the progress on the AEOI has helped jurisdictions identify about €107 billion in additional revenue (tax and interest, penalties) through voluntary disclosure programmes and associated measures. Furthermore, the commencement of AEOI is associated with a 22% decrease in foreign-owned bank deposits maintained in international financial centres, along with



Information exchange among Global Forum members is getting stronger, leaving little room for tax evaders to hide

increased deposits between non-financial centres. This shows the impact of a significant widening of the exchange of information network, especially through the expanded participation in the Multilateral Convention on Mutual Assistance in Tax Matters, including its use as a basis for AEOI. Tax evaders increasingly have less room for manoeuvre.

Looking beyond the figures, for the full benefits of the AEOI Standard to be realised, it is vital to ensure the quality of information exchanged and for it to be effective in practice. This is the task of the Global Forum which, since 2014, has been monitoring, assisting and reviewing the global implementation of the AEOI Standard.

The year 2020 was a major milestone in this work with the publication of 100 reports on the legal frameworks that jurisdictions have put in place to implement the AEOI Standard, for the first time. This paper sets out the rationale, process and outcomes of the reviews so far and gives details on the start of the next stage of the reviews, relating to the effectiveness in practice of the AEOI Standard.

The AEOI reviews: A peer-driven process

An inclusive, peer-driven and multilateral peer review process is key to ensuring that the AEOI Standard is an effective global tool to tackle tax evasion. This is because for each jurisdiction to fully benefit from the AEOI Standard, it relies on all others to properly implement it.

Under the AEOI Standard, financial intermediaries conduct due diligence procedures to identify the relevant accounts maintained by non-residents and report information on them to their local tax authorities, so it can be exchanged with the tax authorities from where the account holders are resident. Therefore, the success of the AEOI Standard hinges on financial intermediaries and sending jurisdictions effectively implementing the requirements and ensuring the completeness and accuracy of the exchanged data.

Cognisant of the limitations of unilateral actions to ensure effective global implementation of the AEOI Standard, the G20 leaders called on the Global Forum to monitor and review its implementation. The

choice of the Global Forum could have been expected as it was already delivering robust peer reviews in relation to the international standard in exchange of information on request (EOIR). These commenced from 2009 when the G20 leaders called for an end to bank secrecy and mandated the Global Forum to oversee the effective implementation of the EOIR. In 2014, following the development of the AEOI Standard by the OECD working with G20 countries, the G20 then expanded its mandate to the Global Forum to include the AEOI Standard.

The objective of the AEOI peer review process is therefore to provide peers with assurance that all jurisdictions are implementing the AEOI Standard effectively.

To give confidence to all that a level playing field is being delivered, the review process is driven by AEOI peers; it is the jurisdictions that are implementing the AEOI Standard that assess its implementation by others and determine whether expectations are being delivered. This is done in accordance with the agreed terms of reference and review processes. Figure 2 depicts the various component groupings underpinning the AEOI review process, as well as their key roles, with the Global Forum Secretariat supporting the process at each stage.

All of the 100 reports published in 2020 were prepared by the AEOI Assessment Panel, which consists of 13 public officials from AEOI peers, experienced in the implementation of the AEOI Standard. They analysed all of the relevant information and engaged with each implementing jurisdiction to conduct the assessments and prepare the draft reports. The draft reports were then evaluated, discussed and approved by the AEOI Peer Review Group (the APRG), a group of 34 AEOI peers tasked with ensuring the consistency and robustness of the reviews. Finally, the reports were sent for adoption by all AEOI peers and cleared for publication. Making the results public provides transparency over the process and accountability with respect to the level of implementation observed. Note that the approval and adoption procedure is based on the consensus-minus-one principle, whereby no one jurisdiction (including the assessed jurisdiction), can block the approval of a particular report.

Figure 2: AEOI peer review process

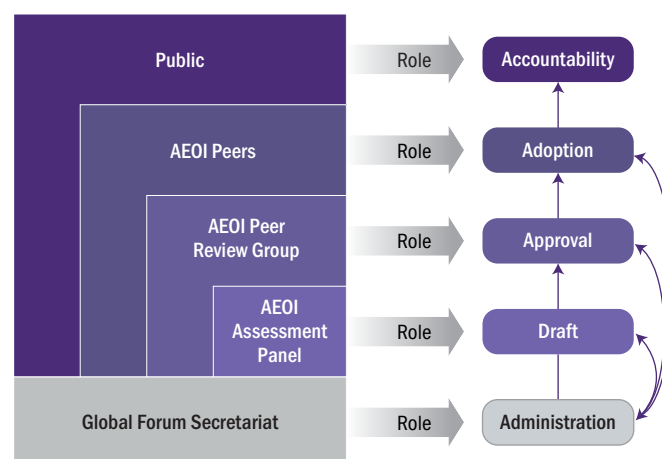


Figure 3: Stages of the AEOI review process



The process of conducting AEOI peer reviews

In 2015, two years before the first exchanges were due to commence, the Global Forum started its monitoring activities on the implementation of the AEOI Standard and launched a “staged approach” to monitor, assess and assist in the implementation of the standard.

At its core, the staged approach was designed to ensure each element of the legal, administrative and technical aspects relating to the implementation of the AEOI Standard were being put in place in a correct and timely manner.

As part of this approach, the Global Forum conducted detailed reviews of the domestic and international legal frameworks jurisdictions put in place to implement the AEOI Standard. This included a review of the detailed due diligence rules enacted in 100 jurisdictions, including over 550 categories of jurisdiction-specific non-reporting financial institutions and excluded accounts, to ensure they met the requirements.

The purpose of conducting these reviews during the implementation process was to highlight issues early to support the effectiveness of the AEOI Standard from the start. The various stages of the AEOI review process are set out in Figure 3 and expanded on further below.

The staged approach met its purpose. Many jurisdictions were quick to address the issues raised in the recommendations made by the Global Forum. Some jurisdictions introduced relevant changes even before the recommendations were formally issued.

In total, 64 jurisdictions have already successfully addressed over 400 recommendations made. Also, about 50 jurisdiction-specific exclusions that did not meet the required conditions set out in the AEOI Standard were removed.

The reassessments of the legal frameworks are ongoing as jurisdictions continue to pass amendments to address the remaining

recommendations. In some cases the timely passing of amendments has been delayed due to the impact of the COVID-19 pandemic.

In 2020 the Global Forum drew conclusions on the legal assessments carried out as part of the staged approach. This culminated in the publication in December 2020 of AEOI peer review reports covering 100 jurisdictions, including determinations on the extent to which each jurisdiction has the necessary legal frameworks in place. This completes the review of the legal frameworks for all jurisdictions that committed to commence exchanges by 2017 or 2018.

While there were challenges caused by the COVID-19 pandemic, it was possible to finalise the process as planned. This was mostly due to the prior work that was carried out over recent years, as well as due to the hard work and adaptability of Global Forum members, given the importance of this agenda. The 2021 iteration of this report will be an opportunity for jurisdictions to improve their legal determinations provided that they address the outstanding recommendations.

The main outcomes: A positive picture

The overall outcomes of the 2020 reviews demonstrated a very high level of compliance with the requirements, with 88% of jurisdictions being determined as having implemented the legal requirements of the AEOI Standard to a satisfactory level.

The determinations that can be issued are either:

- In place;
- In place but needs improvement; or
- Not in place.

Most jurisdictions (54) are in the “in place” category. These are jurisdictions whose domestic and international legal frameworks were considered to not include material gaps and that were properly implementing the AEOI Standard.

The second largest group, where a very broad variety of gaps were identified, is the 34 jurisdictions that fell into the “in place but needs improvement” category. This category includes jurisdictions whose legislative frameworks were determined to have one or more deficiencies that meant certain elements of the AEOI Standard were not properly in place, but which were not expected to undermine its overall operation. The last category of “not in place” comprises 12 jurisdictions whose respective legal frameworks were determined to need significant improvement to meet the requirements. At the extreme end of this category, there are two jurisdictions that have not yet enacted a legal framework

“Tax authorities will intensify their compliance regimes in order to make sure that financial institutions fulfil their obligations”

implementing the AEOI Standard. Table 1 lists the jurisdictions in each category of determination.

The main areas which jurisdictions need to change in their legislative frameworks pursuant to the AEOI peer reviews process could be grouped in three main categories:

- 1) The largest category of remaining recommendations relates to the jurisdiction-specific exclusions of non-reporting financial institutions and excluded accounts that do not satisfy the conditions set out in the AEOI Standard to be considered low risk of being used for tax evasion purposes.
- 2) The second largest category comprises of recommendations made with respect to the completeness of the enforcement frameworks. For example, the requirement to having powers that can be used to address avoidance of the due diligence procedures and reporting requirements, the ability to impose sanctions on account holders and controlling persons for submitting false self-certifications and having record-keeping obligations that cover the full scope of the records required to be kept under the AEOI Standard. This is a particularly important area on which all jurisdictions falling in the “not in place” category have multiple recommendations.
- 3) Another area where jurisdictions often received recommendations relates to missing parts of the detailed definitions of key terms set out in the AEOI Standard.

The jurisdictions that committed to commence their first AEOI exchanges in 2017 or 2018 should be recognised for their high level of compliance with the legal requirements of the AEOI terms of reference. This is against the backdrop of these jurisdictions having implemented and operationalised the AEOI Standard in a record time, which was a huge undertaking on a scale unprecedented in the field of international tax cooperation.

“The AEOI Standard may be extended in the future to cover crypto assets”

What is next?

The peer review work is not yet finished; the AEOI Standard must operate effectively in practice.

In the coming two years the Global Forum will focus on carrying out peer reviews on the effectiveness of the implementation of the AEOI Standard in practice. This work will conclude with the issuance of compliance ratings in 2022 on how effective each jurisdiction’s implementation is.

The effectiveness reviews will largely analyse whether each jurisdiction’s operational framework to ensure compliance with the AEOI Standard by financial institutions is sufficiently comprehensive and robust to properly police and enforce the requirements, as well as any issues each jurisdiction’s exchange partners have identified with the completeness and quality of the information received.

In the meantime, it can be expected that tax authorities will intensify their compliance regimes in order to make sure that financial institutions fulfil their obligations and correctly apply the required due diligence and reporting procedures in practice.

Another issue of note for the near future is the possible update of the AEOI Standard to extend its coverage to crypto assets. This topic was addressed in the report of the OECD Secretary General Angel Gurría prepared for the G20 Summit in Riyadh, Saudi Arabia.

Table 1: List of assessed jurisdictions and their AEOI legal determinations

Legal determination	Jurisdiction
● In Place (54)	Anguilla, Austria, Bahrain, Bermuda, Brazil, Brunei Darussalam, Bulgaria, Cayman Islands, China, Colombia, Cook Islands, Cyprus, Denmark, Finland, France, Gibraltar, Greece, Greenland, Guernsey, Hong Kong (China), Iceland, Indonesia, Ireland, Isle of Man, Italy, Jersey, Korea, Lebanon, Lithuania, Luxembourg, Malaysia, Malta, Marshall Islands, Mauritius, Montserrat, Nauru, New Zealand, Niue, Norway, Pakistan, Portugal, Qatar, Saint Kitts and Nevis, Samoa, San Marino, Saudi Arabia, Singapore, Slovenia, Spain, Sweden, Turkey, United Arab Emirates, United Kingdom, Vanuatu
● In Place But Needs Improvement (34)	Andorra, Antigua and Barbuda, Argentina, Australia, Barbados, Belgium, British Virgin Islands, Canada, Chile, Croatia, Czech Republic, Estonia, Faroe Islands, Germany, Hungary, India, Japan, Latvia, Liechtenstein, Mexico, Monaco, Netherlands, Panama, Poland, Russia, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Slovak Republic, South Africa, Switzerland, The Bahamas, Turks and Caicos Islands, Uruguay
● Not In Place (12)	Aruba, Azerbaijan, Belize, Costa Rica, Curaçao, Dominica, Grenada, Israel, Macau (China), Romania
● Not In Place (no AEOI legal framework) (2)	Sint Maarten, Trinidad and Tobago



What direct tax teams can learn from indirect tax innovation

Direct tax teams are looking at how their indirect tax colleagues have digitalised their processes to apply the same lessons to corporate tax matters, but indirect tax managers warn that technological transitions are not easy.

Indirect tax regimes have led the way in digitalising tax compliance processes, such as e-invoicing requirements, real-time reporting, SAF-T, and much more. As digital tax compliance expands into wider corporate tax and transfer pricing areas, direct tax teams are using the experience of their indirect tax colleagues as they transform their tax processes.

Direct tax teams are “having a rude awakening” on digitalisation, said one indirect tax associate director at a multinational pharmaceutical company. “The difference between the indirect tax functions and the rest of the tax function, from a digitalisation point of view, is that we’re generally at the forefront of it.”

The associate director added that direct tax teams have “come on our coattails... to replicate the relationship we have with the IT function”.

The reporting requirements of direct and indirect tax are different, but the introduction of country-by-country reporting (CbCR) and the need to extract data, the European Union’s directive on administrative cooperation (DAC6), digital audits, and other global measures, mean direct tax teams cannot wait much longer to utilise tax technology.

As with all transformation projects, the challenges of gaining budget, stakeholder buy-in and finding the right solutions remain. At a roundtable held by *ITR*, in association with Thomson Reuters, indirect tax leaders shared their experiences.



Anjana Haines

COVID-19 could restrict tax technology advancements

Although indirect tax teams have been among the first to switch to digital practices, many are still on their transformation journeys.

Jeroen van Asch, who works on Thomson Reuters' ONE-SOURCE tax solutions, said indirect tax managers find it tough to stay ahead of local and global regulations.

"Everybody is quite involved in the in the day-to-day activities, really trying to manage what is around the corner in six months, 12 months or 18 months. This is quite challenging. We also see that authorities are demanding not only more information, but also more frequently," said van Asch.

In Spain, where the VAT reporting system, Suministro Inmediato de Información (SII), was introduced in 2017, there have been numerous amendments to the regime. In October 2020, significant changes were announced to the regime that will require additional information from January 2021 and include more data checks.

In Norway, where SAF-T became compulsory in January 2020, a large amount of information has to be submitted, with additional demands being added before an audit.

Add to this the difficulties posed by COVID-19, which has limited resources and budgets, as well as more scrutiny from boardrooms, and the squeeze on tax functions becomes noticeably tighter.

For one indirect tax team leader from a multinational industrial equipment supplier company, the economic impact of COVID risks slowing down technological advancements in the tax function. "There are other issues where the company needs to invest currently. So it concentrates on other tasks than VAT," they said.

One European VAT Leader from the Netherlands said he finds it really hard to get visibility at the board level to be granted budget or IT resources.

"One of the biggest hurdles that we have is our IT department," said the European VAT leader. "They are always busy with other projects that are more urgent or more important than VAT."

"I'm using my tax director as a wedge to get a foot in the door and it looks like we might be getting some traction right now, but it is really hard," added the VAT leader.

Demonstrating value

A survey of more than 300 tax departments conducted by Thomson Reuters in March 2020 found that only 4% had an optimised tax department, whereas most said their departments were chaotic (25%), reactive (33%) or proactive (28%).

When the survey was repeated at *ITR*'s roundtable, the results showed that things have not changed in six months, meaning many companies are still relying on Excel and are struggling to become strategic partners in their business.

No matter what the business sector, indirect tax leaders say demonstrating the value and return on investment is essential to getting the buy-in required from the boardroom and IT department.

"You need to demonstrate the value and explain VAT to a lot of people so that they understand where the risks lie, where the issues

can occur, and where the penalties might be," explained the indirect tax team leader.

"After those explanations, they are willing to decide to go with the project to set up our systems better, etc. But you need to first explain and demonstrate the value," said the team leader.

For some indirect tax directors, their IT departments only provide support for simple requirements or small projects, but getting agreement on the more valuable projects is a challenge. However, some suggest that changing the way the conversation is framed, or pivoting from boardroom buy-in to focus on the IT department can make the difference.

"If you can demonstrate that there is value for the business and in any projects that are to be performed, whether that be FT reduction, demonstrable risk reduction or, in the best scenario, an actual cash flow or trapped VAT improvement," then resources are often available, said the associate director.

"It changes that conversation from crying wolf all the time that the world is going to end if we don't do X as the most important compliance project in the world, to a conversation on the return on investment, which I think was the key for us."

The tax team has to ensure it is engaged with the IT department to show what the value of the project is upon completion across both departments and for the business.

"The important step for us over the last number of years is having a seat at the table. We're involved in the in the global IT roadmap, we sit at the IT table during budget, we have a dedicated tax budget each year within the IT roadmap," said the associate director.

"So, for example, take transparency reporting, we have carved out a separate team within our IT department to deal with transparency reporting alone. We just roll that from country to country as we work through it, but the enabler was having the seat at the table with IT in the first instance,"

The associate director explained that the tax function has to demonstrate the value returned for the IT department, as well as the board, and ensure it is not a one-way relationship.

Three indirect tax directors suggested integrating key tax projects into annual objectives. "We all have year-end reviews, so they [the IT department] can say at the year-end review that we delivered this tax project, this is the saving out of that project," said the associate director.

A 'beauty contest' of software

Finding the right software is another hurdle in the tax transformation journey, which is made more difficult by the type and structure of the business, the differences in country-specific compliance rules and the need to predict possible risks.

"We went through a beauty contest of all the relevant software available four years ago," said one head of indirect tax from Germany. "Finally the decision was taken to develop a home-grown solution that best fits to our needs together with an external software company based in Cologne."

For the indirect tax team leader, the use of two parallel software programs has worked well, with one that can deliver on country-specific compliance requirements and another that enables data analytics. They said the right solution requires a combination of internal software, internal development and external programs.

“Direct tax teams are “having a rude awakening” on digitalisation”

However, without fixing the master data, all efforts are void. “There is no point buying so-called push the button software if your underlying data is incorrect,” said the associate director.

“You’re just going to create incorrect reporting. The journey towards automation, as much as you can, does start from fixing your master data before you can move anywhere forward. Otherwise, you are just reporting the incorrect data quicker,” said the associate director.

Several users of the Thomson Reuters’ ONESOURCE solution recommended cleansing the master data for errors regularly.

“What the tax department has decided to do is not download the data on a monthly basis for the monthly return preparation, but to download this usage data on a weekly basis and send all these exception reports straight back to the [relevant] teams, where the problems are actually being caused,” said van Asch.

“This means the team leaders every Monday morning have this big Excel sheet in their email inbox with all the errors that the tax department or the software solution has found and with instruction to rectify this master data,” he said.

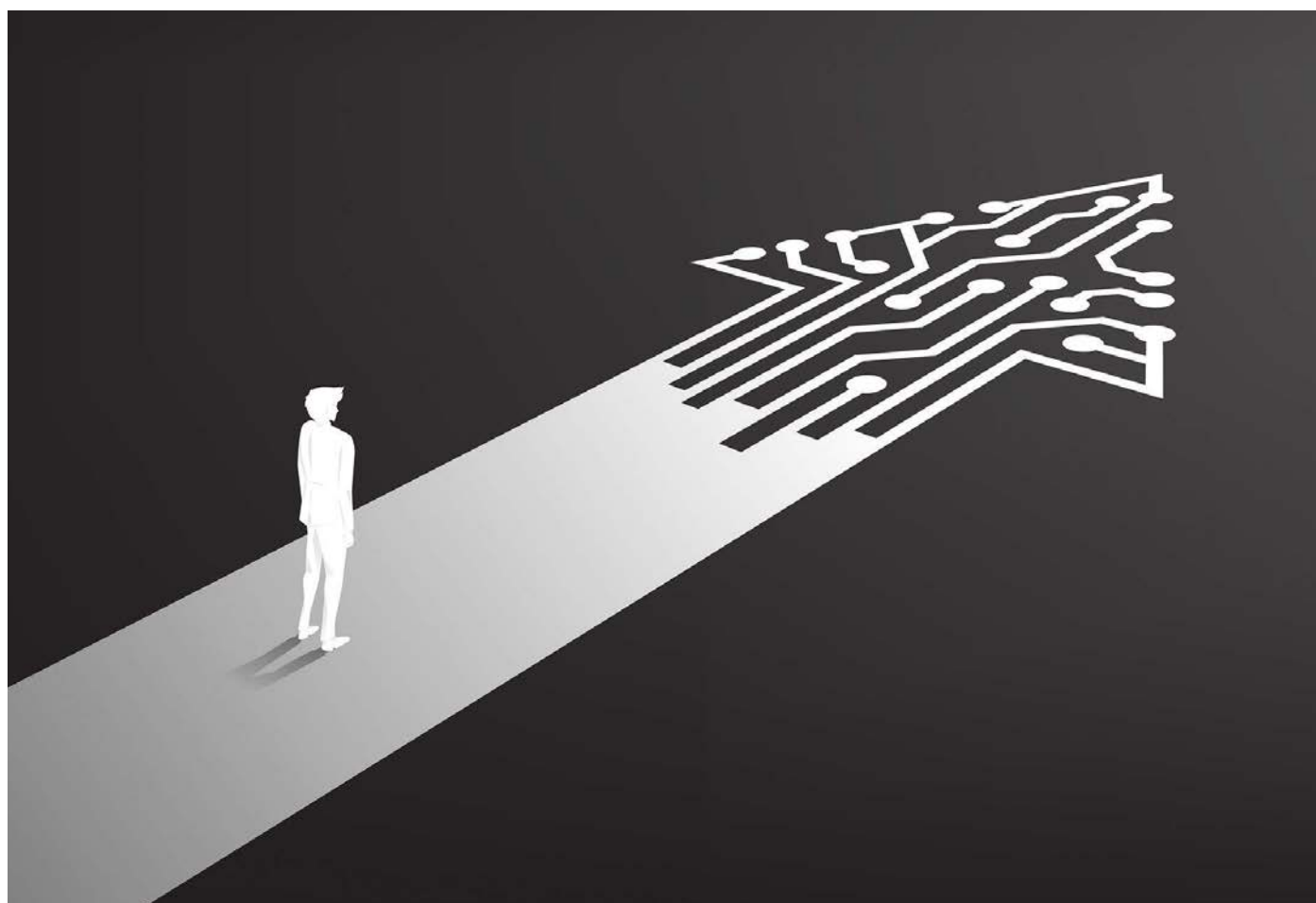
“That means that at the end of the month when you are preparing your return filing, hopefully during the month you have cleansed the master data and you will be able to do your returns and compliance process much quicker,” van Asch continued.

“You need to demonstrate the value and explain VAT to a lot of people so that they understand where the risks lie, where the issues can occur, and where the penalties might be”

Data management is crucial to the process and the wrong data will produce the wrong results.

“If you send the wrong master data back to the teams who own this data, you’ll find that they are basically so fed up with the email on Monday morning that they actually start improving the core processes at the source and you will find that you get less wrong master data over time,” said van Asch.

Transforming the tax function to suit the digital age is not a simple or short journey for tax directors. However, many tax departments would do well to note the success and failures of their indirect tax colleagues to ensure the path is smoother for them.



Corporate tax teams are tapping into the digital opportunities

Countdown to digital tax

The OECD held a two-day conference on January 14-15 to allow stakeholders to discuss its blueprints for digital tax reform ahead of the G20/Inclusive Framework meeting later in January.

The Paris-based organisation has to find a final agreement on pillar one and pillar two by mid-2021 or nothing will stop the rise of tax nationalism around the world. A growing number of countries are imposing forms of digital taxes on technology companies to gain revenues they believe to be owed.

Yet the digital tax framework will affect more taxpayers than US corporations such as Apple, Amazon, Google and Facebook. Pharmaceutical companies, for example, are concerned about the consequences for their industry given the importance of intangible assets. Here, Alice Jones, Danish Mehboob and Josh White take a look at the proposals put forward by companies such as Microsoft, Netflix and Unilever in response to the blueprints.



Highlights of the OECD consultation on pillars one and two

Here are *ITR*'s key takeaways from the January 14-15 consultation on the OECD's blueprints for digital tax reform.



Josh White

Digital tax has become the hottest topic in international tax policy, and 2021 could be the year that this debate is finally settled. However, there is a lot of work to be done in very little time.

Day one

The first day of the consultation focused on the details of pillar one, particularly Amount A in the three-tier profit allocation rules.

Will Morris, chair of the Business at the OECD (BIAC) tax committee, said: "There is a huge amount of support in the business community for a multilateral agreement."

Whatever the flaws of pillar one and pillar two, Morris stresses that the problems of unilateral measures are far worse. He thinks that political and technical input from the business community will help carry the proposals over the finishing line.

"The amount of work that has gone into this is almost literally Herculean," said Morris.

Thomas Roesser, senior director and tax policy counsel at Microsoft, said: "While there is no agreement on scope, profitability threshold, and reallocation percentage, the blueprint and economic impact assessment repeatedly use examples that produce a result we do not believe is modest."

"Any additional profit allocation to market jurisdictions beyond the arm's-length principle under Amount A should be less than 2% of remote sales



Source: OECD, licensed under CC-BY-NC 2.0

Less than six months to go

into a jurisdiction," he added.

Tim McDonald, vice president of global taxes at P&G, said: "I don't profess to be a digital expert, so these are more distant impressions. I think you would strive for multinationals to generally be in one of these two mechanisms: Either a taxable presence or the absence, which for short-hand we just called 'scale without mass'."

"If you're looking at definitions, you could probably build

off of a broad interpretation of ADS," McDonald added. "It would certainly have sales thresholds like the current blueprint, both at the country and global enterprise level."

"There needs to be the absence of a local counterparty, a local distributor or service provider, if you're providing a service, because one of the fundamental, original objections – and why DSTs came about – was there is a large and uncapped ability to

exploit a market without being a taxpayer," argued McDonald.

Day two

The second day focused on the pillar two blueprint and how best to secure a global minimum tax rate.

Tania Saulnier, mission director at the Movement of the Enterprises of France (MEDEF), said: "All the options described in the blueprints should be available because they could all be useful."

"We believe that over-complexity has now been reached," said Saulnier. "Why is complexity a problem? It is a problem because it creates critical risks."

Saulnier backed deferred tax accounting and calls for the undertaxed payments rule (UTPR) and the subject to tax rule (STTR) to be "postponed".

"They should only be considered after a probationary period," she argued.

Ann-Maree Wolff, head of tax at Rio Tinto, said: "Corporates don't pay tax on profit. They pay tax on taxable income, according to the local laws."

So, comparing taxes could be a comparison of apples and oranges, argued Wolff. Timing differences mean that the company's income is not necessarily 'under-taxed'. This is especially significant for capital-intensive industries.

"The proposals as they currently stand will result in double taxation," she says. "They may also inappropriately protect some truly undertaxed profit that should be subject to a top-up tax."

"Changes will be required to achieve the appropriate outcome," she stressed.

Pascal Saint-Amans, director of the OECD's Centre for Tax Policy and Administration, gave his closing remarks: "We've not heard anyone say that the international tax system is perfect," he pointed out. "That's a change."

"I think we can be optimistic," he continued. "The main takeaways will be, of course, the discussion on how we can simplify pillar one."

Microsoft warns digital tax agenda may fail on its complexity

The OECD faces criticism from cloud-computing services for not including enough technical detail in its latest blueprints and economic impact assessment of the two-pillar solution.

While almost all stakeholders prefer a multilateral solution from the OECD, the digital tax blueprints recommend an expensive and complex tax environment under pillar one that may hinder a global consensus. Advisors said the data in the OECD's economic impact assessment also falls short of supporting investment and growth opportunities. They say more information on the spill-over effects of BEPS and US tax reform is necessary.

"While there is no agreement on scope, profitability threshold, and reallocation percentage, the blueprint and economic impact assessment repeatedly use examples that produce a result we do not believe is modest," said



Danish Mehboob

Thomas Roesser, senior director and tax policy counsel at Microsoft, ahead of a highly anticipated consultation meeting starting on January 14. "Any additional profit allocation to market jurisdictions beyond the arm's-length principle under Amount A should be less than 2% of remote sales into a jurisdiction," he added.

Tax directors at Microsoft and other large consumer-facing digital companies suggest ring-fencing Amount A to sustain the OECD's digital tax plans since wider agreement

does not look promising while the political and technical details continue to miss stakeholder expectations. Key components still under discussion in the two-pillar solution include scope, corporate segmentation, nexus, and allocation of losses.

The consequences of the OECD failing to finalise a multilateral solution will mean a variety of unilateral digital service taxes in 2021 that will undermine global trade.

"We are concerned that the pillar one blueprint is overly complex," said Roesser. "If it is too difficult to reach political agreement on the Amount B rules within the desired timeline, then we suggest re-focusing efforts on concluding an Amount A for agreement."

OECD consultation expectations for cloud-computing services

The OECD's public consultation on January 14 and 15 will allow governments and businesses to express their views in more detail, including the suggestion to isolate and re-work Amount A under pillar one based on time pressure and the limited assumptions from the OECD's impact assessment.

Microsoft and other cloud computing service businesses are considered automated digital services under the OECD's blueprint and fall within scope of significant Amount A charges as such services expand rapidly amid remote-working conditions during the COVID-19 pandemic. Microsoft is advocating for a ceiling on the tax quantum in jurisdictions with customers and no physical exposure to manage the incoming tax burdens.

"Ultimately there must be a binding agreement from members on a clear set of rules, including the scope of Amount A and Amount B," said Roesser. "By limiting the in-scope revenue for Amount A to remote sales booked outside a market, there would be no



Microsoft calls for tax ceiling in Amount A

need to distinguish between automated digital services and consumer-facing businesses. And without Amount B, policy makers could agree on a modest cap on Amount A reallocations, which would simplify the process,” he added.

There are a few scenarios that may be discussed at the OECD meeting on January 14 in which to balance the quantum allocated under Amount A and B to countries, including comparing fixed returns from value-added marketing and distribution functions under Amount B to the profit already allocated to the marketing and distribution affiliated with the arm’s-length principle.

Another scenario to limit quantum on cloud-computing companies may include a safe harbour on marketing and distribution that eliminates the risk of double counting under Amount A for entities with factors contributing to limited physical presence in jurisdictions.

Simplification remains a priority for two-pillar solution

Simplification is emphasised by all stakeholders in the ongoing OECD process as being essential. Roesser and other Microsoft tax managers suggest that the primary rule for factors relevant to revenue sourcing and tax base calculations under pillar one should be consistent with information most businesses already collect.

“It should be clarified that taxpayers need not follow sourcing rules where privacy laws would be violated and are not required to invest in new compliance systems to both satisfy privacy law and pillar one sourcing rules,” said one tax manager at Microsoft who requested to remain anonymous.

However, the political status of the two-pillar solution undermines some of the technical simplifications required as governments continue to manage expectations on winners and losers in the final outcome of the project expected by mid-July. An ongoing blocker to wider stakeholder agreement is that the blueprint guidance is not clear on the

principles behind some of the proposed technical rules, which is relevant to support novel pillar one computations.

“The language in paragraph 582 results in the Amount A reallocation overriding the transfer pricing guidelines regarding development, enhancement, maintenance, protection and exploitation (DEMPE) rules for general income tax reporting purposes,” explained Roesser as an example. “The Inclusive Framework should prioritise the use of current transfer pricing concepts with additional documentation requirements as necessary for the reallocation of Amount A,” he added.

Additionally, under pillar two, Procter & Gamble, GlaxoSmithKline, Unilever and 46 other companies also want clarification on how the global anti-base erosion (GloBE) proposal will interact with the US global intangible low-taxed income (GILTI) rules.

However, among the most popular recommendations that the OECD received from more than 200 large businesses is to remove unilateral measures when a multilateral solution is agreed rather than when implementation happens.

“It will be important for member countries to understand whether the incremental tax revenue benefit of the blueprints outweigh their administrative costs of implementing the blueprint and more disputes with taxpayers and other countries, and potential loss of sovereignty,” said the tax manager from Microsoft.

Some tax directors at cloud-computing companies believe their products are back-office business productivity tools that do not satisfy the stated justifications for inclusion in Amount A. Many taxpayers, including Microsoft, want empirical data on BEPS and US tax reform in a follow-up analysis to the economic impact assessment to provide countries with sufficient insights to inform Inclusive Framework negotiations on the scope of Amount A in coming months.

Uber recommends the OECD rethink Amount A scope

Ride-sharing company Uber has reiterated its doubts over the OECD’s pillar one blueprint and taken issue with the scope of Amount A. The company recommends refining and narrowing the scope to fit the OECD’s goals.

The OECD closed its public consultation on its blueprints for pillar one and two on December 15.

Uber took the opportunity to question whether the scope of automated digital services (ADS) and consumer-facing businesses (CFBs) will be “inconsistently applied”.

Francois Chadwick, vice president of tax and accounting at Uber, questioned why consumer-facing business-to-business (B2B) models get a carve-out whereas ADS would not.

“This disparate treatment has the potential to create competitive imbalances. For example, while a platform connecting two groups of B2B customers to each other appears to be caught by the ADS definition, a platform selling first-party B2B services of the same type would not be excluded by both the ADS definition and the CFB definition,” said Chadwick.

“If the ability to use digital technology to interact with local markets to a high degree without significant local physical presence is a key justification for singling out ADS for different treatment, that same justification appears to apply to many consumer-facing businesses that take advantage of digital technology to deliver traditional goods and services, and that may compete with digital services companies,” he argued.

Uber suggested in its response to the OECD that the Inclusive Framework con-



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sider “refining the scope of Amount A” to either limit its application to business-to-consumer (B2C) companies in the case of automated digital services or eliminate the B2B exception for consumer-facing businesses.

The company raised similar doubts about the scope of Amount A in the past. Uber’s 2019 statement suggested the app service was content to accept the country-by-country reporting (CbCR) threshold but wanted more clarity on what counts as a consumer-facing business, particularly the distinction between B2C and B2B companies.

Although Uber began as an app service to connect drivers with customers, the company has expanded to cover delivery services for restaurants and even freight transport. The aftermath of the COVID-19 pandemic has accelerated investment and growth in these alternative offerings, which is why the question of scope is so crucial for the company.

The risks of Amount A

Discrimination and controversy

The Silicon Valley Tax Directors Group shared the same concerns as Uber, which is one of its members. The group warned that the scope of Amount A could lead to more

tax controversy, and was clear that the blueprints should not be a radical departure from the existing tax system.

“The ultimate solutions should reflect an understanding of current circumstances, should not stray unnecessarily from the arm’s-length standard, and should follow a number of specified high-level guidelines,” said Robert Johnson, co-chair of the Silicon Valley Tax Directors Group.

The group stressed that the attempt to “draw lines” around automated digital services and consumer-facing businesses is “proving to be potentially discriminatory and liable to generate enormous controversy”.

Economic nexus

Uber was clear that the OECD should not take a ‘plus factors’ approach for a new nexus rule. “We believe that using ‘economic nexus’ as a proxy for market engagement is equally appropriate for both ADS and CFBs,” said Chadwick.

“We are sceptical that a CFB with sufficient in-country revenue to develop economic nexus would engage with that market any less than an ADS provider under the same circumstances,” he added.

The company agreed that there should be a nexus applied after a certain revenue threshold, but questioned whether this threshold should be greater for CFBs than for ADS companies.

“If CFB-specific ‘plus factors’ are to be used, they should be standalone factors that are specific to Amount A, and should be focused on ensuring that businesses that directly compete with ADS businesses will be within scope of Amount A,” said Chadwick.

Meanwhile the Silicon Valley group was more concerned with the need for consistency. “Nexus standards should be uniform for different sectors; should include a single, per-country revenue threshold; [and] should have a temporal aspect,” said Johnson.

He specified that the nexus rule “should be based exclusively on sales to the taxpayer’s direct customers, and should trigger non-discrimination obligations on the part of the nexus jurisdiction”.

Losses and profit shortfalls

Many technology companies have historically run on losses, including Airbnb and Uber, so such businesses want to make sure that the OECD factors loss-making into the new rules.

“The Amount A tax base rules should apply symmetrically at the level of the MNE group irrespective of whether the outcome is a profit or loss,” said Chadwick. “We agree losses and profit shortfalls should run through a single account for the MNE group.”

“Losses should be subject to a worldwide group reallocation only after the group has earned taxable profits on a cumulative basis,” he explained. “This proposal would avoid separate allocation to, and tracking of, losses on a country-by-country basis under a parallel tax system.”

The Silicon Valley group echoed these points. “The Amount A tax base should take into account losses in full, including all pre-regime losses, and also profit shortfalls associated with Amount A activities,” said Johnson. “The Amount A allocation should be based on a deemed routine return of at least 10% of sales.”

Johnson suggested “a reallocation of no more than 10% of residual profits” and argued a safe harbour for marketing and distribution to prevent double counting. The safe harbour would be based on an appropriate return on marketing distribution activities, including relief for withholding taxes imposed by the market jurisdiction.

Overall, Uber’s concerns are representative of how many technology companies view the OECD blueprints. As much as the blueprints have come a long way since the digital tax debate began, the OECD has a lot of work to do before it can satisfy most stakeholders.

Netflix rejects ‘political’ ring fencing in OECD digital tax blueprints

The video streaming service, Netflix, is arguing that the scope of Amount A in the pillar one proposals should be based on objective financial metrics.

The scope of Amount A, which provides for allocating a company’s residual profit to market jurisdictions, should not be limited to automated digital services (ADS) and consumer facing businesses (CFB), according to Netflix. In a written consultation response, the content platform argued that maintaining Amount A’s narrow range would unfairly ring fence a sub-section of multinational enterprises (MNEs).



Alice Jones

In its comments on the public consultation document, Reports on the Pillar One and Pillar Two Blueprints, Netflix wrote that “the new rules should guarantee a fair and equitable system applicable to all taxpayers irrespective of business model”.



MNEs have argued against singling out ADS and CFB companies under Amount A

Netflix is likely to make this argument at the public consultation meeting on January 14-15. The company will be represented by Lisa Wadlin, the company's VP of global tax, who will speak on a panel about reducing the complexity of pillar one.

Contradicting BEPS Action 1

The suggested scope of Amount A in the pillar one and pillar two blueprints, which were released in December 2020, diverges from the OECD's historical position on ring fencing.

Netflix pointed out that the blueprints contradict the conclusion in the Final Report on Action 1 of the BEPS Project, released in 2015, "where it was correctly concluded that it is not possible to ring fence the digital economy as all economic sectors possess a certain level of digitalisation". This conclusion was echoed in the March 2018 Interim Report of the Task Force of the Digital Economy.

The video streaming service contended that the rationale for treating ADS companies and CFBs differently from other taxpayers has no clear grounding in policy and is therefore "based on political recommendations from a certain group of countries".

Netflix argued that ring fencing digital MNEs under Amount A would be "detrimental to a stable tax environment" and that the "highly subjective" definitions of ADS and CFB could lead to disputes between taxpayers and revenue authorities.

Instead, the content platform proposed that objective financial metrics should be used to determine which companies fall within the scope of Amount A. Netflix suggested that the OECD choose from metrics including global revenue, profit before tax, consolidated turnover, group operating margin profitability, or in-country revenue.

However, Netflix also included a back-up proposal, arguing that, if the ring fence does go ahead, Netflix itself should be treated as a CFB not

an ADS. "A similarly-situated content provider that delivers such content by other non-digital means would be characterised as a CFB. Therefore, digital content streaming should be treated as a CFB and not as an ADS," stated Netflix.

The opposition to ring fencing digital companies is shared by many MNEs and also, notably, by the US government. The resistance plays into a wider concern about unilateral measures such as digital services taxes (DSTs). Digital businesses, aware of the media attention on their tax affairs and under pressure to contribute to the economies in which they are active, are concerned about the risks of over-taxation, double taxation, and disputes with tax authorities.

Netflix stated that singling out CFB and ADS companies could allow countries to "justify their adoption of unilateral measures (such as DSTs) that target those same business models". Like other MNEs that commented on the blueprints, Netflix said that a multilateral solution is incompatible with DSTs and should be contingent on countries repealing their unilateral measures.

The corporate response to the pillar one and pillar two blueprints highlighted many other issues that must be resolved before an agreement can be reached. These include the risk of double taxation, the extent of the safe harbour provisions, and the nature of a transition period between agreement and implementation. Netflix raised all these points in its submission.

However, the ring fencing question is one of the most contentious and long-fought. Pascal Saint-Amans, director of the Centre for Tax Policy and Administration at the OECD, has told *ITR* that while ring-fencing the digital economy would "not be a good policy", extending the scope introduces a host of political and technical issues. The decision is one of politics, as well as of policy, and reaching a consensus will not be easy.

Unilever: How the OECD could simplify pillar two

Unilever has laid out ways the OECD could reduce the level of complexity in its pillar two proposal for a global minimum tax rate, including measures to safeguard businesses from double taxation.

As the OECD opens its consultation on digital tax, businesses want to see the organisation simplify the proposal for a worldwide minimum tax. Multinational companies fear that the global anti-abuse erosion (GloBE) proposal will just add more complexity to the international system.

One such company, Unilever, made a series of recommendations in its 2020 consultation response. The company expects the proposals to increase the effective tax rate (ETR) for many businesses and suggested that country-by-country reporting (CbCR) could offer a possible safe harbour.

"One of the key simplification measures to look at is the CbCR ETR safe harbour work that has the potential to reduce duplicative efforts," wrote Janine Juggins, executive vice president of global tax and treasury at Unilever, and Sebastiaan de Buck, vice president of tax strategy, in the company's consultation response.

"Why not have a simplifying measure that takes a MNE out of pillar two in full if the global ETR is clearly in excess of a minimum rate?" wrote Juggins and de Buck.

"A further simplification opportunity would be to exempt any legal entity which calculates its taxable income using a statutory rate of tax that is at least equal to the minimum tax," they suggested.

Many companies are not so concerned about where they



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pay tax so long as they are not paying tax more than once on the same income. However, this is exactly what multinationals fear may arise if the GloBE policy is not designed properly.

Designing GloBE

Pillar two has been less controversial than pillar one in some ways. Many countries are open to minimum tax rates and the US has already implemented a version of this policy. As such, a lack of support is not the problem.

The details of such a policy are where the disagreements start. The OECD's existing GloBE proposal is defined by four key rules:

- 1) An income inclusion rule, which would apply a top-up tax rate where a foreign entity or branch pays tax at a rate below a minimum rate;
- 2) A switch-over rule, which would generally permit resident jurisdictions to switch from an exemption method to a credit method where the profits attributable to a permanent establishment (PE) or derived from immovable property (which is not part of a PE) are subject to an effective rate below the minimum rate;
- 3) An undertaxed payments rule (UTPR), which would



Taxpayer ideas are crucial

deny deductions for payments to related parties that are not subject to tax at the specified minimum rate; and 4) A subject to tax rule (STTR), which would subject payments taxed below the minimum rate to withholding by switching off treaty benefits.

These rules are the source of much of the complexity the business community wants to reduce. Yet any workable minimum tax model will have to account for different economic factors.

The Inclusive Framework has supported the idea of creating a globally uniform tax base to determine whether or not a constituent entity's income is low-taxed. De Buck and Juggins fear this could lead to double taxation.

"The creation of a global tax base is a fundamental departure from existing international tax standards and is a key innovation of pillar two," wrote Juggins and de Buck.

At the same time, the STTR would deny treaty benefits for certain deductible intra-group payments where the income faces no tax or low rates of tax in the receiving jurisdiction. This rule might be expanded beyond deductible intra-group payments.

"The STTR is intended to help source countries protect their tax base, especially for countries with lower administrative capacities. This is relevant for an R&D intensive company noting use of, for instance, innovation box or patent box type regimes that provide for a lower effective tax rate," said Juggins and de Buck.

This could even apply in cases where the taxpayer is compliant with BEPS Action 5. The OECD has discussed the possibility of carving out regimes compliant with BEPS Action 5 on harmful tax practices. However, the Paris-based organisation may have dropped this idea.

"Countries should remain free to choose if and how they incentivise R&D activities within the limits of BEPS Action 5," argued Juggins and de Buck.

"MNEs should not be treated differently for pillar two purposes depending on the policy choices of countries on R&D incentives," they added.

Pillar two risks putting a limitation on the use of R&D tax incentives such as the BEPS Action 5 compliant innovation box or patent box regimes, according to Juggins and de Buck. This would favour "expenditure-based tax incentives".

The OECD will be reviewing its blueprint and trying to find a compromise on many of these issues, but the clock is ticking and time is running out.

Unintended consequences

Every policy change comes with unintended consequences. There is a concern that the GloBE proposal might overlap with similar regimes, particularly the US global intangible low-taxed income (GILTI) rules.

Unilever echoed the calls from businesses to recognise the US GILTI regime as an IIR equivalent system. The coexistence principle would allow the two regimes to cover businesses moving from one to the other. This could help prevent the GILTI measure from 'overlapping' with the GloBE proposal.

At the same time, the company hopes that the OECD solution will curtail unilateralism. "International consensus, and global consistency, may be a key element of its success, therefore the status of the rules, minimum standard or not, is a key element," said Juggins and de Buck.

"We should mitigate the risk of this resulting in unilateral measures that are not consistently applied," they added.

The level of complexity in the proposal could be a source of tax controversy if it comes to pass. "While the IIR and UTPR are intended to be coordinated so that the UTPR would not apply where the IIR applies, it seems inevitable that disputes would arise," said Juggins and de Buck.

"Using a multilateral convention to create a dedicated dispute resolution mechanism would thus seem to be an important component of ensuring certainty for taxpayers," they argued.

Although the OECD is looking to settle digital tax in the next six months, the results may not mean the end of tax competition. Pillar two might set the floor for tax competition, but it could just mean headline corporate rates fall to the minimum rate.

"Despite bringing the overall level to a certain minimum tax, would it not incentivise countries to reduce their rate to a level aligned to the minimum tax and is that in itself not tax competition again?" asked Juggins and de Buck.

There is a lot to settle in the next six months. The OECD will no doubt pay close attention to what taxpayers are saying, particularly companies like Unilever. But no result will keep all sides happy.

How COVID-19 has impacted global M&A activity

Deloitte's practitioners from across the globe assess how transactional activity has evolved as a result of the coronavirus pandemic and consider the key aspects of the new deal landscape.

When COVID-19 spread around the globe in the early months of 2020, it caught the world by surprise and many businesses were unprepared. Governments and organisations responded in various ways, with different impacts on the business world generally, and merger and acquisition (M&A) activity in particular, although there have been some similarities as well.

Uncertainties remain but while lack of preparation was an issue at the beginning of 2020, it no longer needs to be an obstacle as businesses can identify the opportunities available to them now so as to better position themselves for success in 2021 and beyond.

Initial impact and response by region

EMEA

During the first three or four months after the COVID-19 pandemic spread throughout Europe, Middle East and Africa (EMEA), the level of uncertainty in the market, combined with low business optimism and confidence, was so high in the region that there was little M&A activity. However, generous government support programmes, including support for employees and payroll, as well as creditor forbearance schemes, have allowed many companies to weather the storm through 2020.

The generosity of government support and subsidies during these times led to the number of distressed M&A opportunities being lower than expected in the region, while deal activity has largely focused on defensive strategies such as asset sales rather than lender-forced transactions. There have been many announced or planned initial



public offerings (IPOs), which is evidence that there is money in the market with investors actively looking for opportunities, in particular private equity firms. Parties to transactions have been relying on representations and warranties insurance to a greater extent due to the level of uncertainty in the market. The same pressure has contributed to deals closing at a slower pace, with a more intensive due diligence process.

Once government support is reduced or disappears, a likely increase in distressed market activity will be seen, as some businesses continue to struggle and as a second wave of the virus makes its way through the region. Recovery for these businesses will depend on how long the economic consequences of COVID-19 lasts. The number of necessary restructuring transactions and insolvencies will likely increase as a return to some form of pre-COVID normalcy takes longer to materialise. A significant uptick in semi-distressed M&A activity and, in particular, transactions fuelled by large amounts of unspent private equity 'dry powder' looking for bargains, along with industry consolidations and Asian investment into Europe, are expected to start in 2021.

Americas

In the Americas, and the US in particular, many companies were in survival mode in the second and early third quarters of 2020. Distressed transactions were fairly prevalent, including debt restructurings, defensive M&A transactions such as liquidity planning, and other transactions to strengthen balance sheets. This was due in large part to uncertainty about the evolution of the pandemic and uncertainty about the level of government support.

As the summer evolved, deal market activity accelerated and the presence of impatient private equity money became noticeable. This is due in part to cheap financing continuing to be readily available and the banking and lending systems remaining quite stable. Another dynamic particular to the US has been the presidential election and the prospect of an increase in tax rates and a roll-back of many of the 2017 tax reform measures sometime in 2021 or later. This has led to an increase in the sale of closely held businesses, corporate divestitures, and public company deals, as well as consolidation in various sectors to reduce costs and drive synergies, gain market share, acquire new customers and/or geographies, and otherwise strengthen one's market position.

In the Deloitte survey published in October 2020 – M&A Trends Survey: The future of M&A – US dealmakers described their M&A strategy in response to the current climate as: Responding to structural sector disruption by accelerating long-term transformation to other business models (33%), using M&A and other investment activities to capture unassailable sector and market leadership (24%), maintaining parity with the competition (23%), and preventing further deterioration of current weakened market position (20%).

Companies have also been looking to streamline transaction teams in part by engaging fewer professional service providers to handle more aspects of a transaction, including finance, tax, and cross-border legal due diligence, as well as assistance during the implementation process. In this environment, where much uncertainty remains, buyers and sellers have been bridging valuation gaps through the use of earn-outs in negotiations and managing other issues through the use of representations and warranties insurance.

“Once support measures are phased out, distressed activity is expected to increase”

The combination of full private equity coffers, stable financial systems, and the threat of tax increases in the US has been driving the M&A market and continues to do so. Since the third quarter of the year, most elements of the deal market have been very active and there has been a spike in deal volumes. IPOs, including acquisitions using special purpose acquisition companies (SPACs) are becoming increasingly common, as are non-traditional transactions such as alliances and ecosystem partnerships, joint ventures, etc.

Lastly, robust technology, dynamic financial services, and distressed energy sectors have fueled extensive corporate transaction activity. Meanwhile, the list of companies that will struggle or thrive through these difficult circumstances is getting clearer, allowing more accurate company and asset valuations and preparation for future transactions.

Asia-Pacific

The picture in the Asia-Pacific region has been more mixed as COVID-19 has affected countries differently.

China, which recovered from the pandemic earlier than other countries, has seen an acceleration in M&A activity. Some government and creditor support in other countries, such as a moratorium on interest payments and a temporary ban on new insolvency filings in India, has helped suppress the number of distressed transactions. However, governments and lenders are becoming increasingly uncomfortable as lengthy support measures could threaten their own recovery. Where government or lender support has been lacking or less generous, bankruptcies and restructurings have been more prevalent.

Once support measures are phased out, distressed activity is expected to increase. M&A activity has been increasing steadily in the second half of 2020, such as in China, India, Japan, and Singapore, although each country is on a slightly different trajectory and deal activity is still below expectations in many countries.

One common feature of the deal market has been a significant increase in inbound investments from private equity from all over the world, which is a reversal of the types of deals that were prevalent before COVID-19, i.e. outbound investments by Chinese investors. While some inbound deals have been strategic, the majority of transactions have involved distressed acquisitions and divestitures. Similar to the EMEA and Americas regions, more and more companies in the Asia-Pacific region have been looking for efficiency, scale, and cost reductions either by consolidating professional service providers or by bringing more transactional work in-house.

Key considerations for the new deal landscape

While uncertainties about the global economy remain and second waves of the virus affect many countries, companies should

prepare to strengthen their positions for survival and success in the new normal when the COVID-19 pandemic is over. Their focus should be on certain fundamental concepts affecting how they handle future transactions, as well as developments in the economy more broadly.

M&A planning and due diligence

Opportunities in 2021 will abound for companies that are in the right place to capitalise on them, whether these open up new markets for them or allow them to make bargain acquisitions. Planning and due diligence will be key for those who maintained a strong position through the pandemic, thinking through the different scenarios and alternatives in front of them, and determining which type of strategy they need to implement, be it offensive or defensive with corresponding tax risks, opportunities and future business state tax modelling.

For M&A planning and due diligence to be successful, companies should be very clear and certain about their acquisition goals ahead of time. It is more important than ever to stop and ask the question – how does this company or asset acquisition fit into my business strategy?

For this reason, acquisition strategies should be communicated to professional advisors, including for tax, early in the planning stages, allowing them to provide the most relevant and comprehensive planning and implementation advice possible and anticipate potential hurdles and risks, allowing their clients to adjust their plans, as necessary, before great costs are incurred.

Tax can also be a significant source of synergy in a transaction and have a meaningful and favourable impact on enterprise value. As such, an integrated strategic tax review powered by new technology should be part of any pre-deal discussion and ultimate structuring and integration work, with a focus on identifying risks and opportunities, listing priorities, setting timelines, and laying out how execution will bring synergies to light in the near and long

term (e.g. through value chain alignment, efficient financing, utilisation of tax attributes, legal entity integration and simplification, refund and incentive opportunities domestically and across the globe, etc.). Technology acquisitions through industry convergence will also be important as companies that use M&A to digitise their own businesses could strengthen and bolster their supply chains and product enhancements as well as access new markets, new customer bases, and new data.

Consolidating professional service providers should play a role too, reducing costs, risks, and inefficiencies, and speeding up execution. By leveraging and consolidating the parties that perform legal, financial, commercial, and tax due diligence, companies can drive automation, efficiency, and cost control into the process in a very thoughtful manner.

Understanding the target: Business, tax and legal perspective

Having a good understanding of the commercial aspects of a business target is important as well, especially as the commercial landscape has changed as a result of COVID-19, upending traditional assumptions and business models and increasing uncertainties.

In the UK, for example, the traditional business model for leases has been ‘fixed rental businesses’ meaning rents consist of a fixed amount that increases periodically. As a result of COVID-19, recent company voluntary arrangements (CVAs) have completely torn that business model apart, converting fixed-retail price index (RPI) leases into turnover-based leases which calculate rent as a percentage of turnover and are not fixed. If a company is looking to acquire a business that has some exposure to retail, has it thought about what would happen if the leases that it thinks it is buying are suddenly linked to turnover? What assumptions have been made and how uncertain might those be? As a tax professional, are you asking the right questions to be informed in the ‘new normal’ of the business and the potential impact on your tax profile?

Added to a greater understanding of the new commercial landscape should be a greater than usual dose of skepticism when looking at a potential deal because there is a lot of market distress. Acquirers should ask themselves why a seller is selling at this time and should also think about risks that they may not usually be concerned about, as well as what the strategic, tax, and legal implications might be. Not least whether any warranties and indemnities being given by a vendor have any real value.

Considering the wider economy and the future of work

There are also broader shifts in the deal market and the economy that have been accelerated by COVID-19, and that should be considered when looking to do a transaction.

Companies should think through how the future of work will impact their business and a transaction’s synergies. The movement of people and functions away from traditional places will have a different impact on different organisations and could increase some risks, while resulting in cost savings over the next five to 10 years – though it may increase the compliance obligations in terms of employment contracts and income tax, among others.

A corollary to this is the future of the city. Space in some cities used to be dedicated to one particular purpose. As this changes, governments will need to think about how to regenerate affected cities, a shift that will impact businesses that operate there.



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Maintaining resilience

These shifts underscore how resilient companies need to be in every aspect of their business, not only from a financial perspective, but also from the perspective of talent (attracting and retaining it), operations, supply chain, tax, and data, to name just a few areas.

A key component of a business' arsenal in becoming and staying resilient is investment in innovation. Governments are going to have to invest greatly in new technology and infrastructure to create economic stimulus. However, these investments are often linked to a strategic shift towards sustainability. One example is Europe's investment in the electric vehicle infrastructure, and green energy and sustainability more broadly. Therefore, any

business that is involved in this type of capital spend or its design, or that is a recipient of it, stands to benefit. Major innovations could have a large impact on many businesses in many different sectors. Businesses that do not want to be left behind need to think about how they can innovate their own products, services, operations, and supply chains. M&A has an important role to play in this as well because companies can either innovate themselves or acquire innovative targets.

While uncertainty remains, the promise of effective vaccines in the pipeline may well bring some confidence to move forward with the opportunities available. 2021 may be the year rewarding the resilience from 2020.



Connecting to a resilient world

M&A in the new environment

Uncertainties about the global economy remain, but now could be the time to strengthen your position for success in the “next normal.” If you would like to discuss your transaction strategy for the upcoming year, and what the tax or legal implications may be, contact your Deloitte partner or email the team at globalmatatxlegal@deloitte.com.

www.Deloitte.com/tax

Financial sector prepares for significant tax changes

Hansuke Consulting held its second Financial Services (FS) Tax Conference on November 18-19 2020.

Tax experts from leading companies and non-governmental organisations discussed practical issues of transparency and integrity. All the signs point to tax transparency expanding in the near future, whether it's through mandatory disclosure rules or public country-by-country reporting (CbCR).

Achim Pross, head of the OECD's International Tax Cooperation and Administration Centre, addressed the conference on how the digital tax reform may impact the FS sector. What the OECD decides to do about the online economy this year will determine the future of international policy for finance and every other industry.

Here, *ITR* journalists Alice Jones and Danish Mehboob offer a snapshot of the discussions and speeches at the conference.



Efficiency and cost savings crucial to global tax transparency success

Tax transparency regimes must be cost efficient and streamlined globally to minimise the burden on both businesses and tax authorities and safeguard taxpayer data, according to tax professionals from corporate, governance, and advocacy backgrounds.



Alice Jones

Panellists at the Financial Services Tax Conference held by consultancy firm Hansuke said that international bodies should cooperate on tax transparency solutions. In addition to initiatives from the OECD and the EU, some have suggested the UN could also consider a convention on tax matters. However, taxpayers worry that uncoordinated efforts could mean that companies are held to different standards in each country.

“Any EU initiative should avoid creating an un-level playing field between EU and non-EU countries with regards to disclosure or reporting requirements,” said António Frade Correia, senior tax advisor at the European Fund and Asset Management Association (EFAMA), which represents 60 corporations in the investment management industry.

Initiatives already in place include the OECD’s country-by-country reporting (CbCR), automatic exchange of information (AEOI) and the common reporting standard (CRS). There is also the EU Directive on Administrative Cooperation (DAC6) and country-specific measures such as the US Foreign Account Tax Compliance Act (FATCA).

Crowded transparency landscape

In such a crowded landscape, new transparency initiatives find it difficult to gather support. Take, for example, the OECD’s treaty relief and com-



Tax transparency initiatives should not expose strategic or confidential MNE data

pliance enhancement (TRACE) system. TRACE’s purpose is twofold: to streamline the procedure for claiming withholding tax (WHT) relief at source on portfolio investments, and to help countries monitor tax compliance.

Trying to claim WHT relief is a difficult and time-consuming process, so streamlining the procedure would be welcomed by multinational enterprises (MNEs).

However, Katja Pusilla, senior advisor at the Finnish tax administration Vero Skatt, suggested that no countries have implemented TRACE to date because of an overload of transparency measures. “It has nothing to do with TRACE itself. It’s more related to the fact that we had FATCA and CRS and the exchange of information,” she said.

Any new measures should therefore be carefully designed to ensure they do not overlap with existing actions and are easy for revenue authorities to implement. “There can be, in

theory, a truly transparent system that is so expensive that no one will apply it in practice,” warned Pusilla.

Speakers at the event also noted that transparency requirements must be balanced against the compliance burden for MNEs. Correia said that EFAMA’s members are keen to see more clarity on the reasoning for including certain information under transparency initiatives.

Systems should be simplified to require only necessary and proportional data from taxpayers. “Streamlining procedures and reporting requirements could substantially reduce costs [such as] operational overheads, legal and tax audit and advisory costs,” said Correia.

EFAMA’s members, like most MNEs, are also concerned about protecting their competitive advantage in the market, and Correia said that information requirements must be designed “to safeguard strategic or confidential data” belonging to taxpayers.

Meanwhile, a streamlined approach would help to smooth over differing interpretations of the guidance by tax authorities, according to Correia. This would avoid misunderstandings between MNEs and the countries in which they operate, which raise the compliance burden and increase the risk of disputes. Correia cited the CRS as a good example of a harmonised approach that has been largely facilitated by the OECD Commentaries.

Public CbCR

In addition to streamlined transparency measures, the panellists touched on the future possibility of public CbCR.

Alex Cobham, CEO of the research and advocacy group Tax Justice Network (TJN), echoed Correia in citing the need for a “level playing field”. Cobham said that public CbCR would help to achieve this by bringing MNEs to the same level of transparency as domestic businesses that publish annual accounts. The TJN released a report on November 20 calling for CbCR data to be made public, a move that MNEs have historically opposed.

However, Cobham pointed out that the AEOI, transparency around beneficial ownership, and confidential CbCR were all initially written off as “utopian” but have gradually made their way into the mainstream. If TJN is a forerunner of international tax policy, it is reasonable to consider that public CbCR, too, could be introduced in the future.

MNE tax directors are having to contend with a greater compliance burden than ever before, as tax transparency ramps up. Voices from across the international tax world suggest that cooperation between major international bodies will be vital to streamline transparency requirements, enabling initiatives to be smoothly implemented by revenue authorities around the world. However, a focus should also be on lessening the burden on MNEs, minimising costs, avoiding disputes and safeguarding company data.

FS sector should follow four areas in digital tax debate

The role of fund managers and financial technology in the financial services (FS) sector is keeping negotiations about partial inclusion on the table for more than 137 countries participating in the digital tax debate.

Achim Pross, head of the international cooperation and tax administration division at the OECD, identified four remaining technical questions for tax directors working in the FS sector to follow in discussions on the two-pillar proposals to address the tax challenges of the digital economy:

- 1) Should funds fall within scope of the pillar one rules, especially fund management?
- 2) How do you address separate accounting treatments for insurance reserves as part of the consolidated tax base?
- 3) How do you make adjustments for certain dividends, and treat portfolio dividends in the final rules?
- 4) What pre-regime losses should be available to taxpayers to lower the burden, including those tied to the COVID-19 pandemic?

These questions continue to shape OECD digital tax negotiations because there are notable circumstances where funds should be in scope as they are broadly defined and consolidated accounts, and the treatment of the tax base for insurance reserves, may face a minimum tax under pillar two.

Developments in the FS sector within the past few years, such as commission-free trading platforms and crypto-asset trading, has led policymakers to raise concerns about the growing role of technology directing financial products and services in the market.

This has also shaped negotiations on the OECD's two-pillar solution, and left room for partial inclusion of retail products and services as they expand in the market.



Danish Mehboob

Speaking at the FS Conference held by Hansuke, Pross said that although it is widely understood that the FS sector has extensive regulations, the problem to solve is about presence.

"Some see this as a digital only issue, while others think about going wider like a destination-based principle, which involves consumer-facing businesses where you profit from a market without a direct physical presence," he added, regarding possible in-scope activities in the FS sector.

However, one tax director at a UK-based banking group said FS businesses generally need to have a local presence to penetrate a market jurisdiction because financial regulation makes it very hard to sell retail cross-border and, therefore, the FS sector should benefit from a carve out in the digital tax blueprint.

Policymakers negotiate on certain FS activities

Consumer-facing businesses in the FS sector such as retail banking and funds, which should be within scope of the digital tax rules under the OECD's definition of "consumer-facing", were largely excluded from the proposed rules because financial regulation can already ensure that profits from retail activities remain local under strict substance requirements.

There are also accounting issues to support an exclusion of the wider FS sector. Typical



operating metrics such as interest and risk measures to identify profitability in the market do not really work in the banking sector because banks report trading revenue net of costs and interest revenue net of interest expense, which can normally distort operating margins and skew results from consolidated financial accounts.

However, OECD delegates are still negotiating the inclusion and treatment of financial technology and fund management under the two-pillar approach, which are the most hotly debated areas for inclusion from the FS sector.

"For example, regarding the Libra project [Facebook's global crypto-asset framework], the central banks didn't care for so many years until they saw that they could lose control over the money system," said Robert Welzel, tax advisor at WTS Global. "The crypto-asset evolution could change the direction of tax policy for financial services and re-scope pillar one rules in the future. Blockchain could introduce completely new asset classes into the financial sector, and this will change the discussion again."

Funds receive more attention in the digital tax debate

Fund management is an area of high importance for tax

policymakers, since many authorities are concerned about tax avoidance and treaty shopping schemes via funds that have operations in tax havens. There is agreement for more tax transparency and disclosure measures across jurisdictions in 2020 with public country-by-country reporting receiving renewed attention.

Most jurisdictions support tax neutrality for fund taxation, which may align with discussions in the digital tax debate on improving tax dispute prevention and resolution mechanisms ahead of implementing pillar one and two. Taxpayers continue to support a uniform approach for investment funds with multi-jurisdictional structures to rely on tax treaty benefits, since countries tax investment funds differently.

Revenue authorities can tax investment funds through three options:

- 1) Tax transparency (targeting the investors);
- 2) Fund taxation (targeting the fund); and
- 3) Deductions for distributions (targeting either the fund or the investors).

"Across all considerations a key concern for us is that our products are sold by third-party banks and insurers," said one group head of tax at an asset management business. "We are relieved that FS is carved out and believe that is the right answer, but to conclude that banks and insurers are out while fund managers are in was a bit perverse."

Most stakeholders following the OECD's digital tax agenda agree that the FS sector should be outside the scope of pillar one as long as it continues to be regulated, but the question is how the regulation develops if the regime is contested by more technical advancements.

The ongoing developments in fund taxation and financial technology such as crypto-assets will continue to challenge the digital tax debate, and policymakers involved in shaping the OECD's digital tax agenda will need to think far ahead to avoid revisiting negotiations after 2021.

FRANCE

Sumerson



Nicolas Dubouille and Alexia Dal Ponte

Twin cases reduce the scope of taxing capital gains on sale of French shares

When enacted in 1978, Article 244 bis B of the French Tax Code (FTC) provided for the taxation of capital gains recognised upon the disposal by non-French natural persons or look-through partnerships of a significant shareholding (more than 25%) in a French entity. This tax mechanism was later modified to include the capital gains realised by non-resident companies subject to a tax that is comparable to French corporate income tax (CIT), by the French Amending Finance Law dated December 30 1993, which came into force on January 2 1994.

As an exception to the principle of taxation of capital gains on movable properties in the state of residence provided in double tax treaties (DTTs), this tax only applies to taxpayers established in countries that have not concluded a DTT with France, or in countries having concluded a DTT which expressly allows the source state to apply such tax (e.g. Austria, Italy, Spain, or Sweden).

Under this tax, a parent company established abroad, selling a participation in a French subsidiary is subject to French CIT at the standard rate. While, under the French participation exemption regime applicable to capital gains recognised upon the disposal of qualifying participations, a similar French parent company, implementing the same transaction, benefits from a partial tax exemption (12% of the gain remains taxable, as an addback to the tax result of non-deductible expenses).

Article 244 bis B FTC: European entities

Aware of this discrimination, the French tax authorities (FTA) provided in their guidelines that parent companies established in another EU/EEA member state can benefit from a tax refund mechanism, up to what would have been paid by a French entity in the same situation.

In a remarkable case, the French Supreme Court (*Conseil d'Etat*, October 14 2020, n°421524) considered that the provisions of Article 244 bis B FTC constitute a restriction to the freedoms of establishment and of capital movements,

enshrined respectively in Article 43 and 63 of the Treaty on the Functioning of the European Union (TFEU).

The *Conseil d'Etat* further issued that, even if the FTA are allowed to interpret legal provisions when they are contrary to EU law, this ability is given only when the legal provisions are unclear, which is not the case of Article 244 bis B FTC. In order to not infringe the principle of legality, the FTA must refrain from applying, in its entirety, the discriminatory taxation.

As a result, parent companies incorporated in another EU/EEA member state are thus entitled to obtain the complete restitution of the tax paid until the French legislator intervenes on this issue. It should be noted that this decision creates a reverse discrimination for French parent companies, as they are now in a less advantageous situation than other European companies (since the French parent companies continue to bear CIT on 12% of the capital gains).

Article 244 bis B FTC: Companies incorporated in third countries

The freedom of capital movements was extended to third countries by the Maastricht Treaty. It also included a standstill clause, pursuant to which a restriction to this freedom of capital movements toward third countries may subsist, if the discrimination was in force on December 31 1993 and continuously since then, and if it concerns direct investment.

The Versailles Administrative Court of Appeal (CAA Versailles, October 20 2020, n°18VE03012) drew the logical consequences of the entry into force on January 2 1994 of the aforementioned law extending the provisions of Article 244 bis B FTC to companies subject to a tax that is comparable to French CIT. The Court of Appeal ruled that the discrimination at hand cannot be saved by the standstill clause as the temporal condition is not fulfilled.

However, it is important to point out that the tax on capital gain remains applicable if the foreign company holds a significant shareholding that allows it to influence the management and to have control over the French entity whose shares are sold (e.g. if the foreign entity holds more than 50% of the share capital and voting rights of the French subsidiary). Indeed, in such a case, the company is not protected by the freedom of capital movements (since the investment does not fall within the scope of indirect investment), nor by the freedom of establishment, which does not apply to relations with third countries.

These two important decisions considerably reduce the scope of Article 244 bis

B of the FTC. While waiting for a legislative intervention, the non-resident entities, which fulfil the conditions mentioned *supra*, are no longer subject to a tax on capital gains recognised upon the disposal of a significant shareholding in a French entity and, as a result, are entitled to claim for the refund of the whole amount of the tax paid on the capital gains realised since 2019.

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NERA Economic Consulting



Yves Hervé and Philip de Homont

Taxation of the digital economy: Analysing user base value

One of the most significant issues facing the transfer pricing community, and the wider business society, concerns the taxation of the digital economy. Generally, two challenges are raised regarding this issue: first, that digital companies supposedly pay low taxes due to the excessive use of loopholes and, second, more intricately, that the rise of the digital economy leads to a new dynamic between market states and the host countries of these companies. In particular, market jurisdictions claim that a high value is generated from the data provided by users in their countries and that this value is not captured fairly.

Regarding the first charge, over the past five years, many steps have been taken in the international tax framework under the BEPS approach to close perceived loopholes around non-residency status and, more importantly, on the valuation and recognition of intellectual property (IP) value contributions. It should, therefore, be expected that the crassest examples of low group effective tax rates will become a thing of the past.

OECD pillar one: The problem with a departure from the arm's-length principle

However, even if the question of whether digital companies will be taxed more substantially has been addressed, a question remains as to where they will be taxed.

The OECD has tried to address this point via its new pillar one approach, which has been subject to public consultation. This approach stipulates that a

certain percentage of super profits (i.e. profit beyond a defined threshold) should be taxable in market jurisdictions.

The proposed formulary approach is a clear deviation from the arm's-length principle, which serves as the basis for long-standing international transfer pricing principles. As such, it will make transfer pricing more complex and costly, and will erode the international consensus that has done much to prevent double taxation.

In particular, even the pillar one proposal still foresees an allocation of the income remaining after the attribution of Amount A under the OECD pillar one proposal according to the arm's-length principle. The inevitable contradictions between these two approaches will likely lead to increased controversy. Functions surrounding the development, maintenance, enhancement, protection, and exploitation of intangibles – such as the user base – still need to be remunerated. Since this remuneration ultimately needs to be drawn from the overall profit of the company, it will remain a contentious issue to determine how much profitability stems from various intangible contributions for the user base apportionment.

In view of the upcoming realisation that the pitfalls related to the proposed pillar one solutions are larger than initially expected, the question is, therefore, whether there could still be an economically based alternative to the proposed formulary apportionment.

Local data: Formulary apportionment or economic foundations?

Digital business models often do not require a local presence to conduct business. Whether the local users still give rise to a local nexus for income tax is, to some degree, a normative question that must be answered at a political level. However, there is also the technical question about how value generation of local user contributions can be assessed economically.

Through projects, NERA Economic Consulting has gained insights and developed objective techniques to assess value contribution by users and data, which could be considered in the regulatory debate. A simplified example of how an economic analysis can be technically conducted is presented below. This is not to say that local users or data should be considered a local nexus *per se*. However, it helps to attribute an arm's-length profit to such intangibles.

Data-based economic valuation of user contributions

In the simplified example, a technology company that has a user base that uses the

digital services of the company while being shown advertisements, is considered.

Typically, the company will be largely driven by two factors: user participation and the underlying technology. From an economic point of view, both factors are unique value drivers that generate value jointly and should thus be remunerated via the profit split method. This shifts the question to what percentage of the profits should be attributable to each intangible category.

Economic analysis to determine an appropriate split of a jointly generated profit is rooted in game theory. In our experience, the Shapley value concept can be particularly useful for gaining insights. The concept is based on marginal contributions (i.e. the relative profit that both technology and users can bring to the business). If one party is relatively unimportant to the overall business, it should earn a lower share of the overall profit.

A detailed analysis of the technology and user base components aims to identify the parts that are 'unique and valuable' in the sense of the OECD Guidelines. Substantial portions of the technology and user base might turn out to be either relatively easy to replicate or not subject to effective protection (legal or otherwise). The precise definition of what constitutes unique features will depend on the individual case, but, as a guideline, analyses can be conducted regarding which features can be readily copied by competitors and what data is easily available on the one hand, and which features are strictly proprietary to the analysed company on the other hand.

When the unique and valuable aspects of the user base and technology are clearly identified and delineated, it becomes possible to conduct a meaningful marginal profit analysis for four combinations:

- 'Normal' technology and 'normal' user base;
- Normal technology and comprehensive user base;
- Unique technology and normal user base; and
- Unique technology and comprehensive user base.

For each of these cases, the profit potential is separately identified through a simulation of the company's (external) monetisation (i.e. how much revenue could be generated in each combination). Data analytics experts from technology companies regularly conduct such analyses for business reasons. The marginal profit increase (with and without) each unique and valuable element then reflects the relative value contributions for the two categories of intangibles.

A value for local user contributions

Overall, the methods discussed above allow for the identification of the proportion of a digital company's profits that should be attributed to the user base as opposed to the technology. In practical terms, it is often necessary to consider other intangibles or activities as well, but the basic principle can nevertheless be used.

It follows that a completely formulary apportionment for remunerating the user base is not just a violation of the arm's-length principle. It is not necessary to quantify local user contributions because economic methods to assess relative value contributions based on the multinational's own big data exist.

If it is decided that a local user presence gives rise to a taxation nexus, the method above allows companies to determine an economically justified allocation to the overall user base, which can then be allocated to the various tax jurisdictions in which the users are located. Since this is economically justified in the first place, it would remain within the framework of the established arm's-length principle and reduce the scope for international disputes.

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ASC rules on the tax treatment of interest-bearing loans concerning stamp duty and VAT

Through the landmark decisions No. 2163-4/2020 and 2323-5/2020, Greece's Administrative Supreme Court (ASC) ruled on a range of legal matters concerning the tax treatment of interest-bearing loan agreements in terms of stamp duty and VAT.

The decisions of the ASC were issued on the occasion of interest-bearing loan agreements concluded by a Greek company with a foreign-affiliated company, which was a non-banking entity. The dispute arose in the context of a typical

payment of a loan, as well as in the context of the offset of repayment by the Greek company of an existing loan through the grant of a new loan of at least equivalent value by the same foreign lender.

Ruling

The granting of non-banking loans in return for consideration (interest) by persons who carry out an independent economic activity falls within the scope of VAT and therefore, according to an explicit provision of law (Article 63 of L. 2859/2000 – VAT Code), was decided as being exempt from stamp duty.

In particular, the imposition of stamp duty on interest-bearing loans by persons engaging in activities within the scope of VAT, has been abolished since January 1 1987 pursuant to Article 57 of L. 1642/1986 (currently Article 63 of the VAT Code) which, pursuant to Article 33 of the 6th Directive 77/388/EEC on VAT (Directive), explicitly defined that as of the introduction of VAT law, the provisions for the imposition of stamp duty on cases provided for in the provisions of Article 2 of the same law and their ancillary agreements shall be repealed.

However, the relevant interpretative Circular POL 44/1987 included loans in general within those transactions which would still be subject to the stamp duty, while for bank loans, an explicit legislative exemption was introduced.

In this context, the ASC, by way of interpretation of Article 2 (transactions subject to tax), Article 3 (taxable persons), Article 4 (economic activity), Article 8 (on the provision of services) and Article 22 (on the granting of credits) of the VAT Code, in conjunction with Article 63 of the VAT Code and in the light of the provisions of the Directive and the relevant case law of the Court of Justice of the European Union (CJEU), accepted that the regular granting of interest-bearing loans by a taxable person acting in that capacity, constitutes a provision of services in return for consideration and such activity is subject to VAT and falls within the general concept of granting of credits. The above apply provided that the granting of a loan is

carried out with a business or commercial purpose characterised by a concern to maximise returns on capital investments. The same applies even if the granting of a loan is on an occasional basis, if the creditor acts as a taxable person in the context of another economic activity.

In particular, for VAT purposes, the imposition of interest is the crucial element when evaluating the supply of funding services, while the legal form and status of the lender as a banking or financial institution is irrelevant provided that the latter carries out an independent economic activity, i.e. pursues a business purpose aimed at making a profit from the granting of funds. Thus, such a transaction falls within the scope of VAT and therefore the imposition of stamp duty in both capital and interest (as well as on any ancillary agreements) is illegal as it is contrary to Article 63 of the VAT Code and the provisions of the Directive, as has been interpreted by the case law.

Impact

Based on the above argumentation and case law, it should be examined whether other cases of granting credits, such as under cash pooling agreements/schemes, are also outside the scope of stamp duty.

Moreover, the decisions are in principle binding only between the specific litigant parties up until their conclusions would potentially be endorsed by the tax administration through the issuance of a relevant circular. However, the above interpretative position of the ASC is expected to be followed by the administrative courts, which hear the merits of a case and are bound by the ASC's case law.

In this context, it appears that companies which, prior to the tax audit, remitted stamp duty on interest-bearing loan agreements, can – subject to the five-year limitation period from the end of the year in which the return was filed – amend the respective stamp duty returns and at the same time request for the refund of the amounts unduly paid on the basis of lack of tax liability.

For companies that, after the completion of the tax audit, remitted the stamp duty as assessed by the tax authorities, the possibility of requesting the annulment of the final corrective tax assessments under the procedure of Article 63B of the Tax Procedure Code could be examined. The said article applies to tax acts issued as of January 1 2020 and provides for a three-year limitation period.

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ITALY

Hager & Partners



Gianluca Nieddu and Barbara Scampuddu

A closer look at the case law on non-interest bearing loans and the arm's-length principle

The Decision No. 55/2020 published by the Regional Tax Court (second degree) of Bolzano on December 4 2020 was focused on the existence of subjective and objective requisites in order to apply transfer pricing provisions. The takeaways from this decision can be summarised as follows:

- The subjective circumstances must be identified by referring to Article 110, paragraph 7, of the Presidential Decree No. 917/1986 (Income Tax Code). The provision refers to transactions that occurred between an Italian enterprise and non-resident companies that “directly or indirectly control the Italian enterprise, or are controlled by it, or are controlled by the same company controlling the Italian enterprise”.
- Additionally, only those inter-company transactions from which income is expressly derived, are subject to the transfer pricing provisions. Article 110(7) of the Income Tax Code refers to the inter-company transactions that may affect “components of income”.

The case under analysis – which refers to fiscal years 2011, 2012 and 2013 – involved an Italian company that granted a non-interest bearing loan to a Chilean company, whose 48% of shares is owned by the Italian company. The outcome of the tax inspection concerning the fiscal years in which the loan was granted was an assessment for direct taxes concerning transfer pricing issues. In particular, the Italian Tax Police challenged the non-interest bearing nature of the loan, arguing that the Chilean company should have paid interest to the lender (i.e. Italian company).

Based on the transfer pricing point of view, the tax inspectors argued that “no independent entity would have granted a loan equal to \$1.224 million without interest”. Therefore, the Italian company filed the appeal to the Provincial (first degree) Tax Court of Bolzano which ruled in favour of the taxpayer. The Tax Office appealed to the second degree tax court, which accepted that the arguments of the

“For VAT purposes, the imposition of interest is the crucial element when evaluating the supply of funding services”

Italian company related to the lack of subjective and objective requisites in order to apply the transfer pricing provisions to the case at stake.

To have a clearer picture of the subjective circumstances in a transfer pricing case, it is worth mentioning that the notion of control shall be firstly identified by referring to Article 110 (7) of the Income Tax Code. Accordingly, the Regional Tax Court noticed that the Italian company owned only 48% of the Chilean company's shares and only one of the three Chilean company's directors was appointed by the Italian company (more details regarding the notion of 'associated enterprises' are given in the Ministerial Decree May 14 2018, which provide practical guidance on transfer pricing).

Moreover, the second degree judges deemed that the 'power of control' cannot extend to every hypothesis of economic influence, even potential economic influence that had affected the circumstances of the case. In other words, a mere economic influence does not meet the notion of control provided by the transfer pricing rules. Therefore, the subjective condition was not met in the case at hand and thus the transfer pricing provisions could not be applied.

With regard to the objective circumstances of the case under analysis, they affect the possibility to grant (or not) a non-interest bearing loan. It seems that the interpretation of the Regional Tax Court of Bolzano is aligned with other case laws on the same object matter, according to which the transfer pricing provisions apply only in the case of inter-company transactions for consideration rather than for free of charge transactions.

Furthermore, the second degree court firmly rejected the Tax Office's approach that would make reference to a fictitious and hypothetical income (i.e. interest) that the Italian company should have obtained from the loan granted. In fact, such an approach does not meet the provisions of Article 53 of the Italian Constitution on the ability to pay and the progressiveness of taxation.

Finally, the judges noted that no Italian provision obliges the lender to apply an interest when a loan is granted.

As a last remark, even if this decision comes from a second degree tax court and can be still appealed before the Supreme Court, it is important to highlight that the position taken by the Bolzano Regional Tax Court stood against the trend adopted by the Supreme Court in recent years, when analysing the non-interest bearing loans and the arm's-length principle for direct

“ It is important to highlight that the position taken by the Bolzano Regional Tax Court stood against the trend adopted by the Supreme Court ”

tax purposes. Consequently, it will be enlightening to see the future decision of the Supreme Court if appealed by the Bolzano Tax Office.

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Grégory Jullien

Mapping the EU's path to sustainable tax governance

Tax became a focal point for European public opinion in the aftermath of the 2008 financial crisis. Since then, transparency towards tax administrations has grown continuously in the EU. With the shift towards sustainable economic growth – the main pillar of the EU policy agenda – tax has become a fundamental part of corporate sustainability strategies.

Enhancing sustainability

The success of this EU strategy is dependent on the measurement of sustainability. There are few legal requirements for businesses to be publicly transparent regarding taxes (such as in Australia, Spain, and the UK, or in the extractive and banking sectors) beyond pure financial reporting obligations like the international financial reporting standard (IFRS) or the Sarbanes-Oxley Act (SOX) in the US. However, a significant number of voluntary best practices exist as put forward by bodies such as the B Team and the Global Reporting Initiative (GRI).

From 2021, the EU will enhance sustainability reporting by connecting it to financial reporting and creating tax transparency obligations. Taxation will become

embedded in sustainability reporting aimed at measuring business performance based on environmental, social, and corporate governance (ESG) criteria. Businesses will have to report about tax twice – once for financial reporting purposes to their shareholders, and a second time for sustainability reporting purposes to a much wider base of stakeholders, including tax administrations, governments, regulators, investors, clients, and the general public.

For example, under the EU Sustainable Finance Disclosure Regulation, financial market participants and advisers must disclose sustainability risks in all investments, notably with respect to companies' good governance practices and in particular tax compliance, while the revised Non-Financial Reporting Directive will probably include a tax dimension in 2021. The challenge posed by sustainability in relation to tax requires businesses to anticipate, adapt and act proactively by developing and mastering tax policy, tax governance, and tax communication, which are interdependent.

Creating business confidence through transparency

In this evolving and complex environment, where the costs of cross-border business are rising due to increasing tax risks and double taxation, businesses are facing growing pressure for tax transparency. Society requires them to explain and demonstrate the sustainability of their tax governance and control framework for fulfilling their tax obligations (i.e. to explain their strategy and approach to tax management).

Businesses are also expected to explain the outcome of this sustainable governance (the taxes paid and collected) based on data that is not yet available.

Communication regarding taxation is an important and constituent part of sustainable governance, but it is a highly technical subject that may be difficult for stakeholders to understand. As a result, tax transparency will continue to evolve.

Anticipation is key on tax matters, especially to adapt and align communications about tax to sustainability expectations regarding appropriate oversight and control of tax risk. Businesses must adopt a forward-looking attitude to understand future regulatory and tax policy trends. Mastering tax policy is a pre-requisite for creating sustainable tax governance. This implies developing the resources to monitor the tax policy agenda of national, EU, and international institutions in order to be part of the tax policy discussion, rather than being its subject.

Growing pressure is placed on businesses to better manage tax and related risks

by strengthening the control environment governing reporting processes and by facilitating real-time compliance and data-oriented auditing by tax administrations. It is time for companies to assess the sustainability of their tax governance and control framework in order to adapt and meet sustainability expectations and reporting obligations. This will take time and require significant resources. Clearly, sustainable tax governance can no longer be considered in isolation from a broader business governance and sustainability strategy.

Businesses taking pre-emptive action to understand the landscape, and creating a tailored tax governance and control framework, will be able to participate in tax policy discussions and share their experience and point of view. They will also be in a position to produce the data needed to communicate effectively about tax and demonstrate the sustainability of their tax governance in fulfilling their tax obligations. Sustainable tax governance should produce many other benefits, such as a reduced tax risk and associated costs, the proactive identification of gaps, enhanced processes, improved tax reporting to the board and stakeholders, evidence of effectively managed tax risk, etc. It will also allow businesses to enter into cooperative tax compliance arrangements, which will evolve further in the EU and improve tax certainty and relationships with tax authorities.

Whatever the form and extent of tax transparency obligations, and regardless of any link to sustainability, there will be an incentive for businesses to voluntarily exceed requirements (especially if public country-by-country reporting is adopted) so that they can deliver their vision of the management of taxation and provide meaningful explanations of highly technical and complex tax information to their stakeholders. They can draw on the growing body of voluntary tax transparency measures, such as the GRI or B Team, to achieve this goal.

Businesses will only be able to successfully address the challenges of sustainability in relation to tax by creating sustainable tax governance.

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NETHERLANDS

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Daan Arends and Sebastiaan Wijsman

Recovery of VAT: CJEU rules that actual use takes precedence over intention

In 2018, the deduction of VAT on costs related to aborted transactions was confirmed by the Court of Justice of the European Union (CJEU) in a case where the taxpayer intended to acquire all shares in another company and provide VAT taxable (VATable) management services to such company. In that case, the CJEU considered that the activities of the taxpayer to render VATable supplies, amounted to economic activities in pursuit of making taxable supplies allowing for VAT deduction.

In November 2020, the CJEU further specified its thinking when asserting the deduction of VAT in relation to aborted transactions. The *Sonaecom* case deals with the recovery of VAT incurred on costs related to (i) consultancy services consisting of market research, and (ii) services related to the issuance of bonds, both expenses were incurred with the view to invest and acquire shares in another company, which ultimately did not materialise.

Background

Sonaecom is a mixed holding company that renders strategic management and coordination services to companies operating in the telecommunications market. Sonaecom purchased consultancy services with the intention to acquire the shares in Cabovisão. Furthermore, Sonaecom paid a commission to BCP Investimento for services relating to the placement of a bond in the amount of €150 million (\$185.1 million). The intention of Sonaecom was to use the capital raised following the bond placement to acquire Cabovisão and further invest in triple-play technology. Ultimately, the acquisition of shares in Cabovisão did not materialise, as a result of which Sonaecom decided to use the capital to provide a loan to its parent company based in the EU.

Judgment

The CJEU first discussed the recovery of VAT on costs relating to consultancy services which were purchased as part of the intended acquisition of Cabovisão. The CJEU ruled that the consultancy services

at issue were purchased in the context of Sonaecom's intended acquisition of a company and that Sonaecom intended to carry out VATable management services for that company. Thus, these costs are part of Sonaecom's general costs and, therefore, Sonaecom is entitled to deduct VAT on the consultancy services in accordance with its *pro rata*.

The CJEU continued with the analysis of the recovery of the VAT paid on the commission paid for the bond placement with the view of making investments, where those investments ultimately did not take place and the capital raised was paid to Sonaecom's parent company in the form of a loan. According to the CJEU, the deduction of VAT paid must correspond as precisely as possible to the actual use of the goods and services purchased. Consequently, an actual use of goods and services takes precedence over the initial intention.

The services purchased by Sonaecom are not considered part of its general costs but instead are considered to be directly related to the loan that Sonaecom provided to its parent company. Contrary to the consultancy costs, the CJEU neglected the intended investments and linked the costs for the bond placement to the VAT exempted loan and referred to the actual use of the capital raised.

The direct and immediate link

In *Sonaecom*, the CJEU applied a broad interpretation on whether there was such a direct and immediate link to a particular output transaction to be established. Apparently, even if there is no particular direct output transaction connected to the used services, further analysis should be made on whether a subsequent output transaction can be identified to which the costs can be linked.

Sonaecom used the services for the bond placement, which in itself does not give rise to any output transaction. Those services were consumed in full when the capital was obtained. In this instance, Sonaecom claimed that the costs for the bond placement should be deductible as general costs and that the intended purpose of the issue of the bond was to continue the group's economic activities.

The CJEU ruled that only where an input transaction cannot be allocated to an output transaction, the link between an input transaction and an undertaking's overall economic activity should be examined as a secondary point. The CJEU simply followed the Advocate General and ruled there was a direct link between the services used and the use of the capital that was raised. By doing so, the CJEU seems to have navigated away from the cost-component

approach which assumes that direct costs of acquired services are part of the various cost components of a particular output transaction. In this instance, there is no such immediate link or direct output transaction. Moreover, at the time the costs for issuance of the bonds were incurred, there was no intention, link or connection between the services purchased and a VAT exempted output transaction.

Therefore, it would be interesting to see in which cases taxpayers need to 'look through' when incurring costs in the course of their overall economic activities and need to find specific output transactions at a later stage that can be linked to such costs. If this was a VATable output transaction, a taxpayer could still be eligible for the recovery of VAT also, where its overall economic activity gives right to only partial deduction of input VAT (i.e. on a *pro rata* basis).

Concluding remarks

In line with its earlier case law, the CJEU allows Sonaecom the deduction of VAT on costs in relation to an investment in another company with the intention to provide VATable management services to such company, even if investment does not take place.

However, where costs are incurred for attracting a loan or raising capital with a view of investing into such other company, further analysis should be made of the actual use of the capital raised when the investment would not take place. Although the outcome of this judgment was unfavourable for Sonaecom, the judgment broadens the opportunities to recover VAT on costs incurred in the case of unrealised transactions.

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POLAND

MDDP



Monika Dziedzic

Changes for limited partnerships lead 2021 tax developments

Through the updated regulations in November 2020, Poland has adopted a range of major changes concerning the taxation of doing business in the country.

The changes include the double taxation of some partnerships; deferral of corporate income tax (CIT) for small companies owned by individuals; an obligation to publish tax strategies by large companies; and a new model of taxation for real estate companies.

Limited partnerships

The most revolutionary amendment imposes the status of 'corporate profits taxpayer' on limited partnerships (*spółka komandytowa*) with a seat or place of management in Poland, which so far had been tax transparent.

The model will mean a double taxation, firstly on the level of the partnership's profit, and secondly at the level of profit distribution to the partners. Limited partners will be entitled to an exemption of 50% of received distributions, but only up to approximately €15,000 (\$18,159) per year per limited partnership.

Unlimited partners will be entitled to credit proportionally for the entire income tax paid by the partnership, but only within five years. Thus, the new system will differentiate the tax position of limited and unlimited partners. The above regulations enter into force on January 1 2021 but limited partnerships may decide to only apply them from May 1 2021, and continue the tax transparent treatment until the end of April 2021.

These rules will apply to general partnerships (*spółka jawna*) but only if the partners are not individuals, or if the taxpayers participating in their profits are not disclosed. General partnerships with disclosed partners will still be tax transparent.

Deferral of corporate income tax

Lump sum taxation, being a sort of deferral of income tax to the moment of dividend distribution, will apply to companies which select such a system for four years. Companies will have to be owned by individuals, have an annual turnover in the preceding year of up to approximately €25 million, and cannot have participation in other entities and passive income exceeding 50% of turnover.

There are plenty of other requirements and conditions for this system to apply, including consideration of employment, and investments in new assets, among other factors. Thus, one should carefully check if the company qualifies for the tax deferral.

Other major developments

Companies with a turnover exceeding €50 million per year, and tax capital groups, will be obliged to prepare and publish strategy reports on the execution of their tax policy on their websites, within 12 months after the end of the tax year.

Real estate companies will have a series of new duties to comply with. For example, when the shareholder sells their shares, it will be the real estate company that has to pay the capital gains tax. Some real estate companies will be obliged to appoint a formal tax representative, and many will have to report information about their shareholders (where there is more than 5% participation).

Entities operating in special economic zones (SEZs) will not be entitled to change the depreciation rates for new assets.

Losses carried forward will not be possible after further reorganisations.

Transfer pricing documentation will be required when the beneficial owner of the party to the transaction is from a tax haven.

A reduced 9% CIT rate will apply to companies with a turnover of up to €2 million (increased from €1.2 million).

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ROMANIA

EY



Adrian Rus and Gabriela Bancescu

Considerations on country-by-country reporting requirements

Under BEPS Action 13, large multinational enterprises (MNEs) are required to prepare country-by-country (CbC) reports with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which the MNE group operates. CbC reports should be shared among tax administrations in jurisdictions in which the MNE group operates, for use in high level transfer pricing and BEPS risk assessments.

Most often, a Romanian constituent entity is required to file a CbC report in Romania if:

- It is the ultimate parent entity of the MNE; or
- It is the surrogate parent entity, being appointed by the MNE as a sole substitute for the ultimate parent entity; or
- It is a constituent entity of the MNE and at the CbC report due date in Romania, no qualifying competent authority agreement regarding the

“Transfer pricing related actions are included among those considered by the authorities for fighting tax evasion”

automatic exchange of the CbC reports is activated between Romania and the jurisdiction in which the CbC report for the group is filed.

Based on the currently activated relationships for automatic exchange of CbC reports, Romania receives CbC reports only from the EU jurisdictions. Moreover, it is worth mentioning that under the multilateral competent authority agreement (MCAA) on the exchange of CbC reports, Romania notified its status as a non-reciprocal jurisdiction and, as such, will not receive CbC reports submitted to tax authorities in other jurisdictions.

Nevertheless, Romania has a legislative requirement for local filing as mentioned at point (iii) above and the Romanian constituent entity of the MNE, that is neither the ultimate parent entity or the surrogate parent entity, would still be required to file the CbC report in Romania. In this latter stance, the local filing obligation is waived only if the group has appointed a surrogate/designated entity for filing purposes at EU level.

Failure to comply with the Romanian CbC reporting rules shall potentially trigger the following penalties:

- Penalty of up to approx. €10,000 (\$12,100) for late submission of the CbC report or incorrect or incomplete submission of information; or
- Penalty of up to approx. €21,000 in case of failure to submit the CbC report.

According to the OECD/G20 BEPS Project CbC Reporting – Compilation of Peer Review Reports (Phase 3), it is recommended for Romania to take steps for implementing processes or written procedures to ensure that the exchange of information is conducted in a manner consistent with the terms of reference relating to the exchange of information framework. Moreover, it is also recommended to ensure that the appropriate use condition is met as soon as possible (recommendations that remain unchanged since the 2017/2018 peer review).

Considering the Romanian CbC reporting requirements that are still in place, it is recommendable that MNEs perform an analysis to assess the appropriate CbC

report filing and/or notification obligations in Romania.

These are important aspects in the overall context of the Romanian transfer pricing environment that has become highly litigious in recent years, with transfer pricing being a main target of the tax audits and many transfer pricing cases being settled in the Romanian courts, while some reach mutual agreement procedures.

According to the Romanian tax authorities, transfer pricing related actions are included among those considered by the authorities for fighting tax evasion. These include specific actions for identifying MNEs bearing a high transfer pricing risk and also undertaking specific transfer pricing risk analyses based on information received under the exchange of information mechanisms provided under the framework of OECD BEPS Actions 5 and 13 (including CbC reports received by the Romanian authorities).

From a practical perspective, it is unclear at this stage how the Romanian tax authorities are using and interpreting the CbC reporting information received for the purpose of undertaking transfer pricing risk assessments. Practical outcomes and effects for the MNEs operating in Romania are expected to be seen in the near future.

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25 years of Swiss VAT: The partnership with the Principality of Liechtenstein

Following the introduction of VAT in Switzerland 25 years ago, the Principality of Liechtenstein widely adopted the technical articles from Swiss VAT law into its own VAT legislation. In addition, a bilateral agreement details the cooperation between the VAT authorities of the two countries.

In the following article, the convergences and discrepancies between the VAT law of Switzerland and Liechtenstein are explored.

Liechtenstein has adopted Articles 5 to 14 of the Swiss VAT law. Accordingly, the requirements for a mandatory VAT registration and the option to a voluntarily VAT registration are, in principle, the same. Furthermore, the principles of the place of supply rules for the supply of goods and services are identical.

Liechtenstein domiciled entities register for VAT with tax authorities in the Principality of Liechtenstein whereas Swiss domiciled entities register for VAT with the Swiss Federal Tax Administration (SFTA). Foreign domiciled entities with supplies that lead to a VAT registration in the Swiss customs territory need to register with the SFTA. Based on this principle, a Swiss VAT registered entity may declare Liechtenstein turnover via its Swiss VAT returns.

While Switzerland maintains a publically available electronic register of entities with an UID (business identification number), in which it can be verified whether an entity is VAT registered with the SFTA, such a register is not in place in Liechtenstein. Hence, VAT numbers of Liechtenstein domiciled entities are not publically available online.

Contrary to Swiss VAT law, a Liechtenstein domiciled entity that only achieves turnover abroad is exempt from VAT liability.

Entities that are only VAT liable due to the acquisition of services need to register with the Liechtenstein VAT authorities and file an annual acquisition tax return on an official form provided by the authorities. In Switzerland, the declaration of acquisition tax is declared with a letter to the SFTA.

Cross-border VAT grouping between Swiss and Liechtenstein domiciled entities is not possible. Moreover, within the Swiss customs territory, the single entity principle applies. This means that branches in Switzerland are seen as part of the headquarters in Liechtenstein and vice versa.

While the Liechtenstein authorities have their own procedures regarding VAT audits and legal procedures, the Swiss Supreme Court is in charge for final decisions on the interpretation of the technical articles.

Overall, there is wide accordance, especially in the day-to-day business between Swiss and Liechtenstein VAT law. However, the fact that Liechtenstein is a sovereign state with its own law and institutions needs to be kept in mind, also for VAT purposes.

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US TP Forum

ITR hosted its virtual US Transfer Pricing Forum on December 1-2 2020.

Transfer pricing directors at top US companies tuned into the two-day conference to take part in discussions about how best to approach corporate tax governance to meet the challenges of TP policy, among many other topics.

ITR has been hosting TP forums for more than 20 years. Here, Reporter Alice Jones and Deputy Editor Josh White provide their analysis of the panel discussions.

How businesses are restructuring to bring TP documentation in-house

Multinational enterprises (MNEs) are moving more of their transfer pricing (TP) documentation work in-house, but each business has a different approach.



Josh White

Many MNEs are moving TP documentation in-house, but this is not always a simple task for companies going through a merger and there is no magic formula. Global companies are working to simplify their intricate TP structures before they begin completing TP documentation requirements within the tax function or shared service centres.

Even though this trend goes back several years, some MNEs are still in the early stages of bringing everything in-house. “We are moving towards a much more centralised approach with the aim of taking our transfer pricing documentation in-house in the next couple of years,” said one tax manager at a life sciences company in Missouri.

“We’ve just found that in certain countries and regions our teams don’t have the time and the resources to handle the documentation. So we went to a service provider,” the tax manager told the audience at *ITR*’s US TP Forum held on December 1-2.

The life sciences company went through a recent merger and now has to bring together two different structures. One company had a localised approach to TP compliance, whereas the business that took it over has a global approach.

“We had more detailed reports at the local level versus more streamlined reports at the global level,” the tax manager explained.



Bring it all in-house

“We’ve found that upon audit the transfer pricing documentation isn’t used much more, other than for penalty protections,” the manager continued. “We’re trying to be a lot more streamlined about our report preparation process, so we can focus on other areas.”

The life sciences company is slowly restructuring to centralise its TP operations. However, there are many different approaches companies can take and this is just one route.

Top-down, bottom-up

One multinational pharmaceutical group decided to take all of its documentation processes and move them in-house long ago. This was due to concerns about control and consistency, not just cost efficiency.

“We think it’s very important to have consistency in how we describe our business and how we describe the transactions across all the countries in which we operate,” said one transfer pricing director at a pharmaceutical group in Ohio.

“The approach we follow is what I call a top-down, bottom-up approach,” the TP

director told conference attendees. “The group here is responsible for preparing standard template documents that describe our business models and describe our transactions in a consistent way.”

The global team delivers those templates to the subsidiaries in different countries. The local teams then prepare the files and come back to the global team as part of a review process. This differential approach takes into account the level of risk in each market.

“We thought that the differential approach was one of the really necessary ingredients to make this work,” said the director.

The TP director said the company “would struggle to prioritise” documentation in particular markets without a risk-based approach. However, this approach may not work for all MNEs because each has its own unique structure.

Two steps

Most businesses prefer a simple documentation process if possible, yet even a relatively simple approach can become more complex over time. One

approach is to organise the TP documentation through as few teams as possible.

“We have a two-step approach for most jurisdictions, where the report is prepared in Mumbai and our global team reviews the reports and makes sure we are comfortable with the conclusions,” said one senior VP of transfer pricing at a financial services company in Texas.

“We have a very good team in Mumbai that assists us with the compliance process, especially the pooling of the data which is usually the biggest part of the work,” said the senior VP.

“It’s about managing the risk and spending a lot of time on preparation,” the senior VP told the *ITR* audience. “We prepared about 150 reports last year.”

Even this approach to compliance is not a uniform approach. The company in question applies this two-step process to most of its reporting, but not for one region where it requires an extra stage. This means not all of the TP documentation is done in-house.

“We bring most of it in-house, except in Latin America as a region where we do need to translate the reports after we’ve prepared them. So we go to service providers for that,” the senior VP continued.

Latin America includes some of the most complex and aggressive jurisdictions in the world. So the financial services company had to pay special attention to the documentation in places like Mexico as part of the price of doing business there.

There is no magic formula for TP documentation. The price of doing business in a certain market might mean more tax complexity and more detailed TP reports to minimise audit risks, but all companies have to find their own way to file the right documentation on time.

What all transfer pricing directors can agree on is that no matter what method is used, the TP documentation needs to be able to tell the right story.

COVID-19 to increase TP scrutiny on MNE inter-company loans

Tax professionals told ITR that they expect the COVID-19 pandemic to intensify scrutiny on multinational enterprises' (MNEs) transfer pricing (TP) arrangements.

Speaking at the *ITR* US Transfer Pricing Forum in December, Andrew DeSimons, manager of transfer pricing at Withum, said that with TP being a “low-hanging fruit” for tax authorities, inter-company loans will be subjected to heavy scrutiny. This comes as tax authorities are working to recover financial losses incurred as a result of COVID-19.

Some jurisdictions have already seen a rise in TP audits, and taxpayers expect increasing inquiries from revenue authorities into their benchmark studies and permanent establishment exposures. Meanwhile, in some Latin American countries, COVID-19 has caused countries to step up reporting requirements under BEPS as they try to combat aggressive tax planning. The compliance burden on taxpayers is increasing across the board.



Alice Jones

Panellists at *ITR*'s TP forum advised tax directors to remember that, while some revenue authorities have relaxed requirements during COVID-19, this will not last. “At the end of the day, the fundamentals of transfer pricing really have not changed... the logic behind it is still maintained,” said DeSimons. “Any changes, whether they're drastic changes or small changes, have to be supported by facts; by the functions performed, by the risks incurred, and the assets employed”.

Some panellists were more optimistic that tax authorities would be lenient. “I personally think that the taxing authorities will be reasonable in accepting the profitability that

was based on the benchmarks from the COVID-impacted period,” said Sadia Nazir, director of global transfer pricing at Clarios.

Nevertheless, tax teams need to prepare for the possibility of intense scrutiny to protect their businesses. In times of uncertainty, advice from tax professionals often focuses on comprehensive documentation and the COVID-19 pandemic is no exception.

“A couple of years from now, when you're audited, it will be difficult to remember all the details,” said Nihan Mert-Beydilli, associate director of transfer pricing at NERA Economic Consulting. “I think keeping up the documents is the most important thing you can do to be prepared for the audit.”

Panellists at the *ITR* event advised against making any rash changes to TP arrangements unless tax directors are

certain that they can be justified against changes arising from the pandemic.

Mert-Beydilli warned tax directors to “not be opportunistic in terms of making changes to their structures and policies just because COVID-19 happened” as these will be difficult to defend in the future. “Be cautious and make changes to the extent they are warranted,” she advised.

Marina Gentile, global transfer pricing lead at Withum, agreed, adding that if companies make changes in one direction, they should be prepared to reverse them. “The natural question is, okay, in times of economic downturn you've made this adjustment, but what happens on the flip side? Are you going to adjust in the other direction? I think it's a bit of a slippery slope,” she said.

Ultimately, the overwhelming advice from tax professionals is to be sensible and make adjustments only when they are necessitated by real-world changes. Tax directors should not change anything unless they are confident that they can explain it to a tax inspector's satisfaction.

Above all, tax teams should prioritise documentation so that, if and when audit season rolls around, every decision can be justified.



Tax teams should prioritise documentation in case of future audits

BRAZIL

PwC



Bruno Porto and Mark Conomy

STJ confirms the triggering event for withholding tax

Pursuant to a judgment dated August 18 2020 – *Recurso Especial* N° 1.864.227 – SP (2020/0049097-0), the Superior Tribunal de Justice (STJ) unanimously confirmed that the mere accounting recognition of a debt (as an ‘accounts payable’) was not sufficient to constitute the triggering event for income withholding tax (WHT). Rather, it is necessary that the debt is enforceable by the foreign creditor, so that WHT should only be triggered when the debt matures or at the moment of payment, whichever comes first.

By way of background, over the years, there has been substantial debate in relation to the timing of the triggering event for WHT purposes. More specifically, whether the reference to ‘credit’ within the contemplated potential triggering events could be taken to mean the mere accounting ‘credit’ in the Brazilian entity’s accounting books. At the other end of the spectrum, there exists the view that WHT should only be due upon actual payment/remittance. Finally, there exists a ‘middle ground’ being the view that the triggering event should be the earlier of the payment being made, or the obligation to make payment arising, whichever comes first. It is this latter view that was adopted by the STJ.

In summary, the facts of the case involved a Brazilian entity performing payments abroad in relation to a contract to distribute software. The Brazilian entity, as the responsible party for collecting the tax locally, withheld it on the maturity date or payment (where payment was anticipated prior to the maturity date), and was subject to challenge by the Brazilian tax authorities (RFB), who took the position that the WHT should have been collected on the date of the (mere) accounting recognition of the debt.

The judgment considered that according to Article 43 of the Law 5,172/1966 (*Código Tributário Nacional*), the triggering event for WHT is the acquisition of the economic or legal availability of income. Taking into account the doctrine on the difference between the concepts, it was considered that ‘economic availability’

is the ‘effective receipt’ of income, being the value that is added to the taxpayer’s assets. On the other hand, ‘legal availability’ stems from the value that the taxpayer can make use of as titleholder via such legal title.

Further, the judgment went on to consider that the accounting recognition of the future debt does not equate to economic availability, as the money is not yet within the direct possession of the creditor. Nor can it be understood as legal availability, considering that merely the accounting entry, prior to the maturity of the debt, provides no right or title for the creditor, as it is not possible to require payment of the amount.

The judgment concluded that Article 685 of Decree 3,000/1999 (the previous version of the Brazilian income tax regulations) determines that the incidence of WHT arises on income, capital gains and other earnings paid, credited, delivered, employed or remitted abroad. The accounting recognition of the debit does not correspond to any of the concepts referring to the economic availability (payment, delivery, employment, remittance) or legal availability (credit). Therefore, the accounting recognition cannot be considered as the triggering event for the WHT, which in this case only happens with the maturity or the anticipated payment of the debt.

Supporting this conclusion, the STJ acknowledged that on the due date the obligation to pay a certain amount becomes payable and the creditor can fully exercise all rights related to the debt, including the right to pursue legally, which demonstrates that it has ‘legal availability’ of the income. In relation to payment, the money comes within the immediate possession and control of the foreign legal entity, fully integrated with its assets, which falls within the concept of ‘economic availability’.

Finally, the judgment referred to *Solução de Consulta* 153/2017 dated March 2 2017 and published by the Brazilian tax authorities on March 22 2017, which expressly recognises that the mere accounting recognition of the credit, as a simple provision or early recognition of expenses does not characterise a taxable event for WHT if there is no economic or legal availability of the income, which only occurs when the consideration becomes due (or anticipated payment) for the services contracted. In this regard, see our previous article providing commentary on *Solução de Consulta* 153/2017.

It is important to note that while the STJ’s decision only contemplated WHT, the relevant *Solução de Consulta* 153/2017 referred to not only addressed

WHT but also addressed CIDE, PIS/COFINS-importation. In this regard, instead of ‘income’, CIDE refers to ‘remuneration’, whereas PIS/COFINS refers to ‘consideration’, however the relevant triggering events also refer to ‘paid, credited, delivered, employed or remitted’. As such, while the decision does not create binding precedent, it does appear that the reference to *Solução de Consulta* 153/2017 could be viewed as providing further guidance for taxpayers in relation to how the STJ may interpret such situations going forward.

The combination of the STJ decision and *Solução de Consulta* 153/2017 appears to pacify the previous discussion in relation to whether the mere accounting recognition was sufficient to be a triggering event for WHT purposes (being confirmed that it was not).

However, in a cross-border context, circumstances will continue to exist where despite the maturity date arising (and passing), there is no legitimate expectation of the income actually arriving in the hands of the non-resident (in cash or kind) or the value of the debt being employed in favour of the non-resident beneficiary. In such cases, where the debt is never to be paid and the value of the debt never employed in favour of the beneficiary or at its direction, there appears to remain a question as to the appropriateness of the liability to tax. Considering this and contemplating the form of taxation (i.e. via withholding), further judicial discussion is expected.

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CHILE

PwC



Mauricio Valenzuela and Santiago Tubio

IRS issues guidance on requirements for the DDT treaty scenario to apply

On December 9 2020, the Chilean Internal Revenue Service (IRS) issued Resolution No. 151/2020, introducing regulations to validate tax residency certificates for applying tax treaty benefits or the full corporate income tax (CIT) credit scenario for dividend distributions tax (DDT) (treaty scenario). The

resolution also provides for guidelines as to how transparent/flow-through entities should be treated in a dividend distribution tax treaty context, being the first approach released in this regard.

As a matter of background, Chile has a two-level integrated tax system under which, as a general rule, the tax paid at the corporate level (27%) is generally creditable against the 35% withholding tax rate applicable to actual distributions (cash basis). In principle, only 65% of the corporate-level tax is creditable against the 35% withholding tax, unless the shareholder is resident in a tax treaty jurisdiction and a beneficiary of dividend income under the relevant tax treaty. In a tax treaty scenario, the underlying CIT paid (27%) should be fully creditable against the 35% withholding tax (i.e. not limited to 65%), thus that the overall income tax burden on distributed profits should be capped to 35%.

Accordingly, tax treaty residency and beneficiary status are both key circumstances for the distribution of profits tax treaty scenario to apply. In this regard, the resolution provides for guidance as to how these requirements should be supported and evidenced to the Chilean IRS.

First, the resolution states that the tax residency certificate should be available to the withholding agent or custody, as of the accrual of the withholding tax liability.

The tax residency certificate should be issued either by electronic means or through a hard copy, and the Chilean IRS is now entitled to validate tax residency certificates through electronic means (e.g. foreign IRS website). If such electronic authentication is not possible, the certificate would need to be legalised, unless apostille is available with the respective foreign jurisdiction. The certificate will be valid for the period stated therein and, in the absence of an effective date, the tax residency will be valid for the time set in the respective foreign law. Where no reference is made to an effective date or term, the certificate will be deemed to be valid until the last day of the year of issuance (aligned with the legal presumption introduced by the 2020 tax reform Law No. 21.210).

Furthermore, the resolution elaborates on substance requirements for tax treaty scenarios to apply. Indeed, it states that the tax residency required is the residency of the effective beneficiary of the income, making applicable beneficial ownership regulations issued in Chile – aligned with the OECD beneficial ownership approach.

Finally, the resolution also provides for a definition of what should be understood as transparent/flow-through entities for

Chilean tax purposes. Indeed, transparent entities would be those entities or agreements whose income, or part of their income, is not subject to tax at the level of such entities or agreements, but instead at the level of the entities/individuals having an interest in them.

The resolution states that transparent entities, as described above, would in principle not be eligible to the full CIT credit tax treaty scenario, unless such transparent entity is legally or contractually binded to remit the income received or accrued, to the entities/individuals having an interest in them. In that scenario, the resolution allows for the tax residency and beneficial ownership requirement to be tested at the transparent entity owners' level.

This is significant progress as Chilean corporate law does not provide for a transparent or flow-through entity concept.

For tax purposes, this seems to be the first clear guidance issued by the Chilean IRS as to how flow-through entities should be treated in a dividend distribution tax treaty scenario context.

Therefore, this resolution is a call for reviewing formal and substance requirements for the tax treaty scenario to apply.

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MEXICO

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Assessing the tax reforms of 2021

The Mexican Congress has passed a tax reform for 2021. The reform focuses mainly on changes to the tax authority's audit capabilities, as well as its ability to instil a stronger sense of self-correction and reporting in taxpayers.

As promised by President Andrés Manuel López Obrador at the start of his term in office, no new taxes are being introduced for the first three years. As a result, there are no major changes proposed to the income tax law or the VAT law.

The Federal Fiscal Code

The amendments focus on increasing the ability of the tax authority to improve tax

collection, both through the implementation of swift auditing procedures, and more expeditious and enforced collection processes.

At the same time, the tax authorities remain focused on driving taxpayers to settle, as opposed to litigate. For the past two years, the Mexican government has been publicising high-profile tax settlements by multinational corporations and large Mexican taxpayers alike. This has been achieved by the Tax Administration Service meeting directly with the taxpayers' senior officials or even stakeholders to push them to settle, often without legal or tax counsel present, a practice that has been generally frowned upon by legal and tax practitioners alike.

The main weapon to encourage taxpayers to settle is the threat of criminal prosecution for tax fraud. To this end, in 2020, the Mexican government introduced a number of measures allowing them to apply organised crime consequences (including mandatory prison time and seizure of assets) and penalties to various instances of tax fraud.

Amendments that did not pass

It is also interesting to analyse a couple of the proposed amendments that were rejected by Congress, and the reasons surrounding these rejections.

Use of video technology in audits

The tax amendment package included a proposal to allow tax authorities to use video and photographs to record the amount of assets of a taxpayer and other factual elements relevant to an audit. This created an uproar from taxpayers and tax practitioners alike, albeit somewhat uninformed.

It was assumed that this process would allow tax authorities to record where a person lived, how many cars they owned, and details about the size and type of house they lived in, with all elements similar to simple surveillance checks. In fact, the proposed recording ability was limited to factual instances arising during an audit that would have otherwise been described by the auditor in words. So, the potential for supposed abuse of authority, was likely to be out of scope in most cases.

It did not help the authorities that a related proposal was to allow the sharing of videos and photographs with the General Attorney's Office, should they prove to be relevant for the investigations of any crime. This element, in contrast, did pose a serious concern since the level of confidence usually granted to the authorities in charge of the investigation and prosecution of crimes in Mexico is very low.

So, a proposal that was aimed at granting the taxpayer more certainty, as to how factual matters were recorded in the audit's minutes – such as the size of a plant or warehouse, the set-up of an office to support business capabilities, or the amount of machines that a taxpayer had available or in operation to carry out his/her trade or business – was eventually rejected because of perceived security concerns.

Criminal prosecution related to business reasons

Another proposal that was rejected pertained to the 'business reason' requirement. Since 2020, Mexican taxpayers must meet two criteria to support that a particular transaction has a legitimate business reason. Taking advantage of a tax benefit is not enough.

The criteria are that commercial benefits exceed the tax benefit and that all legal and corporate steps have been taken to finalise the transaction. Failure to meet these criteria allow the tax authorities to recharacterise the transaction as they see fit under a substance-over-form approach. A special audit is required to come to such conclusion (Article 5A of the Federal Fiscal Code).

For 2021, it was proposed that this ability by the tax authority allows also for criminal prosecution, when applicable.

This proposal was eventually rejected by Congress on the grounds that the tax authorities already have the ability to prosecute a taxpayer, based on information gathered under a business reason audit. This is because, under their interpretation of Articles 63, 108 and 109 of the Federal Fiscal Code, the tax authorities are allowed to use any information gathered under legal basis to support its ruling, including the request for criminal prosecution for tax fraud, to the General Attorney's Office.

Conclusions

Although there are no new taxes being introduced in the 2020 tax reform, Mexican taxpayers may expect the tax authorities to maintain or even increase the existing levels of audits and pressure to self-correct.

This administration has been clear in stating that litigation is widely frowned upon, and that they will keep on pressuring taxpayers' senior officials and stakeholders to settle, in many cases using the threat of criminal prosecution.

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US OUTBOUND

KPMG in the US



Mark Martin and Thomas Bettge

New horizons for dispute resolution under pillar one's Amount A

On October 12, the OECD released its report on the pillar one blueprint, which was approved by the Inclusive Framework on BEPS and represents the latest stage in multilateral efforts to address the tax challenges of the digitalisation of the economy. While considerable technical work remains to be completed, and the deadline for political agreement on the blueprint – along with its counterpart under pillar two – has been pushed back to mid-2021, the blueprint offers many important and innovative proposals, not least in the area of tax certainty and dispute resolution.

The focus of the blueprint's tax certainty chapter is the prevention and resolution of disputes regarding Amount A, which allocates taxing rights on a portion of in-scope companies' profits to market jurisdictions. Amount A is intrinsically multilateral: for any given multinational enterprise (MNE), profits may be allocated away from several countries and spread among a large number of market jurisdictions. The work on dispute resolution for Amount B, which would provide a standardised return for baseline marketing and distribution activities, is considerably less developed; the blueprint simply states that mandatory binding dispute resolution would apply to an Amount B dispute once existing procedures were exhausted.

The blueprint provides that Amount A would be administered through a coordinated system, in which an MNE would file a self-assessment return and documentation package with its lead tax administration, which would proceed to share the return and documentation with all affected tax administrations through an exchange of information mechanism. In the absence of any election by the MNE, all affected tax administrations would then be free to audit the Amount A return. In many cases, sorting through any disputes that arise on a country-by-country basis, or by invoking bilateral treaty relationships where they exist, could prove unworkable.

To avoid individual audits, MNEs could opt into an early certainty process under the blueprint. This involves three key stages: an optional initial review by the lead tax administration, review by an advisory

review panel comprised of affected tax administrations, and a quasi-arbital proceeding by a determination panel using a last best offer approach. Disputes could be resolved at any stage, but the inclusion of the determination panel ensures that mandatory binding dispute resolution provides a backstop to the process.

The two-tiered panel process appears intended to address the concerns of developing countries and other stakeholders regarding the use of mandatory binding arbitration. By interposing an advisory review panel comprised of a subset of the tax administrations themselves before a case is sent to the determination panel, the Amount A tax certainty process increases the likelihood that consensus may be reached without the need for an outside decision maker. While the composition of the determination panel remains to be determined, the suggestion that current or former tax officials may serve as panellists also appears likely to address some tax administrations' concerns.

By and large, the complexities baked into the process are likely necessary in view of the technical and political challenges associated with designing an appropriate tax certainty process for Amount A. Yet the success of the system will probably ultimately depend not on these intricacies, but on MNEs' and tax administrations' ability to avoid them in a significant volume of cases.

This, in turn, requires that all participants approach Amount A early certainty cases with a cooperative attitude: MNEs should be prepared to make frank and timely disclosures, and tax administrations should be willing to accept the work and recommendations of their colleagues in other countries except where they have serious concerns. Given the levels of investment required by the tax administrations in panel cases, as well as the time required to conclude such cases, the optional initial review by the lead tax administration appears likely to be key to efficiently resolving lower risk cases, but that will only work if other tax administrations are willing to accept the lead tax administration's recommendations.

The Amount A tax certainty process is not perfect. More work is needed in some areas, particularly around timing. But it does offer up a new take on dispute resolution that, if approached by tax administrations and MNEs alike with the right spirit, could provide a workable and much-needed structure for handling multilateral controversies, which could have ramifications beyond the confines of Amount A.

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How to prepare for the OECD digital tax reforms

Giles Parsons looks at how tax directors can prepare their businesses ahead of the OECD's digital tax framework being agreed and implemented.

Everyone working in international tax will be aware that the OECD, as the secretariat for the OECD/G20 Inclusive Framework (IF), comprising 137 countries, are continuing to work intensively on proposals for international tax reform, specifically aimed to develop a solution to the “tax challenges of the digitalisation of the economy”, and that pillar one of the proposals includes two formulaic elements. Tax departments should be already making plans to effectively manage a form of global formulary apportionment.

However, the initial objective of this ‘BEPS 2.0’ project was to deliver a consensus-based solution by the end of 2020, which has not proved possible. The update on October 12 announced only an intention to “address the remaining issues with a view to bringing the process to a successful conclusion by mid-2021 and to resolve technical issues, develop model draft legislation, guidelines, and international rules and processes as necessary to enable jurisdictions to implement a consensus-based solution”.

Tax directors should be aware of formulaic proposals and be sufficiently up to date to make informed decisions on prioritisation, but they also need to keep up to date on the other changing legislation, practices, priorities and expectations, and on the political climate that drives ultimate decisions, but with so many variables, where should they start?

An approach that has been useful in the past has been to adapt some of the processes of an enterprise risk review. Those reviews prioritise action based on an initial assessment of the impact of each identified risk and the likelihood of the risk materialising (see Figure 1).

Applying this model to future legislative, regulatory and tax administration changes as part of an initial enterprise review would use knowledge and expectations of the OECD's work on digital tax. It could also include expected changes at the EU, in domestic legislative and in tax treaties. This should all help the enterprise assess how the main business operations of the group might be impacted.

The outcome should be a framework that can be used to focus resources on the changes and risks with the highest potential impact and likelihood of occurrence and keep stakeholders informed.

The review would also document reasons for decisions on prioritisation that can be periodically re-assessed. Whatever happens, it is inevitable that developing the ability to work closely with accounting will be required to access and use more detailed data.

Giles Parsons worked as an in-house professional at American multinational Caterpillar for more than 20 years, setting its tax policy and coordinating its tax services. Before that, he spent nearly 10 years at PwC. He is also the chair of the European direct tax committee at the Tax Executive Institute (TEI). In this column, he draws upon his experience to give his perspective on today's pressing tax issues, and answer questions from readers.

Building consensus

Reaching consensus on the many technical issues will be challenging, but it should be noted that the most difficult issues still to be resolved are political, including thresholds, tax rates, carve-outs, implementation timetables and dispute resolution processes.

It is then quite possible that there could be no final agreement and work on preparation for the outcome now could be wasted. However, a prudent tax director should recall that there was much doubt about the OECD ability to deliver on the original BEPS project, which did result in eventual consensus and global coordinated implementation. There is also still much political and social pressure to act on the widely held view that international taxation needs urgent reforms.

This need to at least be seen to be taking action could persuade governments to finally support a compromise text. And if there is no agreement, countries or groups of countries could well take the detailed technical work of the group as the basis of unilateral or bilateral actions.

It would be ironic if the output of a project intended to avoid unilateral measures provided the material for uncoordinated actions from more countries by providing a summary of best practice or feasible options to implement elements of a formulaic approach, even without consensus.

Given the pressure for action on international tax and to raise revenues in the post-COVID recession, global or unilateral implementation of some or all aspects of pillars one and two could happen, and so the tax director should probably take some steps to be ready.

The proposals are not simple and readiness will include developing familiarity with the technical details being debated and keeping up to date with how the political support for consensual or unilateral actions is developing.

New concepts

There are many new concepts, data needs and sources to be learned and integrated into the compliance and planning processes. For Amount A, the tax department will need to understand automated digital services (ADS) and consumer facing businesses (CFBs) and how B2B transactions could still be treated as “consumer facing”.

For Amount B, understanding what are “routine marketing and distribution activities” in every jurisdiction will be critical, as

“Better to be a dog in times of tranquillity than a human in times of chaos”

well as segmentation, B2B sourcing and revenue sourcing rules, new definitions of nexus and the complex dispute resolution processes.

Among other issues to understand and address will be the interaction of royalties and withholding taxes with Amount A, which group company will pay the Amount A tax, use of an exemption or credit method to mitigate double taxation, Amount B profit level indicators and many others.

Most critically, there is an urgent need to work with accounting to ensure that all the required data is available for Amount A and B calculations because much of this data may not be currently collected or used, and to address segmentation issues that may arise. In addition, the potential effects of pillar two proposals including income inclusion rules, undertaxed payments rules, subject to tax rules, switchover rules and the complexities of global or local effective tax rate (ETR) calculations need to be assessed.

Clearly that could be a lot of work, but it is reasonable to assume that implementation will not be immediate. If the OECD/IF are working towards a mid-2021 date for agreement on “model draft legislation, guidelines, and international rules and processes”, it seems unlikely that any change could possibly be implemented before 2023, and probably not before 2024-25.

A date in late 2021 after the G20/IF have reviewed progress could be a good opportunity to assess whether detailed work in preparation for the new rules is required, when implementation might be, and perhaps develop a time-line for implementation in the group.

While the OECD is focused on pillars one and two, the tax director needs to be able to do more than ensure that the new formulaic calculations can be prepared. Amounts A and B and apply to certain limited fact patterns: in all other cases, existing domestic and international tax law applies and the tax director needs to be up to date on current international tax laws and treaties, BEPS implementation, the Multilateral Instrument (MLI), the EU’s Anti-Tax Avoidance Directive (ATAD) and other directives and to understand how pillars one and two will interact with other rules.

Tax directors should also be able to explain if or how unilateral international tax provisions (DPT, DST, etc.) will operate and how they will change (or not) and be up to date on other COVID-related tax initiatives.

Increasingly, they will also need to understand and adapt to changing stakeholder expectations and the evolution of expectations of more responsible behaviours of MNEs acting for the benefit of multiple stakeholders while also appreciating evolving tax administration approaches to data, audit and transparency.

There is a legendary Chinese curse: “May you live in interesting times”, although the origin of this could be an expression of: “Better to be a dog in times of tranquillity than a human in times of chaos.” Many tax directors may feel that they have been the subject of such a curse and are living in times that are chaotic, rather than merely interesting.

Figure 1

Likelihood of Occurrence	High		
	Low		
		Low	High
Relative Impact			

TAX RELIEF

Because tax doesn't have to be taxing. A less-than-serious look back at some of the quirkier tax stories from the past month.

Elon Musk decides not to move to Mars for tax reasons

The world's richest humanoid Elon Musk has decided to leave California for tax purposes, but he will not be leaving for Mars despite the planet's lack of any tax system whatsoever.

After living in California for many years, Musk has decided to put all of his houses up for sale. Yet he is not about to go to Mars despite his ambitions to reach the red planet.

Instead, Musk has decided the state of Texas is far better than Mars. The lone star

state collects no income taxes of any kind, not corporate income or personal income tax, but it does levy a 6.25% sales and use tax. By contrast, California imposes the highest state taxes in the US, charging a 13.3% income tax rate, an 8.84% corporate tax rate and a 7.25% sales tax.

The South African billionaire is one of the few tycoons to gain hugely during the COVID-19 crisis. His net worth was estimated at a modest \$20 billion in December 2019. But by



Elon Musk comes to Texas

December 2020, Musk's net worth had grown to \$134 billion before ballooning to \$185 billion a month later.

Several of Musk's alleged friends were kind enough to leak the news of his Texas move to the media, although the rumours of Musk driving a Tesla at high-speed towards Austin have yet to be confirmed. ■

Top taxpayers of 2020

Every year *Tax Relief* awards taxpayers and tax professionals for their best fiscal efforts last year. Donald Trump and James Bond both did very well in the first round. So it's time for the second and final round.

British Formula 1 racing car driver **Lewis Hamilton** wins the award for **World's Fastest Taxpayer** after choosing Monaco as his residence. He maintains he does pay tax in the UK, but he also stresses he does not earn all of his money in the UK. *Tax Relief* applauds this diligence.

Meanwhile, **Hunter Biden** wins the award for **Most Taxable Son** after the FBI opened an investigation into his tax arrangements just before his father won the 2020 US presidential election. He denies any wrongdoing, but he's still very taxable.

Dutch Labour MEP **Paul Tang** wins the award for **Most Outspoken Taxpayer**. "You don't have to be loony left to want digital tax," he said.

The award for **Most Fanciable Tax Professional** goes to **Pascal Saint-Amans** (if you don't know who he is, please close this magazine). Saint-Amans has won this award for the 9th year in a row. The consensus shows no sign of changing. ■

OnlyFans slapped with VAT

Subscription service OnlyFans is battling with the UK tax authority over a bill of unpaid taxes. The service, which is popular with amateur pornographers and innocent onlookers, will be expected to repay a large amount of VAT.

OnlyFans began collecting VAT on subscriptions in July 2020. Yet the company, Fenix International, launched

the site in 2016. The VAT bill could be as much as £11.2 million (£15.2 million). HM Revenue and Customs (HMRC) is requesting more than £3 million from sales between January 2020 and April 2020.

However, HMRC could issue OnlyFans with a harsh penalty if it finds the company's tax returns are

inaccurate. This penalty could even double the amount the company owes in VAT. Innocent onlookers are reportedly concerned about the impact this could have on their subscriptions.

This is a question that tax advisors will be grappling with for years to come: Is your porn VAT-compliant? Maybe contemplate that the next time you open a new window in incognito mode. ■

The best of Tax Twitter

At the OECD consultation meeting one partner at a Big Four firm "thanked" the conference for giving him a reason to put on a jacket and tie for the first time in 10 months.

One person on Tax Twitter asked: "What about trousers?"

The exact status of the partner's trousers has yet to be confirmed. ■

Messi 'victimised' in El Prat raid

World famous footballer Lionel Messi got a nasty surprise when he landed at El Prat Airport in Barcelona, Spain. Five Spanish tax agents raided his luxurious private jet while it was still on the runway.

"After 15 hours of flying, I come up against people from the tax agency," the Argentine sportsman told the press just after the El Prat raid. "It's crazy."

Landing in Barcelona, Messi probably expected a hero's welcome from his adoring fans. Instead he got Spanish tax

officials asking for documentation. He was also asked to pay customs upon entry into Spain.

Despite earning €100 million (\$121 million) a year, Messi has had tax issues in Spain for several years. In 2016, the Barcelona striker and his dad Jorge Messi were sanctioned for dodging more than €4.1 million in tax. A Spanish court gave senior and junior Messi a 21-month prison sentence each.



Not actually Messi's jet

At the time, Lionel Messi said he felt "victimised". The Argentine later saw his sentence reduced to a mere €1.8 million fine. His father got his sentence reduced to 15 months. ■



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Brazil Tax Forum

August 30

Women in Tax Forum (US - west coast)

September 9

European Tax Awards

September 15

Taxation of the Digital Economy Summit

September 21

Leading Women in Tax Forum (Europe)

September 23

Americas Tax Awards

September 23

Global Transfer Pricing Forum (Europe)

September 28-29

Indirect Tax Forum

November

Global Transfer Pricing Forum (US)

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