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Practical cross-border insights into corporate tax law

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Q&A Chapters

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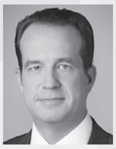
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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in your jurisdiction?

The U.S. currently has 58 income tax treaties in force covering 66 jurisdictions. Four income tax treaties are currently awaiting U.S. Senate approval, namely proposed treaties with Hungary and Poland (replacing treaties in force) and Chile and Vietnam (entering into a treaty for the first time).

1.2 Do they generally follow the OECD Model Convention or another model?

U.S. treaties generally do not follow the OECD Model Convention. The U.S. follows its own model (currently the 2016 U.S. Model Income Tax Convention), which had originally developed from the OECD Model Convention and thus generally parallels its structure. Similar to the introduction to the OECD Model Convention, the preamble to the U.S. Model Convention has been updated to explicitly state the underlying policy that treaties should eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (the "single tax principle").

Despite their similarities, there are important differences between the two models. For example, under the U.S. Model Convention, a person other than an individual that is a resident of both contracting states is treated as not being a resident of either contracting state for purposes of claiming treaty benefits, whereas under the OECD Model Convention, the competent authorities of the contracting states should endeavor to determine such person's residence by mutual agreement. Also, the U.S. generally insists on the inclusion of the limitation on benefits article to tackle treaty abuse, as opposed to the principal purpose test advanced by the multilateral instrument developed under the OECD Base Erosion and Profit Shifting ("BEPS") initiative.

1.3 Has your jurisdiction signed the tax treaty MLI and deposited its instrument of ratification with the OECD?

No. The U.S. is not a signatory of the MLI.

1.4 Do they generally incorporate anti-abuse rules?

Yes. Most U.S. income tax treaties in force include a limitation on benefits article and, in addition, those treaties may contain other anti-treaty shopping provisions. The 2016 U.S. Model Income Tax Convention includes (i) the limitation on benefits article, which prevents residents of third-country jurisdictions from obtaining benefits under a treaty, (ii) a "triangular branch" provision, which limits treaty benefits for income attributable to a third-country permanent establishment if little or no tax is paid in the permanent establishment's jurisdiction, (iii) the "special tax regime" concept, which denies treaty benefits for items of income subject to a preferential tax regime, and (iv) a limitation that denies treaty benefits for certain payments made by expatriated entities.

Two of the most significant income tax treaties that include neither a limitation on benefits article nor a triangular branch provision are the treaties with Hungary and Poland. However, new treaties that include both such provisions are currently awaiting U.S. Senate approval to replace these treaties.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Yes. The U.S. Constitution provides that the Constitution, Acts of Congress and treaties are the "supreme Law of the Land". The U.S. Supreme Court has held that the U.S. Constitution prevails in cases where it conflicts with a federal law or a treaty. Federal legislation (including the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code")) and income tax treaties are on equal footing under the U.S. Constitution and thus the later-in-time rule (*lex posterior derogat legi priori*) generally applies. Nevertheless, U.S. courts first attempt to interpret the law in order to give effect to both the federal law and a treaty, and, although it is widely believed to not be required, some authorities seem to require a clear and manifest legislative intent to override a treaty by the federal law.

1.6 What is the test in domestic law for determining the residence of a company? Has the application of the test been modified in response to COVID-19?

The U.S. generally uses the place of incorporation rule for determining corporate tax residence, under which a corporation is a "domestic corporation" if it is created or organized in the U.S. under the law of the U.S., any U.S. state or the District of Columbia.

In addition to tax residence, the classification of an entity under the "check-the-box regulations" must be determined because such classification governs if and how such entity is taxed for U.S. federal income tax purposes. Domestic and foreign business entities may be classified as corporations, partnerships or entities disregarded as separate from their owners. A business entity with two or more owners is classified either as a corporation or a partnership, and a business entity with only one owner is either classified as a corporation or is disregarded as an entity separate from its owner.

An entity is classified as a "*per se* corporation" if it is organized under a U.S. federal statute or a U.S. state statute that describes the entity as incorporated or as a corporation, body corporate or body politic, if it is a foreign entity in a form enumerated in the regulations or if it falls within certain other categories. If an entity does not meet any of these requirements, it is an "eligible entity" with respect to which its classification is elective. Default classification rules determine initial classification, which can be changed by filing the appropriate forms with the Internal Revenue Service ("IRS"); by default, a "domestic eligible entity" is a partnership if it has two or more owners or is disregarded as an entity separate from its owner if it has a single owner, and a "foreign eligible entity" is a partnership if it has two or more owners and at least one has unlimited liability, an association (which is a *per se* corporation) if all owners have limited liability, or is disregarded as an entity separate from its owner if it has a single owner with limited liability.

The corporate tax residence rules have not been impacted by COVID-19.

1.7 Is your jurisdiction's tax authority expected to revisit the status of dual resident companies in cases where the MLI changes the treaty "tiebreaker"?

This is not applicable.

2 Transaction Taxes

2.1 Are there any documentary taxes in your jurisdiction?

Certain U.S. states and local jurisdictions impose documentary taxes, but there are no such taxes imposed under federal law.

2.2 Do you have Value Added Tax (VAT), or a similar tax? If so, at what rate or rates? Please note any rate reduction in response to COVID-19.

The U.S. does not impose a value added tax at the federal, state or local level. Some states, however, impose sales and use taxes on retail purchases of goods or services. The rates vary based on the type of tax and jurisdiction. Many jurisdictions provided for various temporary reliefs in response to COVID-19 (such as filing and payment extensions and penalty and interest waivers). In addition, the U.S. federal government imposes excise taxes on the purchase of certain specified goods (such as gasoline) or activities (such as commercial highway usage).

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

State and local sales and use taxes usually include exceptions for specified goods or services (such as food or medical care), parties (such as diplomats and governments) or certain types of transactions (such as the sale of stock or other specified corporate reorganizations).

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Because sales and use taxes are typically imposed on consumers, they are generally not recoverable.

2.5 Does your jurisdiction permit VAT grouping? If so, how does this apply where a company in one jurisdiction has an establishment in another?

This is not applicable.

2.6 Are there any other noteworthy transaction taxes or indirect taxes that are payable by companies?

Various other transaction taxes may apply at the state and local levels. For example, most U.S. states impose an *ad valorem* real property transfer tax.

2.7 Are there any other indirect taxes of which we should be aware?

U.S. states and local governments impose various other indirect taxes such as excise taxes, mortgage recording taxes, telecommunication taxes or insurance premium taxes.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Yes. Non-U.S. tax residents are generally taxed in the U.S. on U.S.-sourced income associated with passive investment assets, including dividends, interest, rents, royalties and other "fixed or determinable annual or periodic gains, profits and income" (collectively referred to as "FDAP"), to the extent such items of income are not effectively connected with the conduct of a U.S. trade or business or attributable to a permanent establishment (see question 6.3). Such FDAP is subject to a 30% gross basis substantive tax that is enforced by withholding at the source. Thus, dividends paid by a U.S. corporation to a non-U.S. tax resident are generally subject to a 30% U.S. withholding tax, unless that tax is reduced by an applicable income tax treaty.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Yes. U.S. source royalty income generally constitutes FDAP (see question 3.1) and is subject to a 30% U.S. withholding tax, unless that tax is reduced by an applicable income tax treaty.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Yes. U.S. source interest income generally constitutes FDAP (see question 3.1) and is subject to a 30% U.S. withholding tax, unless that tax is reduced or eliminated by an applicable income tax treaty. In addition, the "portfolio interest exemption" ("PIE") generally exempts, from the otherwise applicable withholding tax, interest paid on registered obligations held by non-U.S. persons that own less than 10% of the voting power of the payer. The PIE is subject to various requirements and exceptions (for example, it is not available to (i) banks receiving interest on ordinary-course loans, and (ii) certain controlled foreign corporations).

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Generally, no. Although the U.S. imposes various limitations on the deductibility of interest expenses, the availability of the PIE or treaty benefits to non-U.S. persons is not directly limited by such limitation.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

This is not applicable.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

This is not applicable.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Yes. Various restrictions, such as the limitation on the amount of a payer's interest deductions based on certain taxable income metrics, the base erosion and anti-abuse tax ("BEAT") and the anti-hybrid legislation, apply at the payer level (see question 10.1).

3.8 Is there any withholding tax on property rental payments made to non-residents?

Yes. U.S. source rental income generally constitutes FDAP (see question 3.1) and is subject to a 30% U.S. withholding tax, unless that tax is reduced by an applicable income tax treaty.

3.9 Does your jurisdiction have transfer pricing rules?

Yes. The Internal Revenue Code authorizes the IRS to adjust items of income, deductions, credits or allowances of commonly controlled taxpayers to prevent tax evasion. The applicable standard in examining intercompany transactions is that of a "taxpayer dealing at arm's length with an uncontrolled taxpayer" (arm's length standard), which generally is met if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in a comparable transaction under comparable circumstances (standard of comparability). The U.S. tax regulations include detailed rules regarding how such standards may be met. If the IRS exercises its adjustment authority, the taxpayer bears the burden of proof to show that the arm's length standard was met.

Although transfer pricing documentation generally is not required by law, it is recommended that taxpayers maintain contemporaneous documentation to support their transfer pricing practices, and taxpayers are subject to various generally applicable reporting obligations. Valuation misstatement penalties and reporting penalties may apply.

3.10 Can companies in your jurisdiction obtain unilateral, bilateral or multilateral advance pricing agreements?

Yes. The U.S. established an advance pricing agreement program in 1991 (currently referred to as the Advance Pricing and Mutual Agreement ("APMA") program). Unilateral, bilateral and multilateral advance pricing agreements may be obtained through APMA.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

The maximum U.S. corporate income tax rate is currently 21%. In addition, U.S. states and local governments may levy corporate income taxes on the same (or similar) tax base, but such taxes are generally deductible from the federal income tax base for corporations (subject to certain limitations). The average combined U.S. federal, state and local corporate income tax rate is 25.89%.

Note that pending legislation may increase the U.S. corporate income tax rate.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

The U.S. federal income tax is imposed on "taxable income", which is calculated as "gross income" reduced by deductions allowed under the Internal Revenue Code. Gross income is defined as "income from whatever source derived"; thus, the U.S. employs a global definition of income based on the accretion concept, where any accession to wealth (other than mere appreciation of asset value with nothing more) constitutes income unless the Internal Revenue Code expressly excludes it.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

This is not applicable.

4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

The Internal Revenue Code and the tax regulations generally allow a group of U.S. corporations to file a consolidated federal income tax return and effectively offset the profits of one group member by the losses of another group member.

The consolidated return rules, which are mostly in the tax regulations, are very detailed and complex. Very generally, certain U.S. entities classified as corporations for U.S. federal income tax purposes may elect to join in filing a consolidated return if they are members of an "affiliated group". An affiliated group is generally one or more chains of corporations connected through stock ownership with a common parent corporation, which must satisfy certain detailed stock-ownership rules with respect to the subsidiary corporations (generally requiring at least 80% ownership measured by voting power and value, but disregarding certain debt-like preferred stock). Sales, dividends and other intercompany transactions between members of a consolidated group are generally deferred until a transaction occurs with a non-member. Groups of corporations filing consolidated returns are subject to various special rules, such as rules on intercompany transactions, loss disallowance rules, loss sharing rules, several liability among members of the group with respect to federal income taxes and basis adjustments with respect to subsidiary member stock owned by other members of the consolidated group.

In addition, many U.S. states allow or require consolidation for state corporate income tax purposes.

4.5 Do tax losses survive a change of ownership?

The Internal Revenue Code and the tax regulations include numerous complex rules regarding loss utilization. One important anti-loss trafficking rule limits the deductibility of losses by a corporation if there has been a sufficient change of ownership in the stock of such corporation. If the elements of the rule are met, the amount of losses that may be utilized per year generally is limited by the product of (i) the corporation's fair market value at the time of the ownership change, and (ii) a published rate of return (1.44% as of October 2021). That limitation, however, is subject to certain complex potential adjustments. For purposes of this rule, a relevant change of ownership generally occurs when, over a three-year testing period, certain large shareholders (generally holding at least 5% measured by value) increase their ownership in a corporation that is entitled to use net operating loss carryovers (or certain built-in asset losses) by more than 50 percentage points. In addition, the limitation is reduced to zero in cases where the loss corporation subject to the limitation discontinues or changes to a sufficient extent its business. Another rule generally disallows a corporation's losses entirely if a person or persons acquire stock of a corporation possessing 50% or more of the voting power or value of the stock of that corporation and the principal purpose of the acquisition is tax avoidance.

In the context of consolidated returns (see question 4.4), the separate return limitation year rules limit the use of losses of a corporation incurred in taxable years when it was not a member of its current consolidated group, such that they may generally only offset income determined by reference to only such corporation's items of income, gain, deduction and loss. Many other rules not discussed herein, in the interest of brevity, may also limit the use of losses.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Generally, no. However, whether an entity distributes its earnings or not may be relevant for various reasons. With respect to corporations, tax is generally imposed at the corporate and the shareholder level, where corporations are not allowed to deduct dividends paid and shareholders are taxed when they receive a dividend distribution out of the corporation's current or accumulated earnings and profits (i.e., classical system of corporate taxation). With respect to partnerships, corporations organized under subchapter S of the Internal Revenue Code, or entities disregarded as separate from their owners (see question 1.6), tax is generally imposed only on the investor level and regardless of whether such entities distribute their profits. Real estate investment trusts ("REITs") (see question 8.3) and regulated investment companies ("RICs") are subject to special tax regimes under which tax is mainly imposed at the shareholder level, but REITs and RICs may be subject to tax on any retained earnings.

Qualified dividends received by individual shareholders may be taxed at a preferential tax rate, and certain corporations may qualify for a dividend received deduction with respect to certain dividend distributions received from other corporations.

The retention of profits may also trigger additional tax liability, such as the accumulated earnings tax imposed on corporations formed or availed for the purpose of avoiding the income tax with respect to its shareholders, or the personal holding company tax imposed on corporations that mainly derive passive-category income and the majority of which is owned by five or fewer individuals.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

Various other taxes may apply in addition to the taxes discussed or mentioned in this chapter, such as the federal excise tax imposed on insurance and reinsurance premiums paid to non-U.S. persons, social security and Medicare tax and unemployment tax imposed on employers, and other state and local taxes which may vary greatly across U.S. states and municipalities.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

Generally, yes. For individual taxpayers, gains from the disposition of capital assets held for more than one year (i.e., long-term capital gains) are subject to preferential tax rates, and losses from the disposition of capital assets may offset capital gains and, if they exceed such gains, ordinary income up to $3,000 per year. For corporate taxpayers, gains from the disposition of capital assets are subject to regularly applicable tax rates, and losses from the disposition of capital assets may only offset capital gains. Individuals may carry unused capital losses forward indefinitely, and corporations may carry unused capital losses back three years and forward five years.

Note that pending legislation may increase the tax rate imposed on capital gains.

5.2 Is there a participation exemption for capital gains?

No. The U.S. allows a participation exemption only with respect to certain dividend distributions received by a corporation (see question 7.2).

5.3 Is there any special relief for reinvestment?

The Internal Revenue Code includes various non-recognition provisions under which a built-in gain is deferred (or in the case of a tax-free subsidiary spin-off, eliminated) rather than recognized and included in taxable income in the specified transaction. For example, such provisions include like-kind exchanges of real property, involuntary conversion, transfers of property between spouses or incident to a divorce and certain corporate reorganizations such as mergers, stock sales or liquidations.

In addition, the 2017 tax reform introduced a regime under which taxpayers may defer or partially eliminate certain capital gains by investing in a "qualified opportunity fund" located in any of the "qualified opportunity zones" enumerated by the IRS.

5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

The U.S. generally imposes an indirect capital gains withholding tax on non-U.S. taxpayers with respect to gains from the disposition of U.S. real property and stock of U.S. corporations holding certain threshold amounts of U.S. real property (see questions 8.1 and 8.2).

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

Most U.S. states impose filing fees on the formation of corporations and limited liability companies, but there are no such taxes imposed under federal law.

6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

Generally, no. Both U.S. subsidiaries and U.S. branches are subject to two levels of tax: a U.S. subsidiary is taxed (i) on its business profits on a net basis (see question 4.1), and (ii) on dividend distributions on a gross basis (see question 3.1); and a U.S. branch's foreign home office is taxed (i) on its U.S. business profits on a net basis (see question 6.3), and (ii) by a branch profits tax (see question 6.5).

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

A U.S. branch is taxed on a net basis on income that is "effectively connected with the conduct of a trade or business within the United States" ("ECI"). Such tax is imposed on the branch's home office. In addition, the home office may elect income to be treated as ECI. If the home office is a tax resident in a jurisdiction with which the U.S. has an income tax treaty in force, such tax may be limited to income that is attributable to the home office's permanent establishment within the U.S. (generally a lower threshold; however, certain exceptions from ECI may result in business profits not reaching the level of ECI, despite the U.S. having taxing rights under a treaty).

6.4 Would a branch benefit from double tax relief in its jurisdiction?

Yes. The home office of a U.S. branch may be entitled to benefits under an applicable income tax treaty.

6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Yes. A U.S. branch is generally subject to a 30% branch profits tax on the "dividend equivalent amount" ("DEA"), which generally consists of effectively connected earnings and profits for a taxable year, calculated as earnings and profits attributable to ECI without diminution by any distributions made during such taxable year, and adjusted by any increase or decrease in the home office's U.S. assets, net of U.S. liabilities. The branch profits tax is designed to achieve parity between the taxation of U.S. branches and U.S. subsidiaries of foreign entities.

In addition to the tax imposed on the DEA, the branch profits tax also applies to interest paid by a U.S. branch if the recipient is a non-U.S. person not engaged in a U.S. trade or business, and to "branch excess interest" (determined by a formula provided in the tax regulations).

7 Overseas Profits

7.1 Does your jurisdiction tax profits earned in overseas branches?

Yes. The U.S. generally imposes a worldwide taxation on U.S. business entities, and a foreign branch is not considered an entity separate from its owner. As such, foreign branch income is deemed to be derived directly by the U.S. home office and is thus subject to corporate income tax on a net basis. Foreign branch income is generally determined based on the amount of income reflected on the foreign branch's separate books and records, and the U.S. home office is allowed a foreign tax credit on taxes paid in the branch's jurisdiction (subject to certain limitations and "basketing" rules).

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Generally, yes. However, the local company may be allowed a participation exemption (enacted in 2017 and designed as a 100% dividend received deduction) if, generally, (i) both the recipient and the payer entity are classified as corporations for U.S. tax purposes, (ii) the local corporation owns at least 10% of the vote or value of the payer corporation, and (iii) the local corporation has held the stock of the payer corporation for at least 365 days within the two-year period beginning one year prior to the stock becoming ex-dividend.

7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

Yes. A foreign corporation is a controlled foreign corporation ("CFC") if U.S. shareholders (i.e., U.S. resident persons that directly, indirectly or constructively own at least 10% of the vote or value of the foreign corporation) own stock that represents more than 50% of the vote or value in such corporation. In addition, application of certain attribution rules may deem, for example, sister companies to be constructive CFCs. The two major consequences of CFC classification are that its 10% U.S. shareholders must include in income (i) their *pro rata* share of the CFC's "subpart F income" (generally passive category income such as dividends, interest, royalties, capital gains or "foreign base company income"), and (ii) their global intangible low-taxed income ("GILTI"), which is generally the excess of the shareholders' *pro rata* share of the CFC's gross income (reduced by certain items) over a 10% deemed return on the CFC's aggregate adjusted bases of depreciable tangible property used in the CFC's trade or business. U.S. corporations are generally taxed on GILTI at a preferential tax rate, and amounts taken into account in determining subpart F income are disregarded in calculating GILTI. Note that pending legislation may adjust the calculation of subpart F and GILTI (including, among other things, potentially removing the 10% deemed return in the GILTI regime).

In addition, a foreign corporation with predominantly passive-category income or assets may be classified as a "passive foreign investment company" ("PFIC"), which may subject its owners to several onerous consequences, but which may generally be ameliorated by certain elections.

8 Taxation of Commercial Real Estate

8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Yes. Non-U.S. tax residents are subject to U.S. tax on a net basis on their gain from the disposition of a "U.S. real property interest" ("USRPI"), which generally includes an interest in U.S. real property. In addition, that tax is enforced by a withholding regime that generally requires buyers to withhold 15% of the fair market value of the disposed USRPI. That withholding is generally required with respect to all sales of U.S. real property unless proper certification is provided (for example, certifying that the seller is not a foreign person). This regime is colloquially referred to as "FIRPTA" as it was enacted by the Foreign Investment in Real Property Tax Act.

8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

Yes. A USRPI (see question 8.1) includes an interest in stock of a "U.S. real property holding corporation" ("USRPHC"), which is generally a U.S. corporation that holds U.S. real property whose fair market value is at least 50% of the fair market value of all of its real property and assets used in its trade or business. Sellers of corporate stock may generally provide a certification by the corporation upon sale that the corporation is not a USRPHC and avoid FIRPTA tax and withholding (although the IRS is not bound by the certification). Publicly traded corporations are subject to certain exceptions from both the substantive tax and withholding requirements.

8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

Yes. If certain detailed conditions are satisfied (for example, the REIT is a corporation, trust or an association beneficially owned by at least 100 persons, distributes at least 90% of its income to its shareholders, at least 75% of its income is derived from real property and at least 95% of its gross income is derived from specific passive sources such as rent), REITs are not subject to U.S. corporate income tax other than on any retained earnings, and their taxation is similar to the taxation of pass-through entities such as partnerships. The taxation of REITs is very complex and multiple technical requirements must be met to benefit from the special tax regime.

9 Anti-avoidance and Compliance

9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

There are various judicially developed doctrines that are comparable to a general anti-abuse rule, such as the "substance-over-form", "step transaction", "economic substance", "business purpose" and "sham transaction" doctrines. All these doctrines generally serve a similar purpose: to look beyond the form of a transaction and disallow otherwise applicable tax benefits if the transaction violates the spirit of the law. In addition, the economic substance doctrine was added to the Internal Revenue Code and carries with it a 20% non-compliance penalty, which can be increased to 40% if the transaction is not properly disclosed.

9.2 Is there a requirement to make special disclosure of avoidance schemes or transactions that meet hallmarks associated with cross-border tax planning?

Yes. The tax regulations require a taxpayer that has participated in a "reportable transaction" to file a disclosure statement with the IRS. Although not all reportable transactions are avoidance schemes, they include as a category "listed transactions", which are transactions that the IRS has specifically identified as transactions with a potential for tax avoidance. Many of the arrangements identified by the IRS as listed transactions include a cross-border aspect (such as the "loss importation transaction", the "abusive foreign tax credit intermediary transaction" or a variation of the "basis shifting tax shelter").

9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

Yes. A person that provides any material aid, assistance or advice with respect to organizing, managing, promoting, selling, implementing, insuring or carrying out any "reportable transaction" (see question 9.2), and earns certain threshold amounts for such aid, qualifies as a "material advisor" and must file a disclosure statement with the IRS.

9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

Yes. The APMA program (see question 3.10) allows taxpayers to enter into an agreement with the IRS regarding transfer pricing methodology. The APMA program is designed to promote certainty between taxpayers and the IRS and to save resources by preventing potential disputes.

The Compliance Assurance Process ("CAP"), available to certain large corporate taxpayers, offers a real-time issue resolution through open, co-operative and transparent interaction between taxpayers and the IRS prior to filing a tax return.

Other co-operative compliance programs include: the Pre-Filing Agreements Program, which allows taxpayers to resolve issues with the IRS prior to filing a tax return; the Competent Authority Assistance, which allows the IRS to assist taxpayers with the application of income tax treaties; the Industry Issue Resolution Program, under which the IRS issues guidance resolving frequently disputed issues; and various dispute resolution and settlement programs.

9.5 Are there rules requiring special disclosure where a company is taking a position on a tax issue that is uncertain (open to dispute from a technical perspective)?

For certain companies, yes. If a corporation has $10 million or more in assets, prepares or issues an audited financial statement (or has its operations reported on a related party's audited financial statements), and either records a reserve with respect to a tax position (under either GAAP or IFRS) or expects to litigate a tax position, then such corporation generally must file a Schedule UTP (which requires providing a concise description of the relevant uncertain tax position) with its corporate income tax return.

10 BEPS, Tax Competition and the Digital Economy

10.1 Has your jurisdiction implemented the OECD's recommendations that came out of the BEPS project?

Yes. In 2017, the U.S. enacted legislation generally intended to be consistent with the recommendations in the two final reports under Action 2 of the BEPS. This legislation, and the tax regulations issued thereunder, generally neutralize double non-taxation effects of (i) inbound dividends involving hybrid arrangements, by either denying a participation exemption or requiring domestic inclusion (depending on whether the hybrid dividend is received by a domestic corporation or a CFC), and (ii) outbound deductible interest or royalty payments that produce a deduction/no inclusion outcome due to hybridity by disallowing such deduction.

In addition, the U.S. enacted the BEAT, which targets base erosion by imposing additional tax on certain large U.S. corporations that make deductible payments to foreign related parties. Such additional tax is designed as a 10% minimum tax (scheduled to increase to 12.5% in 2025) imposed on modified taxable income. Note that pending legislation may replace the BEAT regime with a potentially broader regime.

The U.S. also recently enacted a new limitation on the deductibility of interest expense (very generally limited to 30% of EBITDA and, from 2022, EBIT) and country-by-country reporting consistent with the BEPS recommendations, and has the limitation on benefits article in most of its income tax treaties.

10.2 Has your jurisdiction adopted any legislation to tackle BEPS which goes beyond the OECD's recommendations?

Generally, no. The U.S. has been working on finalizing the implementing tax regulations under the various tax provisions enacted by the reform, many of which are consistent with the BEPS recommendations (see question 10.1).

10.3 Does your jurisdiction support information obtained under Country-by-Country Reporting (CBCR) being made available to the public?

No. Although the U.S. issued tax regulations requiring country-by-country reporting by U.S. multinational enterprises, the information the government obtains is confidential and used solely for tax purposes.

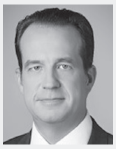
10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Generally, no. In 2017, the U.S. enacted a regime that offers domestic corporations a deduction for "foreign-derived intangible income" ("FDII"), which is an amount that exceeds a deemed return on tangible assets (arguably attributable to intangibles). However, rather than being a patent box, the deduction for FDII is designed to neutralize the effect of GILTI (see question 7.3) to incentivize U.S. corporations to allocate intangible income to CFCs.

Note that pending legislation may replace the FDII regime with an alternative deduction regime.

10.5 Has your jurisdiction taken any unilateral action to tax digital activities or to expand the tax base to capture digital presence?

No. The U.S. opposes unilateral actions to tax digital presence.



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