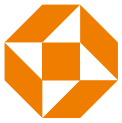

Morison KSi

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Editorial

Sachin Vasudeva, Partner, S.C. Vasudeva & Co., India

Almost 18 months since the Panama Papers leak, another massive trove of secret financial data has been leaked by the International Consortium of Investigative Journalists (ICIJ). The data on how large companies and other high-net-worth individuals moved money to and from 19 tax havens to evade taxes was initially obtained by German newspaper *Süddeutsche Zeitung*. The leak, called the 'Paradise Papers', contains 13.4 million documents from two leading firms in offshore finance.

Against this background, in mid-November 200 delegates from more than 90 countries met in Yaoundé, Cameroon for the 10th meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Global Forum adopted the first report on the status of implementation of the AEOI Standard a few weeks after almost 50 countries started exchanges of information under the new standard on automatic exchange of information, with another 53 countries due to start in September 2018.

The OECD has published updated versions of transfer pricing country profiles (TPCP), reflecting the current transfer pricing legislation and practices of 31 participating countries. The country profiles contain up-to-date and harmonised information on key aspects of transfer pricing legislation, provided by countries themselves. The newly updated profiles focus on countries' domestic legislation regarding key transfer pricing principles, including the arm's length principle, transfer pricing methods, comparability analysis, intangible property, intra-group services, cost contribution agreements, transfer pricing documentation, administrative approaches to avoiding and resolving disputes, safe harbours and other implementation measures. The information contained in the TPCP is intended to clearly reflect the current state of each country's legislation and indicate to what extent their rules follow the *OECD Transfer Pricing Guidelines*.

As 2017 comes to a close, Global Tax Insights completes 5 years; we started this publication in the year 2012. Without the support of our member firms, this would not have been possible. Therefore, a sincere thanks to all member firms for contributing and making this publication a tremendous success. I would also personally like to thank Paul Wan for conceptualising this publication in 2012 at our meeting in Mumbai and giving me an opportunity to lead this project.

Finally, as I sign off, I take this opportunity to wish you all a merry Christmas and a very happy and blessed 2018.

Sachin Vasudeva

Morison KSi

Country Focus

Australia

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Automatic Exchange of Information – Common Reporting Standard

Australia is one of many countries that has committed to the new global standards of automatic exchange of financial account information (AEOI) regimes developed by the OECD and G20. According to the OECD website as at November 2017, there are currently 146 countries around the world that have committed to these new global standards, with 105 countries having set the dates for first information exchanges and 41 developing countries having not yet set the date for first automatic exchanges.

The exchange of financial account information with foreign tax jurisdictions is to help combat tax evasion by foreign tax residents and increase transparency of information by identifying individuals and entities who have offshore accounts and investments. Under the AEOI standard, financial institutions around the world are required to collect information on their customers and investors for reporting to the relevant tax authorities of their countries.

The Australian Government has introduced legislation and entered into international agreements to implement AEOI with:

- The United States, under the Foreign Account Tax Compliance Act (FATCA) – only applies to US citizens and tax residents.
- All other countries under the system known as Common Reporting Standard (CRS).

In Australia, the CRS legislation received Royal Assent on 18 March 2016 and came into effect on 1 July 2017. As from 1 July 2017, under CRS, all Australian Reportable Financial institutions (RFIs) will be required to complete due diligence by collecting and reporting to the Australian Tax Office (ATO) financial account information on foreign tax residents including individuals and any related entities such as trust, company, partnership or association. Reportable financial institutions are required to 'look through' certain entities and report on their controlling persons.

Broadly speaking, there are four types of RFI:

- Depository institutions – banks and credit unions
- Custodial institutions – custodian banks, brokers and central securities depositories
- Investment entities – entities investing, administering or managing financial instruments and financial assets
- Specified insurance companies.

Information regarding the identity of the account or investment holder, interest, dividend, account balances or value and other income generated, or payments made with respect to the account, will need to be reported to the ATO by RFIs.

The ATO will exchange this information with the participating foreign tax authorities of those foreign tax residents. At the same time, the ATO will receive financial account information on Australian tax residents from other countries' tax authorities.

Table 1 outlines the key implementation timeline for CRS in Australia.

Table 1. CRS implementation timeline.

Date	Event
April 2016	AEOI guidance for CRS and FATCA released
December 2016	Finalisation of Domestic reporting format
30 June 2017	Test date for determining high- and low-value accounts
1 July 2017	Date of effect of the CRS legislation
31 July 2018	Australian RFI report due to the ATO for the part of previous calendar year (from 1 July 2017 to 31 December 2017) on high-value foreign individuals and all foreign entities
30 September 2018	Data exchange with partner jurisdictions
31 July 2019	Australian RFI report due to the ATO for the previous calendar year (from 1 January 2018 to 31 December 2018) on all foreign individuals and all foreign entities
30 September 2019	Data exchange with partner jurisdictions

AEOI, Automatic Exchange of Information; ATO, Australian Taxation Office; CRS, Common Reporting Standard; FACTA, Foreign Account Tax Compliance Act.

Note: Due to the starting date of CRS, for the first CRS reporting period (reports due to the ATO on 31 July 2018) the report data will be for the 6-month period from 1 July 2017 to 31 December 2017. Thereafter, reports will cover the full calendar year.

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Country Focus

Australia

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Australian international tax developments for businesses

Over the last 12 months, we have seen plenty of interesting developments in terms of legislative announcements and cases that have a direct impact on the taxation of cross-border business and investment structures. Therefore, it is timely to consider the impact of these developments and how they might affect cross-border structures.

Transfer pricing

In Australia, reporting of an entity's transfer pricing outcomes in an income tax return is generally only required where the total amount of international related-party dealings exceed AU$2 million. This threshold is easily passed as it includes not only trading transactions, but also loan transactions.

Earlier this year, the case of *Chevron Australia Holdings Pty Ltd (CAHPL) v Commissioner of Taxation* ([2017] FCAFC 62) was decided whereby the ATO successfully sought to recover the unpaid tax plus penalties and interest, which was in the hundreds of millions of dollars, on multibillion-dollar related-party loans.

The case involved Chevron, a large US-based resources company that operated a large-scale gas project in Australia. The issue involved was whether the local subsidiary could deduct interest on moneys borrowed from an offshore related party. To be more precise, it wasn't the 'ability' to deduct the interest that was in issue, but rather the amount that could be deducted.

The ATO considered that the amount of interest deducted was excessive, which had the effect of excessively reducing the amount of corporate tax that would have otherwise been payable. It was also noted by the judges in this case that the related-party lender had borrowed the money at vastly reduced interest rates compared to the interest rate it charged when on-lending, and this had the effect of shifting profits elsewhere. Interestingly, the related-party lender was not taxed on those profits in the USA or Australia.

After the Full Federal Court case was handed down in favour of the ATO, Chevron decided to appeal to the High Court of Australia, but subsequently withdrew the appeal; this means that the Full Federal Court decision is now final.

While the Chevron case concerned a very large multinational business, it highlights the importance of planning all cross-border related-party dealings and ensuring that the required documentation and analysis to support any pricing structure that is adopted is in place. Documentation should comprehensively summarise the functions, assets and risk of a business and detail the supporting information demonstrating that transactions are in fact on arm's length terms. The supporting information could include appropriate benchmarking studies and other documentation that meet Australia's stringent transfer pricing rules.

Tax residency for corporates

The tax residency of a company was recently analysed in a case that applied the residency rules to a foreign incorporated corporation.

Regarding the test of corporate residency in Australia, a company is considered a resident of Australia if any of the following apply:

- It is incorporated in Australia
- Its voting power is controlled by shareholders who are residents

"Bywater was a case about whether a foreign-incorporated company was a resident of Australia by reason of its CM&C being located in Australia"

and it carries on business in Australia

- Its central management and control (CM&C) is located in Australia, and it carries on business in Australia.

In November 2016, the High Court of Australia handed down the decision in the case *Bywater Investments Limited & Ors v Commissioner of Taxation; Hua Wang Bank Berhard v Commissioner of Taxation* ([2016] HCA 45; 2016 ATC 20-589; known as 'Bywater'). This case provides more guidance and clarity on the principles of 'central management and control' than what was previously available.

Bywater was a case about whether a foreign-incorporated company was a resident of Australia by reason of its CM&C being located in Australia.

The Bywater case concerned a number of offshore companies that made large profits from share trading on the Australian Stock Exchange. The ATO issued assessments to Bywater seeking tax on the basis that it was an Australian resident company for tax purposes, since the business decisions were made by an individual in Australia.

In plain language, the court considered that a company's CM&C is located where the substantive business decisions are made – that is, the place where the real decision makers act. This level of decision making can be described as the 'strategic' decisions of the company and can be contrasted with the 'day-to-day' or operational decisions.

Another interesting facet of the case is that in concluding that Bywater's CM&C was in Australia, the High Court also held that this automatically results in that company also carrying on business in Australia.

Since the decision was handed down, the ATO has issued guidance on its views in the form of Draft Taxation Ruling TR 2017/D2, which sets out the Federal Commissioner's preliminary but considered view on how to apply the CM&C test of company residency following the Bywater decision. At the same time, the ATO withdrew Taxation Ruling TR 2004/15, which previously provided its view on this test.

Some practical examples of acts of CM&C from TR 2017/D2 are as follows:

- Setting investment and operational policies
- Appointing company officers and agents (including revocation of appointments)
- Overseeing those appointed to carry out the day-to-day decisions
- Matters of finance, e.g. how profits are used and whether to declare dividends.

The practical implications of the Bywater decision and the subsequent ATO draft ruling is that it invalidates the long and widely held belief that a company's CM&C was solely located where the board met to make and ratify decisions. Accordingly, foreign-incorporated companies that operate in Australia at any level of management should be revisiting the issue of residency to determine whether the outcome of the Bywater decision changes their existing position on corporate tax residency. If there are risks that the tax authorities could take a different position, then consideration should be given to reorganising the company to provide more certainty.

Country Focus

Belgium

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2018 Belgian corporate tax reform

On 26 July 2017, the Belgian Federal Government concluded on an important corporate tax reform. The planned reform – which the Prime Minister hopes will result in job creation, increased investments and a fairer tax system – includes important changes to the Belgian corporate income tax regime. Here, we provide an overview of the most significant measures that have been announced.

Lower corporate tax rate

The Belgian corporate tax rate of 33.99% will be lowered to 29% in 2018 and 25% as from 2020. Small and medium-sized companies will even benefit from a decrease to 20% as from 2018, up to €100,000 of taxable profit.

Limitation of utilisation of tax deductions

As a counter-measure for the reduced tax rates, some limitations on the use of tax deductions will be introduced. Utilisation of tax losses and certain tax deductions (such as carry-forward notional interest deduction) will be limited, resulting in a minimum taxable result for companies having a taxable profit of more than €1 million.

Tax deductibility of losses made by foreign branches or permanent establishments of Belgian companies would also be specifically limited.

Amendment (or abolishment?) of the notional interest deduction regime

The Belgian notional interest deduction (NID) regime, a fictitious interest deduction calculated on adjusted net equity, will be thoroughly amended: only 'additional' share capital will be taken into account in order to calculate the NID calculation base.

More strict capital gain exemption on shares

Currently, capital gains on shares derived by a Belgian company may be tax exempt if specific conditions are met. Large companies may be subject to a separate levy of 0.4%.

As of 2018, the participation would have to amount to at least €2.5 million or 10%, in order to be able to claim the capital gain tax exemption. Moreover, the separate levy of 0.4% will be abolished from 1 January 2018.

Extension of R&D corporate tax and wage withholding tax benefits

Belgium offers many tax incentives for innovative businesses. In this respect, the new 85% tax deduction for innovation income (in line with OECD 'BEPS' requirements) covering software and patent-protected products or procedures has been introduced as of 1 July 2016.

Belgium also foresees many other R&D tax incentives, such as an R&D tax credit for investments and an 80% wage withholding tax for R&D personnel. The latter wage withholding tax incentives will be extended to others by broadening the scope of eligible R&D personnel to bachelor degrees.

Introduction of a deemed dividend distribution rule

Pursuant to a new fiction rule, a capital decrease realised from 1 January 2018 may be considered as a deemed dividend distribution in proportion to the available taxable reserves. This may trigger dividend withholding tax at the current rate of 30%. Companies could therefore carefully consider

reducing capital before year end 2017, as the new deemed dividend distribution rule is to come into effect only as of 1 January 2018.

Belgian tax consolidation regime from 2020 onwards

The Belgian government has announced the introduction of the concept of fiscal consolidation between Belgian group entities as of 2020. This may have a significant impact on corporate tax optimisation opportunities or threats within the group.

International tax aspects of the corporate tax reform

The Belgian budget also reflects important aspects of international tax law. In line with BEPS recommendations, a more economic approach to the concept of 'permanent establishment' will be introduced into Belgian tax law. Foreign entities doing business in Belgium may therefore more easily trigger a taxable presence in Belgium.

Specific 'controlled foreign company' (CFC) legislation will be introduced, by which certain income of a CFC will still be taxable in Belgium even if the income is not actually being distributed to the Belgian parent company.

It is also clear that transfer pricing documentation requirements will be sharpened for subsequent years. In line with OECD BEPS requirements, Belgian companies must file their transfer pricing documentation for financial years starting from 1 January 2016, as an annex to the corporate tax return, if one of the following thresholds is exceeded: €50 million operational and financial income, 100 FTE employees, or €1 billion balance sheet total. The threshold is currently considered on a stand-alone basis, but the thresholds are expected to be lowered in future.

"In line with BEPS recommendations, a more economic approach to the concept of 'permanent establishment' will be introduced into Belgian tax law. Foreign entities doing business in Belgium may therefore more easily trigger a taxable presence in Belgium"

Timing and next steps

A first package of measures is announced to be introduced from financial years starting 1 January 2018. A second package, including the Belgian tax consolidation regime, is expected to enter into effect from 1 January 2020.

Country Focus

Germany

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Wages or not, if the employer pays fees for an employee's tax declaration?

A while ago, the chance to live in a foreign country was often incentive enough for employees to go abroad for a while. This attitude has changed over the years. When employers second employees to another country nowadays, the remuneration is a decisive issue. One special part of the compensation package is the question of who bears the costs of the employee's tax consulting. Since a secondment often leads to additional tax declaration obligations, many employers decide to pay the fees arising for the income tax declarations in the home and/or the host country.

When employer and employee have agreed upon the compensation package, it must be checked for every single item if this is taxable for wage/income tax purposes, both in the home as well as in the host country. According to German tax law, 'wage' is in general defined as all earnings received by an employee because of the employment relationship. This basically includes all cash payments and all non-cash benefits. Some salary components are legally defined as tax free – such as the costs of running a double household, up to certain amounts.

Furthermore, there is an exception to the general principle that a benefit is not taxable according to German tax law if the allowance is in the commercial interest of the employer. This means that the corporate purpose is the main focus, and the granting of the advantage is not caused by each employee but by superordinated employer interests.

With regard to payments for tax declarations, employer interest is especially discussed in connection with net salary agreements. This was also the case the Lower Finance Court of Rhineland-Palatinate had to decide (decision of 21 December 2016, ref. 1 K 1605/14) wherein an employer decided to pay the fees for tax declaration caused by the wages and (non-)cash benefits paid by the employer. For all other income, the employees had to bear the taxes themselves. Employer and employee considered this benefit as not taxable. The fiscal authorities did not agree, and required subsequent payments of wage tax by the employer. An appeal was not successful and therefore the employer filed a lawsuit.

The court decided, contrary to the previous assumptions of the finance courts and the fiscal authorities,

> *" When employer and employee have agreed upon the compensation package, it must be checked for every single item if this is taxable for wage/ income tax purposes, both in the home as well as in the host country"*

that this benefit is free of tax. It was considered that a net salary agreement is obviously in the interest of the respective employee because s/he is guaranteed a net salary irrespective of all relevant tax law. But the court stated that the question of whether the employer bears the tax declaration fees must be seen separately. For the employee, the actual amount of the gross income is not important since they received the guaranteed net amount. The employer can only minimise the gross amount when forcing the employee to file an income tax return. Furthermore, the net salary agreement is part of the worldwide human resources policy, since it is very important for this worldwide-acting group that employees are willing to go abroad. Overall, the court decided that in this case the commercial interest of the employer outweighs the own interest of the employee and the assumption of costs is not taxable.

Since the appeal was permitted by the Lower Finance Court, the decision is not legally binding: the Federal Fiscal Court must decide if it agrees with the stated arguments. All taxpayers with a comparable situation should ensure that their tax assessment notices are kept open until the final decision is published.

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Country Focus

Israel

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Multilateral convention to implement tax treaty-related measures to prevent BEPS

On 7 June 2017, Israel's Minister of Finance signed a new convention, the Multilateral Convention to Implement Tax Treaty Related Measures in Accordance with the OECD BEPS Initiative ('MLI Convention'). The MLI Convention is a tool for 'sweeping' amendment of bilateral double taxation treaties as part of the implementation of Action 15 (Development of a Multilateral Instrument for the Amendment of Bilateral Treaties) of the OECD's BEPS Project. The MLI was signed by 70 countries, and seven other countries were willing to sign it. (The USA is not a party to this Convention.)

With regard to Israel, the MLI is intended to amend the double taxation treaties to which Israel is a signatory by adding rules or amending and modifying existing provisions in the current tax conventions dealing with issues such as: revocation of benefits in the event of abuse of the Convention, equality of residency of entities, beneficial owner of dividends, possession of immovable property through entities, transfer pricing, mutual agreement procedures and arbitration in matters relating to tax treaties.

The State of Israel, like any of the countries that have joined the MLI Convention, may request not to apply a specific article of the Convention, to apply it with reservations, or to apply one of the alternatives proposed for the addition or amendment of a particular provision of the said Convention. The amended provisions adopted in the same manner by the State of Israel and the other contracting state shall apply and be incorporated 'automatically' in the relevant tax convention between them.

The State of Israel has announced that the MLI Convention will apply to all tax treaties to which the State of Israel is a party, with reservations. One of the innovations that the MLI wishes to incorporate into the tax conventions is arbitration, whereby in the event that the two contracting countries have not reached agreement under a mutual agreement procedure, the taxpayer will be able to apply to a neutral arbitration process whose decision will be binding on both countries. In this case, the State of Israel has chosen not to apply the arbitration process to the tax treaties to which it is a party.

Country Focus

Malta

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Notional interest deduction rules

With effect from 1 January 2017, Maltese tax-resident companies or partnerships and Maltese permanent establishments (PEs) of non-tax-resident companies or partnerships are entitled to a notional interest deduction (NID) deemed to have been incurred on the said financing.

The NID is calculated by multiplying the deemed notional interest rate by the balance of risk capital that the company or partnership has at year end.

For the purpose of the rules:

- The notional interest rate is the risk-free rate set by reference to the current yield to maturity on Malta Government stocks with a remaining term of about 20 years plus a premium of 5%.
- The risk capital includes share or partnership capital of a company or partnership, any share premium, positive retained earnings, loans or other debt borrowed by the company or partnership which do not bear any interest (including shareholders loans), and any other reserves resulting from a contribution to the company or partnership. The risk capital for a Maltese PE of non-tax-resident companies shall be based on the capital attributable to the Maltese PE.

Being a notional expense, there will not be any accounting entries and therefore it does not affect the accounting profit/loss or retained earnings.

The maximum deduction in any given year cannot exceed 90% of chargeable income. Any excess can then be carried forward to be deducted in subsequent years. The deduction is optional and should be claimed through the tax return on an annual basis only if it is demonstrated that all shareholders or owners approve the claim of such deduction.

The rules outline the effects that such transactions should have on the Companies' tax accounting, essentially by requiring the equivalent of 110% of the NID to be allocated to the Final Tax Account (FTA). If the amount of profits allocated to the FTA exceeds the total profits of the company or partnership, any such excess shall be ignored for the purposes of tax accounting allocation.

Whenever such deduction is claimed, the shareholder or partner is deemed to have received in that year an amount of income equal to the interest on risk capital claimed as a deduction by the company or partnership. Such income shall be characterised as interest income for income tax purposes. However, it is clearly stated that the investment income provisions shall not apply to such deemed income.

Article 12(1)(c)(i) of the Income Tax Act (ITA) exempts from tax any interests accruing to or derived by any person not resident in Malta provided that such non-resident person is not engaged in trade or business in Malta through a PE.

On the other hand, the interest deduction limitation in Article 26(h) of the ITA will still disallow such deduction if such interest is paid to a person not resident in Malta in the following circumstances:

- The risk capital is used to finance the acquisition of immovable property in Malta
- The interest is exempt from tax in terms of Article 12(1)(c)(i) of the ITA
- The shareholder or partner is a non-resident who has a relationship of >10% with the company or partnership.

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Country Focus

Saudi Arabia

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The source: The General Authority for Zakat and Tax (GAZT), www.gazt.gov.sa

VAT in Saudi Arabia

Saudi Arabia's General Authority for Zakat and Tax (GAZT) recently launched a public consultation on the Draft Implementing Regulations for Value Added Tax (VAT). In accordance with the law, this allows members of the public and the business community to provide feedback on the draft until 19 August 2017.

The Draft Implementing Regulations expands on the areas covered by Saudi Arabia's VAT Law, detailing rules for implementation and giving taxpayers sufficient information to complete their VAT compliance requirements. The Draft Implementing Regulations covers, but is not limited to, the scope of taxation (exemption or zero-rated status) for certain goods and services in selected industries, registration rules, VAT grouping, date and place of supply, import and exports, the treatment of used goods, input tax deductions and the review and appeals processes.

This public consultation provides a second opportunity to the public to share feedback on the VAT implementation ahead of its introduction on 1 January 2018. GAZT is in the process of reviewing feedback already received from the public consultation on VAT Draft Law and looks forward to similar public involvement in this consultation on the Draft Implementing Regulations. GAZT has made significant efforts to engage taxpayers around VAT and is in the process of developing a wide range of resources and tools to assist businesses in the process.

Country Focus

Switzerland

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New VAT Law

On 1 January 2018, the partial amendment of the VAT law comes into effect. Many amendments that are undertaken only affect a select few taxpayers who are liable to VAT. In addition to these changes, there are other fundamental amendments that will apply to foreign companies, as summarised here.

Criteria for tax liability in Switzerland

Until now, the issue of who needs to register for VAT in Switzerland was considered from the perspective of the total turnover in Switzerland. If the Swiss turnover was below the tax-exempt amount of CHF 100,000, a foreign company was not required to register for VAT purposes.
On the one hand, this has led to certain distortions of competition. For example, it allowed foreign construction companies close to the border to provide their services to a few Swiss clients, and as long as they managed to keep turnover realised in Switzerland below CHF 100,000, they could avoid paying VAT completely. On the other hand, there has been a growing tendency within the EU to increasingly make foreign companies (domiciled outside the EU) liable to EU VAT. For example, if a Swiss company provided internet services and software downloads to clients domiciled within the EU, it had to register in the EU and make VAT payments in up to 28 countries. It was only a question of time until Switzerland decided to reciprocate.

As of 2018, the law provides that if the turnover realised worldwide exceeds the tax-exempt amount of CHF 100,000, then a foreign company is liable to register for VAT in Switzerland. Some typical cases are analysed below.

Which foreign companies are affected, and how?

This article examines what is going to change in 2018 for a few typical categories, providing an overview of how and to what extent your company will be affected. Of course, in the end, an individual assessment will have to be made for each case.

Construction companies and building workers

So far, there was only a requirement to register if a company realised a turnover of more than CHF 100,000 with Swiss contracts, something quite easily avoidable within the SME sector. Below this tax-exempt amount, it had to be differentiated whether materials were obtained from abroad: if so, then the value of the materials plus the supply of services rendered (which Switzerland considers to be part of the supply of goods) needed to be declared with customs. Otherwise, the beneficiary was liable to acquisition tax, with private persons only needing to declare for services received above CHF 10,000. In practice, neither of these were effective solutions and quite a few services rendered remained untaxed.

From 2018 on, all construction companies with a turnover of more than CHF 100,000 worldwide are required to register in Switzerland as soon as they realise one franc of turnover in Switzerland. In return, the required materials can be imported under their own name, allowing foreign construction companies to immediately reclaim import tax paid at customs, so that their clients will not be burdened by it. These clients will then receive a comprehensive invoice including 8% VAT, just as a Swiss construction company would send invoices to its clients in Switzerland.

"Switzerland – in contrast to the EU – has an unusual approach, whereby impacting or working on an object is regarded as supply of goods and not as supply of services"

'Services' regarded as supply of goods in Switzerland

Switzerland – in contrast to the EU – has an unusual approach, whereby impacting or working on an object is regarded as supply of goods and not as supply of services. Examples include installations and repair work in situ, but also cleaning operations. Since, usually, no goods are brought along, customs cannot levy any taxes. Until now, this meant – as described above, under 'building workers' – that acquisition tax came into effect, with a high tax-exempt threshold for individuals and a high number of unreported cases, as nobody really had any idea what to do, and the authorities were often left in the dark if any breaches occurred.

From 2018 on, any foreign company must register in Switzerland as soon as turnover worldwide exceeds CHF 100,000 and as soon as any supply has been rendered in Switzerland, however small.

Goods export into Switzerland

Basically, for foreign companies exporting goods to Switzerland, nothing is going to change. Just as before, goods need to be correctly declared at customs, who in turn will levy import VAT on top of customs duties and charge it, via the shipping company, to the recipient of the goods. The recipient, liable to tax, can then, where applicable, reclaim this import tax as input tax. This applies not only to wholesale trade between companies, but also to trade with private persons, as long as customs actually levy VAT. However, there will soon be a considerable exception in this instance.

To simplify matters, customs waive import sales tax where the amount is less than CHF 5. Considering today's tax rates, this is the case with a goods value up to CHF 62.50 (at 8%) or CHF 200.00 (at 2.5%), respectively. Instead of rather laborious customs clearance, the package will receive a green sticker saying 'exempt from duty', and the matter is settled. Thanks to this, a flourishing trade with such small shipments has developed in the last few years, and there are a number of foreign mail-order companies that distribute major orders deliberately in smaller shipments that each have a value below the threshold and can thus be imported free of tax. This distortion of competition will cease to exist with the new VAT Act. However, as everyone is aware of the rather complex changeover, the new regulation described here only comes into effect on 1 January 2019.

From then on, it will be mandatory for foreign companies that annually send more than CHF 100,000-worth of small shipments exempt from tax to Switzerland to register in Switzerland. They will also be required to import the goods under their own name, and to invoice their clients with Swiss VAT.

What else is going to change in 2018?

Apart from this major change regarding registration rules, there will be a few more selective changes in the amended law. These will generally have small or no implications for most companies; however, in specific instances they could have major effects. Switzerland will also lower its VAT rates as of 1 January 2018. The regular rate, for example, will change from the current 8% to 7.7%.

Morison KSi

International Tax Cases

Israel

Tax appeal no. 49525-02-14 Gmul America Ltd. V. Tel Aviv Tax Assessor No. 4

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Facts of the case

The appellant acquired real estate assets in the USA through companies under its control that were incorporated in the USA as companies in the LLC, which are regarded as transparent for tax purposes ('check the box', as it's called in the US).

On 1 March 2006, the appellant sold 25% of its holdings in GML Whitestone LLC for US$3 million, and in May 2006 the appellant sold 95% of its holdings in four companies that held real estate assets in Syracuse, New York for US$25 million. From all these transactions, the appellant earned a total profit of approximately 53 million NIS (New Israeli Sheqel).

The appellant reported to the US tax authorities on its revenues and profits in 2006, when, according to US law, the profits that the appellant had from the aforesaid transactions were spread over the years 2006–2009 and the tax payments are also deployed in accordance with that and were paid as detailed here:

- During 2008, a total of about US$113,660 (about 0.4 million NIS)
- During 2009, a total of about US$1,828,080 (about 7 million NIS)
- On 3 April 2010, the appellant filed an amended report with the US tax authorities, which demanded a refund in the amount of US$872,291 due to offsetting losses back (about 3.4 million NIS).

In the 2006 tax report in Israel, the appellant reported a capital gain of NIS 53 million, which is taxable in the amount of NIS 13 million, and on the other hand, sought to offset foreign taxes paid in the USA in the amount of NIS 24 million.

The Tel Aviv Tax assessor ('Respondent') rejected the appellant's calculations and determined that only the foreign taxes actually paid by the appellant in the sum of NIS 400,000 in 2008 would be allowed to be offset, whereas foreign taxes in the sum equivalent to NIS 7 million that the appellant actually paid in 2009 will not be offset. Because these payments exceed the period prescribed in section 207B in the Income Tax Ordinance [New Version] – 1963) ('the Ordinance'), whereby only foreign taxes paid within 24 months of the end of the tax year in which they arise may offset the tax that a taxpayer must pay.

In addition, the respondent did not allow the offset of 17 million NIS that the appellant demanded because the appellant did not actually pay this amount, but attributed the said amount to losses that were deducted from its income and for which it was spared the tax payment in the USA.

Contention of the taxpayer

In the appeal filed by the Company with the Tel Aviv District Court against the decisions of the assessing officer, it argued that the provisions of the Convention exceeded the timetable set forth in the Income Tax Ordinance. In addition, it argued that it should be allowed to offset the tax that was offset in the USA.

According to the appellant, in view of the primacy of the provisions of the Convention, the provisions of Section 207B of the Ordinance may not be applied or interpreted in such a way as to offset foreign taxes paid or if the payment was made outside the period set out in section 207B of the Ordinance.

In addition, the appellant argues that the foreign tax savings that

it had due to offsetting losses reported in 2006–2008 should be regarded as a tax that was paid by it, and that it be allowed to offset it from the amount of tax it owes in Israel.

Alternatively, the appellant wishes to allow it to 'import' losses that were incurred by companies under its control in the years after the 2006 tax year in order to calculate the tax in Israel.

Contentions of the tax assessor

The tax assessor disagreed with these claims. He stated that the Convention is subject to the provisions of the domestic law of each state, and therefore it is necessary to act in accordance with the Ordinance. It was further argued that the right to set off tax is limited to taxes actually paid within 24 months of the end of the tax year, and this right should not be extended to the taxes that would have been paid if losses not been offset abroad.

With regard to the appellant's alternative claim, the respondent argues that the law in Israel does not allow attribution of losses of another legal entity from the taxpayer.

Decision of District Court

Judge Magen Altuvia of the District Court accepted the appeal partially – he allowed the company to offset the taxes paid in 2009, but did not allow them to offset the tax that had not been paid as it was eventually offset in the USA.

On the first issue, the judge found that the provisions of the Convention exceed the timetable in the Ordinance. The convention states that its provisions are subject to the laws of Israel (and the USA), but only 'as long as Israel's internal law does not violate the general principle of the convention, preventing double taxation'.

In this case, it is clear that the appellant paid tax in the USA. In this situation, if it is not allowed to offset the tax only because the US authorities decided to spread it over 3 years, then the Israeli company will be liable to double tax; and this should be avoided.

The judge referred to one provision of the Income Tax Ordinance, which indicates that time frame can be flexible, insofar as it conflicts with the principle of double taxation. Therefore, the judge ruled that the appellant should be allowed to offset the tax paid in 2009.

On the second subject, the judge found in favour of the tax assessor, ruling that the company was not entitled to benefit from tax payments that had already been offset with losses in the USA: 'The appellant's creative interpretation with all due respect leads to absurdity. The appellant's interpretation does not prevent double taxation, but grants a benefit that lacks fiscal logic'.

Therefore, the appeal was partially accepted. The judge ordered the tax assessor to credit the appellant with the tax payments (7 million NIS) it paid in 2009 for the 2006 profit, subject to the fact that it did not receive tax returns in the USA.

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International Tax Cases

India

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Provision of corporate guarantee – whether an international transaction?

Recently, the Hyderabad Tribunal in the case of *Bartronics India Ltd. v. Deputy Commissioner of Income Tax* ([2017] 86 taxmann.com 254) has examined the transaction of corporate guarantee being provided by an Indian company to its foreign associated enterprise (AE). The Tribunal, after examining the issue, has held that providing of corporate guarantee to foreign AEs without charging any fee, is not an international transaction. This decision is explained in detail below.

Facts of the case and contention of the transfer pricing officer as well as the assessee

- M/s Bartronics India Ltd ('the assessee') was formed in 1990 and has been engaged in the business of software development and trading of biometric and e-coding equipment.
- The assessee had given corporate guarantee to its foreign AE for an amount of INR 679,281,000 during Assessment Year 2012–13. The same was not reported in Form 3CEB.
- The transfer pricing officer (TPO) gave a show cause notice to the assessee for making addition at 2%, against which the assessee replied that such adjustment is not required as it is not based on any scientific external or internal comparable rate for the following reasons:
    - The guarantee was given keeping in view the growth and interest of the company and well-being of its subsidiaries
    - The courts in various cases have agreed that corporate guarantee is not an international transaction
    - A liability could arise for the guarantor if a default took place. The corporate guarantee is provided to AE for commercial and business expediency. The assessee has not incurred any cost for providing such guarantee
    - The credit rating of the AE is much higher than the credit rating of the assessee
    - It is part of procedural compliance.
- The TPO, after considering the submissions of the assessee, made comprehensive comments on the issue and also collected information from various websites of the banks regarding how the corporate guarantee fee is computed. He observed that the banks charge a corporate guarantee fee upfront at the time of issue of the guarantee itself, and in case of guarantees covering more than one financial year, the fee is charged by the banks at the beginning of the financial year on the outstanding amount.
- He therefore adopted the same method of computation, and calculated the Arm's Length Price (ALP) of the fee for corporate guarantee given by the assessee to the lending banks against the loan taken by the foreign AE at 2% of the outstanding amount and made addition of INR 13,585,620.
- The assessee therefore preferred an appeal before the Dispute Resolution Panel (DRP).

Decision of the DRP

The DRP observed that the issue of rate of corporate guarantee fee depends on the internal benchmark, if any is available. Otherwise, it must be adopted taking into account the fee charged by the commercial banks. Thus, there cannot be a

standard fixed rate of fee to be adopted in all cases that applies for every year.

The DRP held that the assessee had not produced any evidence to compare the fee by way of internal/external benchmark in the form of a guarantee fee charged by the commercial banks, neither before the TPO nor before the DRP.

Accordingly, the DRP, after considering the facts of the matter, when there is no internal benchmark, and also considering the fact that the judicial pronouncements confirmed the fee in the range of 0.25–3.0% year on year, directed the TPO to adopt the rate of 1.8% (being the State Bank of India's rate for the relevant financial year).

The assessing officer (AO), as per the directions of the DRP, made a transfer pricing adjustment on account of the corporate guarantee fee at 1.8% of the outstanding amount.

Grounds of appeal raised by the assessee before the Tribunal

The assessee raised the following grounds of appeal before the Tribunal against the order of the AO with regard to the addition made on account of the corporate guarantee fee:

- Corporate guarantee is outside the purview of transfer pricing, as per the provisions of the Act read with the rules
- The assessee provided the corporate guarantee for its own investment and benefit, as a parental act/obligation to its newly created AEs, and was a procedural compliance for availing the loan
- The amendment to section 92B of the Act relating to international transaction of issuance of corporate guarantee is effective from 1 April 2012, and is prospective in nature
- When two divergent views are possible, the view favourable to the assessee should be adopted
- The corporate guarantee was on account of commercial expediency, and as such has no bearing on the profits or income of the appellant/AE
- The AO erred in using bank rates (SBI) for charging the corporate guarantee fee, which is not a suitable Comparable Uncontrolled Price (CUP) as it is only a quotation but not an actual uncontrolled transaction
- The AO failed to appreciate that bank guarantees are different from corporate guarantees, as the former is highly secured than the latter.

Decision of the Tribunal

The Tribunal stated that the assessee has provided corporate guarantee to its AE in the current year without charging any fees for this.

The term 'guarantee' was inserted into the definition of 'international transaction' by inserting an explanation in the Finance Act, 2012 with retrospective effect from 1 April 2002.

In the present case, the assessee has objected to include this transaction as international transaction for the reason that the Finance Act, 2012, which has inserted an explanation (applicable prospectively from assessment year 2013–14) and the corporate guarantee transaction will not be applicable to the year under consideration. The same view was upheld by the coordinate bench in the case of *Dr Reddy's Laboratories Ltd v. Addl. CIT* [2017] 81 taxmann.com 398) (Hyderabad Tribunal) and other benches of the Tribunal.

The findings given in the case of Dr Reddy's Laboratories Ltd are:

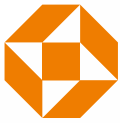
- Transfer pricing is a legislation requiring taxpayers to organise their affairs in a manner compliant with the norms set out. In short, it is an anti-abuse legislation that describes acceptable behaviour, but it does not trigger a levy of tax in a retrospective manner because no party can be asked to do an impossibility.
- Though the Explanation to section 92B is intended to clarify, it must be treated as effective from the AY 2013–14 and in this regard, reliance is placed upon the observations of the Delhi High Court in the case of Skies Satellite.
- The view taken by the Delhi Bench of ITAT in the case of *Bharti Airtel Ltd v. Addl*. (CIT [2014] 43 taxmann.com 150) is one of the possible views on the matter; as long as there is no binding decision of any other higher forum taking a contrary view, the one that is favourable to the assessee must be adopted, even if other benches have taken a different view.
- The Explanation to section 92B cannot be applied retrospectively; and for the years under consideration, the assessee having not incurred any costs in providing corporate guarantee, it would not constitute an 'international transaction' within the meaning of section 92B of the Act. ALP adjustment is therefore not warranted.

Ruling of the Tribunal

The Tribunal stated that there is no dispute that the corporate guarantee is an international transaction, and different assessees are adopting different methods of treatment. Some assessees charge a nominal rate to the AEs, whereas other assessees are treating this as shareholder service. However, relying on the finding of the above decision, the Tribunal held that providing corporate guarantee to an AE without charging any fee would not be considered as an 'international transaction' within the meaning of section 92B of the Act; hence, no adjustment is required for this.

Editorial Comments:

In transfer pricing proceedings, a corporate guarantee given by taxpayers to its foreign AE is always disputed by the department as an international transaction, and adjustment is determined on the basis of bank guarantee rates. While transfer pricing of financial transactions has received considerable attention from the Indian tax authorities and adjustments are made to most cases involving outbound corporate guarantees, taxpayers would find it heartening to see the courts ruling favourably on this issue. There has been a plethora of rulings, including the one summarised above, where it has been held that a corporate guarantee is not an 'international transaction' under section 92B of the Act, relying primarily on legal arguments. The rulings have largely decided the cases focusing on legal interpretations around whether the provision of guarantee constitutes an international transaction, questioning the retrospective application of Explanation to section 92B and emphasising that Indian transfer pricing legislation would prevail. Therefore, taxpayers should evaluate each case in light of individual facts and circumstances and should have robust, well-defined transfer pricing policies and comprehensive analysis towards intra-group guarantee arrangements, always substantiating these with documentary evidence.



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