THE SPACE LAW REVIEW

SECOND EDITION

Editor
Joanne Wheeler MBE

THE LAWREVIEWS

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PREFACE

The first edition of *The Space Law Review* has received excellent feedback from private practitioners, academics and students around the world, whether viewed in hard copy or on The Law Reviews' website.

This year *The Space Law Review* has expanded to include contributions from Pinheiro Neto Advogados in Brazil and Sarin & Co in India, and a chapter on taxation from Slaughter and May in the UK. Further contributions will be added to the online edition during the next year.

I am grateful for the time and dedication of the lawyers who have contributed to this second edition, and for embracing space law as a practice area. But space law is not simply one practice area – it consists of layers of interrelated disciplines and dimensions that lawyers need to apply and be alert to, such as: telecommunications; Earth observation; navigation; security and defence; data management; international relations; radio frequency spectrum; technology; national, regional and international laws and regulations; and corporate, finance and taxation. It requires bright, flexible and solutions-driven minds.

The importance of *The Space Law Review* will grow each year as the value of the space domain and applications from space activities increases and, as such applications of satellite technology are brought into use and the commercial revenues from the industry are recognised. Lawyers will be required to understand the international treaties, how they are enforced and applied in national law and apply such laws, regulations and policies, potentially creatively, to new applications and technologies (civil and military) and new business models.

Private practice in space law in 2020 is coming of age. Space is mainstream now and part of everyone's lives. We have all experienced more change in 2020 than most of us have ever recognised with the onset of covid-19 and the impact it has had on our lives. We have relied on satellite technology for communications, for healthcare (advice, distribution of medicines and for the identification of illness), for education, for information and entertainment, and for simple social interaction more than ever. The importance of the space and satellite industry to our everyday lives has rarely been more important.

The economic benefits from the space sector are being recognised by states. The global space economy is expected to be worth £40 billion by 2030. The productivity of the space sector tends to be much larger than national averages and the jobs more highly skilled.

New and innovative technologies increasingly derive from private commercial activities rather than the more traditional government-funded missions. States are liable and responsible for national activities in outer space and therefore seek to supervise and authorise such activities through national legislation and licensing mechanisms, which we are seeing more of across the globe.

New technology, such as constellations of several thousands of satellites, in-orbit servicing, high-resolution Earth observation data and new small-launcher technology, is testing regulatory and insurance frameworks, and presenting challenges to regulators that must work closely with industry, ideally using anticipatory and outcome-focused regulation, to govern such activities. We are seeing new insurance models and financial security concepts being considered by regulators in the granting of launch and operations licences.

Effective national regulation, enabling innovation and investment, is an increasingly important source of competitive advantage globally. We are witnessing more regulatory forum shopping than ever before in the space industry. Regulators are required to achieve a balance between: (1) managing government risk and liability, compliance with international obligations, safety, security and the sustainable use of and access to space; and (2) encouraging commercialisation, innovation and growth, the benefits to society of new technology and attractiveness to foreign investment.

What is being recognised is the importance of effective national regulation as an enabler for new and innovative satellite technology and the ability to raise finance.

Thank you again to the contributors of *The Space Law Review*. I hope that readers enjoy this edition and recognise the unique value and benefit that the international space industry can bring us, especially during challenging times.

Joanne Wheeler MBE
Alden Legal Limited
London
October 2020

Chapter 4

TAXATION

Tom Gilliver[1]

I INTRODUCTION

For companies in the space industry, tax is an important factor in determining where to base themselves. This chapter surveys the basic conceptual framework relevant to the direct taxation of space companies, focusing particularly on the operation of satellites. While United Kingdom corporate taxation is the author's area of practice, this chapter does not focus on any particular jurisdiction; rather, it highlights concepts and issues that are common to many jurisdictions.

II CORPORATE TAXATION

i Foundational concepts

Tax laws, both domestic and international, typically identify taxable persons or transactions by reference to a physical presence in, or connection with, a particular territory. Thus, extraterrestrial commercial activities do not always fit naturally within the current conceptual framework.

Direct taxes are levied on a person's income, profits or gains, whereas indirect taxes are imposed on transactions involving the production, consumption, sale, transfer or registration of assets, goods or services. As regards direct taxation, commercial space businesses are generally carried on through corporate vehicles, and they may, therefore, be subject to corporate income tax or corporation tax.

As a matter of domestic law, residence for corporate tax purposes is typically determined by a test relating to the place in which the company is incorporated or the place from which it is managed or controlled, or both. The detailed mechanics of the tax code then determine where a particular corporate tax system lies on the spectrum between worldwide taxation (i.e., taxing resident companies on their global profits, whether generated in that country or abroad) and territorial taxation (i.e., taxing companies only on their profits generated within that country). Non-resident companies, on the other hand, are generally taxed only on profits generated in the taxing state, whether through a permanent establishment or (in some cases) otherwise.

Double taxation can arise if two countries seek to tax the same profits of a company. This might be the case, for example, if a company were to be treated as resident in two countries under their respective domestic laws. Domestic relief may be given for double taxation. Tax

1 Tom Gilliver is an associate at Slaughter and May. The author gratefully acknowledges the assistance of Carmelo Franceschino in researching this chapter.

treaties are also bilaterally negotiated to allocate taxing rights between the signatory states and thereby minimise double taxation. Such treaties are often based on a historic version of the Model Tax Convention on Income and on Capital published, and periodically updated, by the Organisation for Economic Co-operation and Development (OECD).

ii Application to commercial space activities

The border between airspace and outer space is not defined in international law. This is pertinent because, while states generally claim rights in respect of the airspace above their territories, the international community has rejected the notion of sovereignty in respect of outer space.[2] For example, the 1967 Outer Space Treaty, one of the foundational texts of international space law, provides that outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[3]

However, there are no clear and generally accepted definitions of 'airspace' and 'outer space'. This has left the door open for attempts to assert sovereignty over outer space in certain respects. For instance, in 1976, seven equatorial countries made the Bogotá Declaration, asserting their sovereignty over the segments of the geostationary satellite orbit directly above their respective territories.[4] The signatories contended that the geostationary orbit is not part of outer space, but is a 'physical fact' resulting from Earth's gravity, therefore constituting a scarce natural resource that they were entitled to control.[5]

This background informs the question of whether a satellite in orbit above a particular country generates a taxable presence in that country for its operator. The Commentary on the 2017 OECD Model Tax Convention observes that a permanent establishment may only be considered to be situated in a contracting state if the relevant place of business is situated in the territory of that state.[6] Accordingly, whether a satellite in geostationary orbit could constitute a taxable permanent establishment for the satellite operator depends upon how far the territory of a state extends into space. However, the Commentary states that no OECD Member Country would agree that the location of geostationary satellites can be part of the territory of a contracting state under the applicable rules of international law. It adds that the area over which a satellite's signals may be received (the satellite's 'footprint') cannot be considered to be at the disposal of the operator of the satellite so as to make that area a place of business of the operator. At present, therefore, the position of the satellite itself and the area that it serves are not usually significant factors from a direct tax perspective: the crucial factor is the tax residence of the satellite operator.

2 Article I of the 1944 Chicago Convention on International Civil Aviation (the Chicago Convention); cf. Article II of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty).

3 Article II of the Outer Space Treaty.

4 1976 Declaration of the First Meeting of Equatorial Countries, signed by Colombia, the Republic of Congo, Ecuador, Indonesia, Kenya, Uganda, Zaire and Brazil (as an observer).

5 Paragraph 1 of the Bogotá Declaration.

6 Paragraph 27 of the Commentary on Article 5 of the 2017 Model Tax Convention.

III OUTLOOK

While national governments and international organisations continue to devote considerable attention and resources to the burgeoning commercial space industry, rather less attention has been given to ensuring that tax systems keep pace. However, if the industry continues to grow rapidly over the coming years and decades, it seems likely that space tax will increasingly come to the fore as a topic for debate.

Parallels may be drawn with the way in which the taxation of digital services has recently become a political battlefield. Arguably, cross-border digital services have exposed the shortcomings of tax systems that are predicated upon physical presence. In response, the OECD, under the aegis of its wide-ranging Base Erosion and Profit Shifting Project, is leading efforts to reshape the international tax landscape in fundamental ways, so as to give due weight to the location of multinational businesses' customers when allocating taxing rights between different jurisdictions. Space tax could eventually go down a similar path; the risk, though, is that (as in the digital taxation arena) individual countries will adopt unilateral measures, resulting in a tax landscape for space companies that is ever-shifting and difficult to navigate.

Appendix 1

ABOUT THE AUTHORS

TOM GILLIVER

Slaughter and May

Tom Gilliver is an associate at Slaughter and May. His practice covers direct taxes, stamp duties and value added tax, with a strong focus on corporation tax. In addition to advising on corporate transactions (including joint ventures, acquisitions and group reorganisations), Tom has experience of advising on transfer pricing and diverted profits tax disputes with HMRC.

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