

Chambers Global Practice Guide 2019: Corporate Tax

Introduction

February 2019

In preparing the introduction for this excellent publication last year, I said that tectonic plates were on the move in global tax - this year it could be said that we are in the middle of a political and fiscal earthquake.

This is not the place for any commentary on the political situation on both sides of the Atlantic (and elsewhere of course) - but the political background is obviously influencing tax developments as countries compete with each other not only for revenue and investments but also in terms of responding to public sentiment about corporate tax.

Business and corporate restructurings to address issues raised by the changing tax world abound. Many people will thus find this publication useful in addressing what the impact of any restructuring may be, looking at how cash flows through a group may be affected and generally trying to assess the impact of changes that are being forced upon them by circumstances.

To highlight a few areas:-

US tax reform

The US has not, of course, moved to a full territorial system. GILTI is going to be a puzzle until all the relevant regulations are released. BEAT is causing problems because its political agenda (to encourage people to bring activities back to the US) really has nothing to do with base erosion in a BEPS sense. Many groups that are faced

with restructurings of how they organise R+D activities or obtain IT or administrative support cross border will conclude that there is no great tax logic behind BEAT. It was always inevitable of course that something that was forced through in such a quick-fire way was going to be a bit rough about the edges - that not only generates uncertainty for taxpayers and business (which is not good) but it also gives legislators the opportunity to catch up with retrospective rules as they start to realise the full impact and implications of what they have done and the loopholes/problems created. This space will have to be watched for a good while yet.

Brexit

At the time of writing, the outcome is still far from clear. The UK financial service sector seems to have survived reasonably well (showing how important business mass and infrastructure are once again) but there is no doubt that the uncertainty of the outcome has caused problems for banks and others trying to predict and cope with potential changes to their business models.

In the corporate sector, the fact that many countries in the EU have restricted changes designed to deal with fundamental freedoms (such as Cadbury in the CFC area or the ability to create tax groups through intermediate offshore holding companies) by reference to EU companies only means that people investing into the UK (as the 5th biggest economy in the world) are facing problems

that could have been avoided by, as the UK did, these countries being more generous and global in their changes. Whether pressure from their local multinational base to extend reliefs beyond the EU once the UK is no longer a member will be successful remains to be seen but it is hoped that it will be.

The UK as an international holding centre remains competitive in terms of its tax system (a proper territorial system, sensible CFC rules, reasonable relief for funding costs of onshore and offshore investments, a low domestic tax rate and no withholding tax on outbound dividend payments). So, it remains an attractive location for UK based multinationals and intermediate holding companies but it has lost its former status as an access point to the EU from an island location off the shores of Europe. Whether the UK remains an attractive location for inward active business investment remains to be seen - the low corporate tax rate (along with all the other facilities the UK has to offer in terms of infrastructure etc) should certainly help on that.

Digital taxation

The UK's DPT rules have been wrongly castigated in the US as extraterritorial. They are only that in very limited circumstances. A better description of them would be that these rules toughen up the existing transfer pricing regime with severe penalties for those taxpayers who are not cooperative and help HMRC put the UK taxable profits in the context of global operations and value add.

The UK has changed its rules designed to impose withholding tax on royalties paid to tax havens for IP located offshore and turned them into direct income tax charging provisions. The full detail of those rules has yet to be fleshed out but they seem inclined to encourage business restructuring (so that there is less "stateless income") rather than collect revenue.

The proposed Digital Service Tax (directed at those who create a digital market space in the UK by

making money out of putting other parties together) has attracted widespread criticism from the US as a thinly disguised attack on specific companies - but surely has more merit than the other proposed solution of attributing residual profit to the market place where consumers are located. This flies in the face of logic in a commercial world where little value would be attributed to sales operations. More work needs to be done there - but, whilst destination based taxation like any other unitary system, is an answer, it is not the right one. It is difficult to see a global solution that changes the allocation of taxes between countries being found here - so a robust and philosophically justifiable patch over the current rules may end up being best.

Quite what the EU agenda for tax competition is remains to be seen.

State aid

There is, of course, logic in the European Commission preventing governments giving aid through the tax system that, if paid directly, would be illegal. It has felt in recent years, however, as if the Commission was on a more general crusade against tax competition - though the recent McDonald's case has established that not all low or nil taxation constitutes State aid. In the meantime, there will continue to be tension in this area.

BEPS

This continues apace whilst some groups still struggle to assess the full impact of things like the anti-hybrid rules. Where the OECD goes next again remains to be seen - they are obviously taking a great interest in the digital trading area. Overall, however, it is difficult to criticise the OECD for the job they have done. Rather like US tax reform, they had an awful lot to do in a very short period. Without drawing any distinction as to what happened across the Atlantic, however, they have done what they had to do very well. The public clamour on multinational taxation seems much quieter now. There is a feeling that much good progress has been made.

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