

## UPDATES & OTHER TIDBITS

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### Tags

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### FOREIGN TRUST DISCLOSURE PENALTIES PARTLY HELD UNCONSTITUTIONAL IN FRANCE

Last December, the French Administrative Court (*Conseil d'Etat*) requested a Constitutional Court (*Conseil Constitutionnel*) ruling on whether penalties imposed under Article 1736, IV bis of the French Tax Code violate the French Constitution.<sup>1</sup> On March 16, 2017, the Constitutional Court returned its ruling, confirming that certain penalties were unconstitutional.

Trustees of a trust with a connection to France are required to disclose the creation of the trust instrument, the names of the settlors and the beneficiaries, as well as the terms of the trust and any amendments made to it. Article 1736, IV bis states that the penalty for non-disclosure is equal to the greater of €20,000 or 12.5% of the assets, rights, and capitalized incomes for disclosures of non-compliance made on or after December 6, 2013, or the greater of €10,000 or 5% of the assets, rights, and capitalized incomes for disclosures made prior to that date.

In its ruling, the Constitutional Court held that the 5% and 12.5% penalties, which are not capped, are disproportionate to the seriousness of the failure. However, the court decided that the fixed penalties of €10,000 or €20,000 should remain applicable since they are not disproportionate to the purpose of combatting offshore tax evasion.<sup>2</sup> The decision takes effect as of the date of its publication and cannot be a used in cases already closed.

### EXECUTIVE ORDER CALLS FOR DEREGULATION, PLACES DOUBT ON OBAMA-ERA PROTOCOLS

On April 21, 2017, President Trump issued an executive order calling on the Treasury Department to review “all significant tax regulations” issued in 2016 and provide recommendations with eye toward simplifying the Federal tax system.<sup>3</sup> Items slated for review include all regulations that (i) impose an undue financial burden on U.S. taxpayers, (ii) add undue complexity to the Federal tax laws, or (iii) exceed the statutory authority of the I.R.S. The Treasury has been granted 150 days in which to prepare its recommendations.

<sup>1</sup> Astrid Champion and Nina Krauthamer, “[Updates & Other Tidbits.](#)” *Insights 2* (2017).

<sup>2</sup> French Constitutional Court, QPC 2016-618, March 16, 2017.

<sup>3</sup> The White House, Office of the Press Secretary, [Presidential Executive Order on Identifying and Reducing Tax Regulatory Burdens](#), April 21, 2017.

The order places doubt on the future of significant Obama-era regulations, particularly the revised regulations under Code §385, which address whether a debt instrument will be treated as true debt for U.S. income tax purposes or re-characterized, in whole or in part, as equity. During a contentious 6-month consultation process, these regulations met with staunch resistance from U.S. businesses and lawmakers, which led to a significant scaling back in the final regulations.

The order appears to be the first step in a broader push by the Trump Administration to refocus its efforts on tax reform after the defeat of the initiative to repeal and replace Obamacare. Speaking with the Associated Press over the weekend, President Trump revealed that his tax reform package is expected to be released on Wednesday, April 26, and will include “a massive tax cut . . . maybe the biggest tax cut we’ve ever had.”<sup>4</sup>

## COUNTRY-BY-COUNTRY REPORTING – GUIDANCE ON FORM 8975

As a follow-up to regulations issued last June,<sup>5</sup> the I.R.S. recently released draft instructions<sup>6</sup> to draft Form 8975, which must be filed annually by the ultimate parent entity of a U.S. multinational enterprise (“U.S. M.N.E.”) in accordance with Country-by-Country (“CbC”) reporting requirements.

While filing requirements generally apply to tax years beginning on or after June 30, 2016, some foreign jurisdictions have adopted CbC reporting rules for annual periods beginning on or after January 1, 2016. In certain cases, these provisions would require an entity in that jurisdiction to report CbC information if it is part of an U.S. M.N.E. group in which the ultimate parent resides in a jurisdiction without CbC reporting requirements for the same annual accounting period. Rev. Proc. 2017-23, issued on January 19, 2017, provides that the ultimate parent of a U.S. M.N.E. may choose to voluntarily file Form 8975 and the accompanying Schedule A for reporting periods beginning after January 1, 2016, and before June 30, 2016.

Globally, a U.S. M.N.E. must disclose the group’s business entities, indicate each entity’s tax jurisdiction, country of organization, and main activity, as well as provide financial and employee information for jurisdictions in which the U.S. M.N.E. does business, on Form 8975, *Country-by-Country Report*, and Schedule A, *Tax Jurisdiction and Constituent Entity Information*. Form 8975 is divided into three parts. The first part deals with the basic identifying information of the filer, whereas the second part is optional and provides a space for any additional information about the group. A “stateless” constituent (*i.e.*, an entity that does not have a tax jurisdiction of residence) must be reported on Schedule A along with a description of the business activity carried on.



<sup>4</sup> “AP Interview with Trump,” interview, AP News, April 24, 2017.

<sup>5</sup> The U.S. Treasury Department and the I.R.S. published final regulations on June 30, 2016, in the form of Treas. Reg. 1.6038-4, which requires the ultimate parent entity of a U.S. M.N.E. group to report CbC information for a relevant reporting period if the annual revenue of the U.S. M.N.E. group for the prior reporting period was greater than \$850,000,000.

<sup>6</sup> Rev. Proc. 2017-23.

The U.S. M.N.E must attach Form 8975 and Schedule A to its income tax return. Beginning on September 1, 2017, Form 8975 may be filed for an early reporting period with the income tax return or other return as provided in the instructions to Form 8975 for the taxable year of the ultimate parent entity of the U.S. M.N.E. group with or within which the early reporting period ends. To file Form 8975 for an early reporting period, an ultimate parent entity that files (or has filed) an income tax return for a taxable year that includes an early reporting period without a Form 8975 attached must follow the procedures for filing an amended income tax return and attach Form 8975 to the amended return within 12 months of the close of the taxable year that includes the early reporting period. Filing an amended income tax return solely to attach Form 8975 in accordance with this revenue procedure will have no effect on the statute of limitations for the income tax return.

## CHINA OFFERS TAX BREAKS FOR MID-SIZED COMPANIES

Following complaints regarding high tax burdens, the Chinese government announced the introduction of several tax breaks in its annual “Government Work Report.” The changes are mainly related to corporate taxation.

The government will provide a 50% reduction in the corporate income tax rate for companies realizing taxable profits up to 500,000 yuan (\$72,300 U.S.D.) per taxable year. This is an increase from the current threshold of 300,000 yuan (\$43,400 U.S.D.) allowing more companies to benefit from the new measure.

Also, the government plans to remove one of the four tax brackets of the V.A.T. scale.

To further the development of a high-tech and innovation-driven economy, the government will increase the R&D deduction from corporate income tax from 50% to 75%. In order to qualify for this benefit, small and mid-sized companies must be registered as technology companies with China’s tax authorities. Regulations, including guidelines and definitions, are expected to be issued in the following weeks.

These measures parallel an array of tax policies introduced last year to encourage economic reform. Under the 13th Five-Year Plan, China now offers tax benefits to “foreign-invested R&D centers”<sup>7</sup> and import items used for scientific research, technology development, and teaching that cannot be produced, or adequately produced, by domestic suppliers are exempt from customs duties and import V.A.T.<sup>8</sup>

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<sup>7</sup> Ministry of Finance, *Circular on Import Taxation Policies for Supporting Scientific Innovation during the “Thirteenth Five-Year-Plan” Period*, (December 27, 2016), art. 2, §7.

<sup>8</sup> *Id.*, art. 1.