UPDATES & OTHER TIDBITS

Authors
Sheryl Shah
Tomi Oguntunde
Nina Krauthamer

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E.U. COUNTEROFFENSIVE TO U.S. TAX REFORM

E.U. efforts to establish uniform corporate tax rules have stalled in recent years, but finance ministers are now pushing for approval to keep Europe competitive in light of recent U.S. tax reform.

One notable concern is the reduction of the U.S. corporate tax rate from 35% to 21%. Historically, smaller E.U. countries have used low tax rates (*e.g.*, 12.5% in Ireland) to attract investment. With a minimum tax rate now being considered to avoid a "race to the bottom," some E.U. countries are concerned that a uniform corporate rate will decrease their attractiveness.

New digital taxation rules, regulations on virtual permanent establishments, and creation a common corporate taxation base ("C.C.T.B.")[1] are also being discussed.

Establishing a C.C.T.B. along with lowering the corporate rate may ultimately increase revenue if the tax base is also expanded. The C.C.T.B. is not expected to be lower than 13.125% – the rate at which the U.S. will tax a multinational's profits under the new global intangible low-taxed income ("G.I.L.T.I.") regime.[2]

Part of defining the C.C.T.B. includes taxing virtual permanent establishments. E.U. lawmakers have already voted that a taxpayer having a digital platform or any other digital business model based on the collection and exploitation of data for a commercial purpose would be treated as having a taxable permanent establishment in a member state. This would ensure that companies such as Facebook and Google will pay more in E.U. taxes.

Final legislation is expected in the late spring.

I.R.S. AMENDS FORM 1023-EZ STREAMLINED APPLICATION FOR NON-PROFIT EXEMPTION

Small charities can apply for tax-exempt status using a streamlined process with the Form 1023-EZ. Form 1023-EZ was designed to assist the I.R.S. in clearing up a backlog of applications that, by 2013, had reached 66,000 – with charities waiting months or years for determinations and "applications requiring review" taking 18 months or more to be assigned to a reviewer.

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[1] See "Proposed Directive on the E.U. Common (Consolidated) Corporate Tax Base – A Primer," *Insights* 2 (2017).

[2] See "A New Tax Regime for C.F.C.'S: Who Is G.I.L.T.I.?" *Insights* 1 (2018).

However, implementation of the new form has not been seamless. The I.R.S. estimates that 20% of applicants using Form 1023-EZ failed the "organizational test" and therefore did not qualify as charities. To address this issue, the I.R.S. revised Form 1023-EZ in January 2018 to require additional information:

- Part III of the form features a text box requesting a brief description of the organization's mission or most significant activities. This provides a better understanding of the most significant activities that an organization engages in to further its exempt purposes.
- Questions about annual gross receipts, total assets, and public charity classification have been added. These questions are also duplicated on the Form 1023-EZ Eligibility Worksheet in the instructions that organizations must certify they have completed.
- Question 29 on Form 1023-EZ Eligibility Worksheet now requires that an automatically revoked organization applying for reinstatement seek the same foundation classification it had at the time of automatic revocation to be eligible to use Form 1023-EZ. Organizations that are not seeking that same foundation classification must file a full Form 1023.

The $400 application fee remains the same.

These revisions are intended to make it easier for organizations to decide whether they qualify to use Form 1023-EZ and to facilitate the I.R.S. make the correct determinations on tax-exempt status. Charities that that do not meet the requirements to use must apply for tax-exempt status using Form 1023.[3]

CELEBRITIES IN TROUBLE OVER SPANISH TAX EVASION

How long do you have to be present in a country in any given year to be liable for paying tax, even on foreign income? The rules vary from by country, and as some celebrities are finding out, there is no exception for popularity.

Singer Shakira declared her Spanish residence in 2015 and has reportedly made a $25 million back tax payment to the Spanish authorities.[4] However, Shakira is now being investigated by the Spanish authorities for the years 2011 through 2014 as to how long she was present in the country and whether she qualifies to be a resident for tax purposes and is therefore liable to pay P.I.T. on her worldwide income.

In Spain, for an individual to be considered a tax resident and be liable to Personal Income Tax ("P.I.T."), he or she must have habitual residence within the Spanish territory.[5] Presence longer than 183 days in a calendar year indicates habitual resi-

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[3] For additional information on the eligibility requirements for Form 1023-EZ, see "I.R.S. Issues New Form 1023-EZ: Streamlined Exemption For Small Charities," *Insights* 8 (2014).

[4] "Shakira Reportedly Pays $25M in Back Taxes to Spanish Government," *New York Daily News*, February 27, 2018.

[5] "Information on Residency for Tax Purposes," Global Forum on Transparency and Exchange of Information, Spain, November 27, 2017.

dence. A person can also be subject to tax if Spain is the main base of a taxpayer's activities or if the taxpayer's dependent spouse and underage children are residents of Spain.

A taxpayer may be permitted to avail him or herself of a tax treaty to change or mitigate these rules. However, an analysis of actual time spent in a jurisdiction must be considered.

Shakira is not the only celebrity facing heat from the Spain government. In 2017, the Supreme Court sentenced Barcelona and Argentina footballer Lionel Messi to a jail term of 15 months for his use of shell companies registered in the U.K., Switzerland, Uruguay, and Belize to divert income away from Spanish taxation.[6] The Real Madrid and Portugal footballer Cristiano Ronaldo has also been accused of tax fraud. Prosecutors claim that Ronaldo understated his income while filing tax returns and used an offshore company to hide income from the tax authorities.[7]

LUXEMBOURG HOLDS FIRM: AMAZON DECISION IS STILL WRONG

Luxembourg maintains that the European Commission (the "Commission") has not shown the existence of a selective advantage and that its ruling in the *Amazon* State Aid case is incorrect. A report[8] released in late February supports the Commission's determination that Amazon obtained illegal tax benefits from Luxembourg inconsistent with the O.E.C.D. transfer pricing guidelines and arm's length standards worth $310 million (250 million) between 2006 and 2014.[9] However, Luxembourg claims that the publication will have no impact on its appeal before the European Court of Justice.

The dispute surrounds Amazon's Luxembourg tax structure, called Project Goldcrest, invloving two Luxembourg subsidiaries of the U.S. parent, Amazon EU Group and Amazon Europe Holding Technologies. Amazon EU Group ran the company's European operations and transferred 90% of its operating profits to the untaxed Amazon Europe Holding Technologies, a shell company that had neither employees nor offices. This resulted in an effective tax rate of 7.25% and not the national rate of 29%.

The transfer pricing assessment, provided by Amazon, was based on the comparable uncontrolled price method and the residual profit split analysis, including an arm's length range for royalties, with adjustments made to account for the particulars of the transactions. After a comparison, the transfer pricing report concluded that the residual profit split analysis was adopted to reduce chances of producing bias estimates.

The Commission report looked at the facts, entities, and agreements and performed its own analysis. It found that the subsidiaries did not perform the functions or have

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6 "Tax Lessons from Soccer's Messi & Ronaldo Tax Evasion Cases." *Forbes*, June 16, 2017.

7 *Id.*

8 E.U. Commission Decision C(2017) 6740.

9 OJ C 44, 6.2.2015.

the capacity to perform the functions anticipated in the transfer pricing report and cost sharing agreement. Furthermore, the subsidiaries did not have access to the intangibles necessary for performing their anticipated operations. The Commission explained that not all methods used to calculate the transfer pricing base are equal. It found that the standards used were not appropriate because they were not market based and resulted in a reduction of charges constituting a selective advantage without justified cause.

The Luxembourg appeal is one of the three high-profile State Aid cases awaiting decisions from the European Court of Justice, along with the *Apple* and *Starbucks* cases.

"Luxembourg claims that the publication will have no impact on its appeal before the European Court of Justice."