ADIT VOICE

Issue 1 – September 2016

In assocation with

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Contents

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Jim Robertson
VP Tax Americas, Shell
Chair, ADIT academic board and committee
Tel: +1 713 241 1035
Email: j.robertson@shell.com
Linkedin: www.linkedin.com/in/jimrobertsonshelltax

CHAIR'S VIEW

Welcome to the first edition of the ADIT Voice.

When I first became a CTA, or ATII as the qualification was known then, in 1983, only a small number of members had any involvement with international tax. Nowadays it is hard to find any of us who do not have some kind of professional contact with the world outside the UK. The Institute responded to this trend in 2003 by introducing a new qualification, the Advanced Diploma in International Tax, now known around the world by its designatory letters, ADIT, and comparable in stature to the CTA. There are now more than 2,800 ADIT students, graduates and International Tax Affiliates in 110 countries and territories. The biggest employers include PwC, KPMG, EY, Deloitte, HMRC and Shell. In Shell we were looking for a comprehensive technical training programme suitable for those wishing to specialise in international tax and decided to recommend ADIT after surveying all of the international tax qualifications in the market, because it can be done anywhere in the world and is subject to rigorous standards and quality control exercised by an academic board that consists of the most respected names in the industry. The board members are:

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The board is supported by a committee that is intended to be representative of the ADIT population. The committee also includes directors/managers from the Institute, including Rory Clarke who is dedicated to ADIT. If you have any questions about the qualification, please contact Rory at rclarke@adit.org.uk or, should you meet any of us at an event or professionally, fell free to ask us about ADIT!

King's College London, academic sector	Jonathan Schwarz	jonathan.schwarz@taxbarristers.com
University of Oxford, ADIT Academic Board	Philip Baker	pb@fieldtax.com
CIOT ADIT Examinations Manager	Rory Clarke	rclarke@adit.org.uk
CIOT Head of Business Development and Marketing	Irene Redman	iredman@tax.org.uk
CIOT Chief Executive	Peter Fanning	pfanning@ciot.org.uk
CIOT Secretary and Director of Education	Rosalind Baxter	rbaxter@ciot.org.uk
CIOT Education Officer	Rhiannon Pardoe	rpardoe@ciot.org.uk
Deloitte	Marissa Hall	marihall@deloitte.co.uk
Shell, energy sector	Jim Robertson	j.robertson@shell.com
EY	Bertil Weigend	bertil.weigend@ch.ey.com
KPMG	Nisha Modha	nishamodha@kpmg.ca
PwC	Trudy Armstrong	trudy.armstrong@uk.pwc.com
HMRC, tax authority sector	Martin Powell	martin.powell@hmrc.gsi.gov.uk
Huawei, technology sector	Conrad Law	cyklaw@yahoo.com

The ADIT exam syllabus consists of three papers

1. **Principles of International Taxation**
2. **Advanced International Taxation, with options by jurisdiction**
3. **Advanced International Taxation, with options by theme**

To achieve ADIT, students must complete Paper 1 and any two option papers from the Paper 2 and/or Paper 3 suites. The technical articles contained within each edition of ADIT Voice will be directly relevant to the ADIT syllabus, and comprise another useful resource with which to keep up-to-date with technical developments whether you are an ADIT student, a holder of the qualification, or just interested in international tax.

I am particularly interested in your feedback about the direction we should be taking to make the qualification even more relevant to international tax practitioners around the world. Recently we added two options, one focusing on EU VAT and the other on Upstream Oil and Gas, to the thematic section of the syllabus.

If you are an ADIT holder, please spread the word about how good the qualification is. If you are not, you can find out more about ADIT at www.adit.org.uk. And if you are a student, good luck in your exams!

Jim Robertson
VP Tax Americas, Shell
Chair of the ADIT academic board and committee

BEPS AND THE PRINCIPLES OF INTERNATIONAL TAXATION

Philip Baker notes the impact of the BEPS Project: whilst it did not set out fundamentally to amend or rethink the basic principles and those principles remain largely intact, there are significant modifications

The international tax agenda has been dominated for the last three years by BEPS – base erosion and profit shifting. This focuses on the corporate income taxation of large, multinational corporations, many of which are alleged to have taken part in base eroding and profit shifting activities. These activities have arisen following business restructuring by many of these multinationals in the 1990s and 2000s.

The issue of base erosion and profit shifting first came on to the international agenda in 2012, though there had been growing disquiet with the low amounts of corporate income tax paid by some multinationals in a number of countries, highlighted by parliamentary enquiries such as those carried out by the UK's Public Accounts Committee. The issue was picked up by journalist and by civil society groups. In 2012 the topic appeared on the agenda of the G20 group of most industrialised countries, though it appears that it was the OECD that put the item on the agenda and then encouraged the G20 to refer the topic back to the OECD for a solution.

In early 2013, the OECD published a short report on "Addressing Base Erosion and Profit Shifting", and followed this in the middle of 2013 with an Action Plan identifying 15 different action points.

The intensive work carried out by the OECD Countries together with some of the G20 Countries led to a series of interim reports in September 2014 and the final BEPS Reports in October 2015. After endorsement of those conclusions, the project has moved into an implementation phase. This has a number of aspects. First, it involves the adoption of domestic legislation in countries that have accepted the BEPS conclusions: this involves, for example, legislation to limit the deductibility of interest in computing corporate profits. Secondly, it involves some implementation at a multilateral level, such as the amendments to the OECD's Transfer Pricing Guidelines to give effect to the BEPS conclusions. Thirdly, current work is taking place during 2016 to draft a Multi-Lateral Instrument which is intended to implement the BEPS conclusions on the amendment of tax treaties by a streamlined process of amending a large number of bilateral tax treaties.

The BEPS Project itself did not set out fundamentally to amend or rethink the basic principles of international taxation. Those principles remain largely intact, though with significant modifications as a result of the BEPS conclusions. Thus, for example, the basis of allocation of tax jurisdiction between countries of residence and countries of source by bilateral tax treaties is not affected. Small changes at the margins, such as the changes to the definition of permanent establishment to combat commissionaire arrangements, or to amend the exclusion for preparatory and auxiliary activities, may reallocate tax jurisdiction to a limited extent. However, the basic concept of a permanent establishment, for example, remains the same. Similarly, the arm's length principle remains the basis for the allocation of profits between associated enterprises, though there are

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changes to the Guidelines to take into account, for example, of group synergies.

Perhaps one of the most significant changes adopted through the BEPS process is the recognition of a minimum standard to counter tax treaty abuse. That will be implemented by including via the MLI specific provisions on treaty abuse, such as a Principle Purpose Test to deny the benefit of tax treaties where the principal purpose was the avoidance of tax. However, even here there is no fundamental change to the role, nature and structure of tax treaties.

Many people see the BEPS Project as essentially applying a bandage, or a series of bandages, to a wounded but still functioning international tax system. But the real question is whether more fundamental surgery will be required in the coming years. Some of the work begun in the BEPS Project, on the digital economy for example, suggest that we may just be at the start of a process involving a more radical rethink of the principles of international taxation. If we are at the start of that process, it will be years before any radical conclusions are agreed.

One of the changes brought in by BEPS, and likely to trigger pressure for more fundamental change, is the introduction of Country by Country Reporting of various tax and financial information by large multinationals. Once this information becomes public (and it is likely to become public quite soon) it may highlight the significant mismatch between the place where multinationals carry on their business and the place where they report profits for tax purposes. Some elements of that misallocation have been tackled through the BEPS conclusions, but it may become apparent that the Project has not addressed some of the fundamental causes for the misallocation. Civil society groups are unlikely to give up their calls for more fundamental reform and a new chapter may be opened.

It would be interesting to speculate what some of these new principles of international taxation in a post-BEPS period of reform might be. Acknowledging that corporate residence is a largely meaningless concept, we may see a heavy swing towards source-based taxation. The arm's length principle may not be formally abandoned, but transfer pricing may come to look more and more like formulary apportionment, possibly through some form of profit split approach. If low tax jurisdictions cannot be required, because of sovereignty issues, to impose a higher level of taxation, then at least their "jurisdiction" to tax might be ignored by other countries: thus, for example, in a formulary apportionment/profit split world, no apportionment would be made or profits allocated to a low tax jurisdiction.

Though the world changes very fast these days, it may be years before any of these approaches are adopted. In the meantime, we have our established principles of international taxation, neatly dressed in a new bandage supplied by the BEPS Project.

PROFILE

Philip began practice in 1987, having been a full-time lecturer in law at London University from 1979 until then. He has maintained some links with academia, and is now a Senior Visiting Fellow at the Institute of Advanced Legal Studies, University of London. He took silk in 2002.

He specialises primarily in international aspects of taxation, which covers both corporate and private client matters. He has a particular interest in taxation and the European Convention on Human Rights, and is the author of a book on Double Taxation Conventions. He has appeared in cases before courts and tribunals at virtually every level from the Special Commissioners (now the Tax Tribunal) to the House of Lords, Privy Council and European Court of Justice.

He is a former member of the Council of the Chartered Institute of Taxation, and remains a member of several committees of the CIOT and of the International Tax Sub-Committee of the Law Society. He is a member of the UK Committee of the International Fiscal Association and a member of the Permanent Scientific Committee of IFA.

NEW AMERICAN PRESIDENT, SAME TAX STRESS GLOBALLY?

David Treitel outlines the challenges and concludes that the one certainty is that whoever wins the Presidential race the US tax system is unlikely to become less complicated

With 2017 now just months away, which President would you like? Trump or Clinton? Which candidate might provide a "nicer" US tax system in the future?

While neither candidate nor party has any clear tax proposals today, three main themes are emerging in the administration of US tax. Firstly, US citizens and green card holders globally continue to receive "FATCA letters", warning them (and in effect their advisers) to become US tax compliant. Secondly, what is known in in the US as the United States Internal Revenue Service (IRS) "Future State Initiative" (or "Making Tax Digital" in the UK), promises idyllic service improvements through increasing engagement with taxpayers online. Thirdly, the IRS publishes frequent news reports explaining that the US tax system is itself a victim of significant criminal activities. Looking at these three topics as a whole, many Americans living outside the US report that the current state of the US tax system gives rise to significant levels of stress; both in relation to tax return forms, the conduct of the IRS and data security and privacy.

Following considerable lobbying, this sense of controlled anger from Americans abroad is just starting to feature on the agenda back home. Perhaps modestly positively for Americans overseas (and arguably simply to garner votes from Americans abroad), recent months have seen proposals being published during the 2016 Republican National Convention arguing for a complete repeal of FATCA; and at the 2016 Democratic National Convention requesting that US law is changed so that "law-abiding Americans living abroad are not unfairly penalized" by FATCA.

Whilst these tentative early proposals seem unlikely to result in any legislative changes, US politicians are having to start thinking about policies that appeal to Americans abroad only because citizens of the US and US green card holders are taxed worldwide, on everything, forever. This obligation to comply with annual US tax and information return filing frequently comes as a surprise, especially to individuals who had left the US during childhood. Even as adults, US persons frequently move abroad for marriage, education and job opportunities, while some simply acquire US citizenship by birth overseas to a US parent.

The first time that many such people hear about US tax filing is when they receive a "FATCA letter" from their bank or financial institution. These letters frequently lead to immediate feelings of anxiety and can trigger more intense levels of depression. Thankfully the IRS have established processes in place to help people catch up where US returns have never been filed, filing has lapsed, or returns that have been filed have incorrectly omitted foreign income.

Under US law until a return has been filed for any year, the statute of limitations remains open for that year. On this basis, the law might suggest that every unfiled return should be completed today. Given, however, that there is frequently little or no tax involved for someone

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living overseas, the IRS currently offer "Streamlined Filing Compliance Procedures", which are a simplified process for US taxpayers who have not filed complete returns in recent years and who have non-US income and assets. In most circumstances, this should result in no penalties.

Essentially, American taxpayers overseas are helped to catch up by the IRS so long as they:

1. Have lived outside the States for at least one of the three most recent calendar years for which a US tax return was due
2. Prepare and file at least three years of amended or late tax returns
3. Include any relevant payment of tax with the returns
4. Write a declaration "in red" on the first page of each return, announcing that the documents are filed under these procedures
5. File six years of late or corrected Return of Foreign Bank and Financial Accounts (FBARs)
6. Include a signed declaration certifying that any past omissions "resulted from non-wilful conduct"
7. Summarise clearly within this declaration reasons why the "non-wilful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law". (Wilful conduct by contrast is defined broadly as a voluntary and purposeful violation of a known legal duty.)

While the Streamlined Filing Compliance Procedures make catching up with US tax form filling relatively painless for many, current IRS Future State Initiative proposals potentially overlook the needs of many Americans abroad. Part of the struggle in trying to get the IRS to engage digitally with Americans globally (according to American Citizens Abroad (ACA), a non-profit organization), is that there is no reliable figure for the total number of US citizens residing outside of the US. Because no-one knows how many exist, where they live, their ages and indeed many US citizens overseas do not have a good command of the English language, ACA argues that "these Americans need more than automation and will continue to require human intervention".

Beyond just trying to figure out how to digitally engage with taxpayers globally, a major current headache for the IRS today is taxpayer identity theft; where criminals file false tax returns using valid names and US social security numbers. IRS Commissioner John Koskinen recently announced, for example, that just in the four months from January to April 2016 the IRS stopped fraudulent refunds totalling $1.1 billion that had been claimed on more than 171,000 tax returns and also suspended for review a further 36,000 suspicious tax returns.

One certainty today – whoever wins the Presidential race – is that the US will continue to raise tax. That tax system is unlikely to become less complicated or any kinder to Americans globally. Overall, raising more tax globally while combatting fraud are doubtless themes that will recur under any future President. Based on past experience, it seems certain that Americans outside of the US will still be lobbying for a "nicer" system right up to the day that Trump or Clinton leaves office.

PROFILE

Frequently quoted as one of the UK's leading experts on American tax, David Treitel is a widely known authority, writer and speaker on US tax. David is Managing Director at American Tax Returns Ltd, a boutique US specialist tax practice in London; dually US and UK qualified and an active member of the Membership & Branches committee of the Chartered Institute of Taxation and the Private Client committee of the Tax Faculty of the ICAEW Tax Faculty. David is also an IRS Certifying Acceptance Agent and represents the ICAEW on the HMRC Expat Forum.

He can be contacted via email at: david.treitel@americantaxreturns.co.uk.

CURRENT TAX ENVIRONMENT IN INDIA

Manish Shah and Vipool Shah outline the key pointers that indicate that the tax environment in India has become quite dynamic and that much is being done to create a taxpayer friendly environment for compliant taxpayers

Since being elected in 2014, the intention of the Modi Government has been to promote India as an attractive business destination. To support this vision, the government has introduced a slew of new/revised legislative, technical and administrative tax reforms with a view to overhauling the existing tax law and procedures to make India an investor and business friendly jurisdiction.

The government is also creating awareness amongst the masses about being tax compliant in India and is also cracking down on instances of tax evasion and black money hoarding in India. To illustrate, the government is educating Indian school children on the importance of paying correct taxes in India!

In this article, we discuss below some of the key reforms from local as well as cross border tax perspective:

A. LOCAL TAX PERSPECTIVE

1. Tax incentive for employment generation

With a view to giving a boost to the 'Make-in-India' movement of the government and also generate employment across all sectors of the industry, an additional deduction from taxable profits for salaries paid to 'new employees' employed during the year is introduced in Finance Act, 2016. Earlier, this deduction was only restricted to Indian taxpayers engaged in 'manufacturing' business.

2. Central Board of Direct Taxes (CBDT) issues revised instructions for staying of disputed tax demands at stage of first–level appeal

Earlier, there was no specific guidance on the amount of disputed tax demand to be kept in abeyance by the tax officer on an application made by the taxpayer. Accordingly, based on the total discretion of the tax officer, at times the amount recovered was as high as 50% – 75% of the disputed tax demand – something akin to the UK's accelerated payment notices.

However, the CBDT has now issued an instruction to tax officers revising the earlier instructions and asking the tax officers to generally insist on payment of only 15% of the disputed tax demand (unless need is felt otherwise). Further, tax officers have been instructed to decide on applications within 2 weeks.

3. General Anti-Avoidance Rules (GAAR)

The introduction of GAAR in India's tax law with effect from 1 April 2017 is expected to impact decades of jurisprudence and also impact existing investment and operating structures in India. The GAAR looks to deny tax benefits in cases where entire transactions/ arrangements were undertaken not for commercial reasons but for the main purpose of obtaining tax benefit in India. However, the CBDT has proactively stated that GAAR provisions shall not apply to any income arising from transfer of investments made before 1 April 2017. However, tax benefits arising from "arrangements" prior to 1 April 2017 may still be covered under the GAAR if the total tax benefit arising to all involved parties in a financial year is more than INR 30 (approximately £330,000)

4. Patent Box Regime

In order to encourage indigenous research and development activities and to make India a global R&D

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hub, the government has decided to put in place a concessional taxation regime for income from patents. Accordingly, an Indian resident earning royalty from a patent developed and registered in India can, subject to conditions, choose to pay tax @ 10% (plus the applicable surcharge and cess) on the gross amount of royalty. However, no expenditure or allowance from such royalty income shall be allowed. This income is also exempted from the levy of book profits tax. However, the concessional tax benefit will be available only if at least 75% of the expenditure for patent development is incurred in India.

5. Goods and Services Tax (GST)

In line with the primary goals of 'Make in India' and 'Ease of Doing Business', the government is pushing hard for the implementation of common indirect tax structure across whole of India - GST. The GST which proposes to subsume almost 15 major indirect taxes (except customs duty in India) will go a long way in decluttering the multi-layered structure of Indian indirect taxes.

The GST Bill has already been passed by the lower house (Lok Sabha) in India and is up for a review in the upper house (Rajya Sabha) in the ongoing parliamentary session. Although the talks of GST implementation in India have been in the fray for a year and a half now, the current government has deliberated well to gain a fair consensus among most of its opposition to ensure that that GST sails through in this parliamentary session. Although, at present most of the political parties have provided their in-principle support to GST, there are a few clauses in the GST Bill (relating to the GST rate), which still needs to be ironed out before the final GST bill is presented in the Upper house in August 2016 for a vote.

Given that GST enjoys a support from almost all the quarters of Indian population, be it the rich or the poor, the minority stand against GST Bill is losing steam by the day. At an administrative front, the government has already released the Draft GST Law in India for public consultation and is extremely optimistic that the April 2017 timeline set for GST implementation is achievable.

B. CROSS BORDER TAX PERSPECTIVE

1. India-Mauritius Tax Treaty Amended - Advantage India

India and Mauritius have signed a protocol on 10 May 2016 amending the over thirty year old tax treaty. In India's view, the protocol will help in curbing the menace of treaty abuse, round tripping of funds and double non-taxation of income. The major amendments to the tax treaty are the provision of *source based* taxation of:

- capital gains arising on sale of shares of an Indian Company
- Interest income of Mauritian banks
- service income from India

The main advantage to India from this protocol is that gains arising from sale of shares of an Indian company which are acquired on or after 1 April 2017 will now be subject to tax in India. This will bring in a lot of certainty and end to endless litigation.

2. Equalisation levy

An equalisation levy @ 6% is to be charged/deducted by an Indian resident engaged in business, on the amount paid for receipt of any 'specified service' from a non-resident. The term 'specified service' means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the central government in this regard.

This is India's version of a 'Google tax' based on the Action Plan 1 of Base Erosion and Profit Shifting (BEPS) project of the OECD. However, specific income-tax exemption has been provided to the income of the non-resident which has been subjected to the 'Equalisation Levy'.

3. Non-applicability of higher withholding tax rate provided under section 206AA of the ITA

With effect from 1 June 2016 to provide that the provisions of higher withholding tax of 20% in case of non-furnishing of Permanent Account Number (PAN – akin to tax registration number), will not apply on payments to a non-resident in certain cases subject to furnishing of alternate documentation by such non-resident. While this is a great procedural relief for such non-resident to not suffer high withholding tax in India, the same does not *per se* exonerate the foreign company from its liability to obtain PAN and file tax return in India.

4. CBDT notifies Foreign Tax Credit (FTC) Rules

The CBDT has notified Foreign Tax Credit (FTC) Rules which lay down broad principles and conditions for Indian taxpayers to uniformly claim deduction or credit for taxes paid in foreign jurisdictions. The introduction of such rules was much awaited as a lot of Indian companies with foreign income faced difficulties while trying to avail FTC and ended up paying taxes in both countries on the same income.

5. CBDT notifies 'indirect transfer' valuation rules

The Income tax law was amended by the Finance Act 2012 to tax gains arising from a transfer of a share of interest in a foreign entity that derives, directly or indirectly, its value substantially from assets located in India. However, there was ambiguity on how the computation of gains was to be made and reported in such cases. Recently, the CBDT has notified 'indirect transfer' valuation rules for determination of Fair Market Value (FMV) and has also prescribed reporting requirement for Indian concerns.

From the above provisions and discussions, it can be seen that the tax environment in India has become quite dynamic and the government is attempting to create a taxpayer friendly environment in India for tax compliant taxpayers after the negative press created by the previous government's retrospective legislation following the Supreme Court decisions in Vodafone and other similar cases.

Manish Shah
Partner – Sudit K Parekh & Co. (SKP)

Manish is a partner at Sudit K Parekh & Co, an audit and tax practice based in India with offices in Mumbai, Pune, Hyderabad, New Delhi and Chennai. Manish is one of the 12 partners at SKP and heads the direct tax practice. He has over 20 years of experience assisting clients with international tax planning including advising foreign clients on having permanent establishments in India and turnkey projects. He also provides clients transactional support and advisory services, including representations on tax matters up to Supreme Court level.

Manish is also a frequent speaker at various forums including the Institute of Chartered Accountants of India.

Manish can be contacted on +91 022 6617 8120 or by email on manish.shah@skparekh.com

Vipool Shah
Managing Director – Godley & Co Limited

Vipool Shah is the Managing Director of Godley & Co Limited, a chartered accountancy and chartered tax advisory firm based in northwest London. Vipool has over 30 years of tax experience including advising private clients and owner managed businesses.

Vipool has had a long association with business in India and works closely with Sudit K Parakh & Co. He is a former director of India Value Investments Limited and co-authored a book '*Inward and Outward Investment: India and the UK*'. Vipool can be contacted on 0208 515 1234 or by email: vipool.shah@godley.co.uk

CIOT CONSULTATIONS AND SUBMISSIONS

The CIOT aims to include input from its members in its responses to consultations, including those issued by HMRC, HM Treasury and the European Commission. This is done via our sub-committees and each sub-committee considers and makes representations to Government on consultations, legislation (existing or proposed) or other material within their remit. The responses below have been taken from the International Tax sub-committee and the EU&HR sub-committee.

International Tax and EU&HR submissions: November 2015 – present

12 November 2015: Diverted Profits Tax
https://www.tax.org.uk/policy-technical/submissions/diverted-profits-tax-ciot-comments

4 December 2015: Patent Box: substantial activities
https://www.tax.org.uk/policy-technical/submissions/patent-box-substantial-activities-ciot-comments

16 December 2015: Modernising VAT for cross-border e-commerce (Digital Economy)
https://www.tax.org.uk/policy-technical/submissions/modernising-vat-cross-border-e-commerce-ciot-comments

21 December 2015: Examination of the OECD'S BEPS recommendations to the G20
https://www.tax.org.uk/policy-technical/examination-oecd%E2%80%99s-beps-recommendations-g20-ciot-comments

8 January 2016: Common Consolidated Corporate Tax Base (CCCTB) – EU Commission Consultation
The CIOT does not believe that a new common tax base, either a 3CTB (common consolidated corporate tax base) or a 2CTB (common corporate tax base without consolidation), would be an effective tool against aggressive tax planning, or be attractive to business. We set out the arguments as we see them against pursuing a policy of a new common tax base, particularly at this time. Fundamentally it would represent a significant centralisation of power. While whether this is acceptable is, ultimately, a political question and, therefore, beyond the scope of our comments, we observed that the strength of the opposition already visible among some Member States means that this is a proposal which is unlikely to be adopted, at least not across the whole of the EU. We also noted the global rejection of the concept of a common tax base and apportionment as part of the BEPS debate.
https://www.tax.org.uk/policy-technical/submissions/eu-commission-consultation-re-launch-common-consolidated-corporate-tax

14 January 2016: Tax deductibility of corporate interest expense
In the CIOT response we first questioned whether a structural interest restriction along the lines being considered is necessary at all in the UK, given that the concerns which led to this aspect of the BEPS Action Plan are either not relevant to the UK or have been addressed by other aspects of the BEPS Action Plan and/or existing UK tax rules. However, it was noted that the UK Government is currently minded to introduce such a structural interest restriction in the UK, and the CIOT can see some merit in having rules which are consistent with those which are introduced by other countries, but this will only be the case if other countries do also implement similar rules.
https://www.tax.org.uk/policy-technical/submissions/tax-deductibility-corporate-interest-expense-ciot-comments

2 February 2016: Draft Finance Bill 2016 Clause 60 General anti-abuse rule - penalty (Penalties for the General Anti-Abuse Rule)

The CIOT are concerned by these pripsals as they go against the general direction of travel regarding penalties, which are generally becoming more mitigatable. We observed that when the CIOT had discussions with Graham Aaronson about the GAAR he made it clear that his committee considered that penalties of the type being suggested were inappropriate. The CIOT consider this to be inappropriate as the Government is now seeking to impose such penalties before there has been a single case brought under the GAAR.

The also consider that the proposed penalty is difficult to reconcile with article 7 of the European Convention of Human Rights, which require criminal penalties to comply with principles of legal certainty and that penalties have also been held to be contrary to the European Convention when they are disproportionate.
https://www.tax.org.uk/policy-technical/submissions/draft-finance-bill-2016-clause-60-general-anti-abuse-rule-penalty-ciot

2 February 2016: Draft Finance Bill 2016 Clause 63 Serial tax avoidance (Tax administration: serial avoiders special regime)

The CIOT are concerned that these proposals give rise to a double penalty; that is the penalty, properly so-called, and the denial of tax reliefs in the future, which is effectively a disguised penalty. Further, the effect of these provisions is to create an absolute offence for tax purposes, because there no requirement of deliberate conduct or carelessness. The CIOT consider that the combined effect of these proposals can be to impose disproportionate penalties. Penalties have been held to be contrary to the European Convention when they are disproportionate: note *Lindsay v Customs and Excise Commissioners* [2002] STC 588.

In addition the transitional rules make these provisions effectively retroactive as they can apply to planning that has already been undertaken if the taxpayer does not correct the return. Retroactive legislation is potentially contrary to the Convention especially when it is of a criminal nature and there is no special justification.
https://www.tax.org.uk/policy-technical/submissions/draft-finance-bill-2016-clause-63-serial-tax-avoidance-ciot-comments

3 February 2016: Draft Finance Bill 2016 Clause 33 Hybrid and other mismatches (Corporation Tax: anti-hybrid rules)

The CIOT noted that the legislation has several requirement for judgements as to reasonableness in applying the rules and this means there is inherent uncertainty within the framework of the legislation. They said that this uncertainty makes the role of guidance particularly important in order to ensure that taxpayers are able to apply the rules with confidence and have an adequate understanding of HMRC's view of the various provisions.

The CIOT also queried whether there any policy rationale or intent behind the selection of the OECD examples by HMRC to be used as the basis for its own examples. The fact that a selection has been made raises the question of why the particular examples have been chosen. For example, HMRC has not included any examples involving permanent establishments.
https://www.tax.org.uk/policy-technical/draft-finance-bill-2016-clause-33-hybrid-and-other-mismatches-ciot-comments

31 March 2016: Shifting sands of UK tax policy and the tax base

https://www.tax.org.uk/policy-technical/submissions/shifting-sands-uk-tax-policy-and-tax-base-ciot-comments

1 April 2016: Treaty residence of pension funds

https://www.tax.org.uk/policy-technical/submissions/treaty-residence-pension-funds-ciot-comments

27 April 2016: Country by Country reporting

The CIOT supports greater transparency by multi-national companies regarding their tax affairs as a means to restoring greater public trust in the international tax system. However, it also holds the view that restoring such trust also requires a much clearer articulation by governments and institutions such as the EU of the principles governing the international corporate tax system, such as:

- The arms-length principle;
- The concept of taxing profits not revenue;
- The concept of taxing profit where value is created not where it is consumed,

noting that all of these principles were re-affirmed by the OECD in the BEPS process.
https://www.tax.org.uk/policy-technical/submissions/country-country-reporting-ciot-comments

10 May 2016: Improving double taxation dispute resolution mechanisms

The CIOT welcomed this EU initiative and the prospect of improvements in this area even if they might only be limited to the EU. They noted their disappointment that the recommendations of Action 14 (Dispute Resolution Mechanisms) of the G20/OECD BEPS project had stopped short of endorsing a universal mandatory arbitration provision for all bilateral double tax treaties and said that they would encourage the EU to channel its resources in supplementing and encouraging the development of the OECD recommendations so that a global approach is taken by all countries, not limited just to the OECD and EU Member States, but including those in the G20 and other countries. This would be the CIOT's preferred outcome. They are concerned to avoid any EU action that is not consistent and compatible with any OECD developments in this area.
https://www.tax.org.uk/policy-technical/submissions/double-taxation-dispute-resolution-mechanisms-ciot-response

6 June 2016: Finance (No.2) Bill 2016 Clause 62 Schedule 10 - Hybrid and other mismatches

This legislation will translate into statute a specific policy intention, which is to prevent the reduction of tax liabilities by multi-national enterprises by the use of hybrid instruments and entities. The CIOT supports the policy intention and their comments are thus focused on whether the legislation translates the policy intention into statute accurately and effectively and without unintended consequences.
https://www.tax.org.uk/policy-technical/submissions/finance-no2-bill-2016-clause-62-schedule-10-hybrid-and-other-mismatches

30 June 2016: BEPS Action 15: Development of a Multilateral Instrument to Implement the Tax Treaty BEPS Measures

The CIOT has consistently supported the BEPS project. In the context of this consultation, they recognised that the tax treaty-related BEPS measures are an important step to improving public trust in the international tax system by reducing the incidence of double non-taxation arising from the use of treaties in ways that were not envisaged when they were agreed. They observed that it is clear that the multilateral agreement will allow the tax treaty measures

developed in the course of the OECD/G20 BEPS project to be implemented far more swiftly than bilateral treaty renegotiations.
https://www.tax.org.uk/policy-technical/submissions/beps-action-15-development-multilateral-instrument-implement-tax-treaty

3 August 2016: Tax deductibility of corporate interest expense - 03/08/2016
In the CIOT's response to the second consultation on tax deductibility of corporate interest expense, they have said that mooted start date of April 2017 is too ambitious given the scale and complexity of the new regime. They have suggested that said there is no need to rush in changes in this area because there are already a variety of rules which limit the tax deductibility of corporate interest expense, such as the Worldwide Debt Cap (WWDC) restrictions and the GAAR.
https://www.tax.org.uk/policy-technical/submissions/tax-deductibility-corporate-interest-expense-ciot-comments-0

9 August 2016: Double Taxation Treaty Passport scheme review
The CIOT has responded to the review of the Double Tax Treaty Passport (DTTP) scheme saying that their members' experience is that the current DTTP scheme is meeting its objective of providing an administrative simplification for corporate-to-corporate lending and we consider that it should be continued.
https://www.tax.org.uk/policy-technical/submissions/double-taxation-treaty-passport-scheme-review-ciot-comments

15 August 2016: Introduction of secondary adjustments into the UK's domestic transfer pricing legislation
The CIOT has told the Government that its proposals on whether secondary adjustments should be introduced into the UK's domestic transfer pricing legislation should not be taken forward.

To do so would not be consistent with the Government's commitment in the Business Tax Roadmap to make the UK's tax system more efficient and competitive. Instead they would introduce increased complexity for little benefit, making the UK less competitive. The CIOT have said that such unilateral rules would cause an increase in double taxation, and serious cash flow problems even if the double taxation issue is ultimately resolved.
https://www.tax.org.uk/policy-technical/submissions/secondary-adjustments-transfer-pricing-legislation-ciot-comments

Advanced International Taxation (Thematic)

TRANSFER PRICING PERSPECTIVE

Ken Almand provides a view of the rising importance of the subject

In twenty years of working in transfer pricing I cannot remember a time when the subject commanded as high a profile as it does now. One thing is for sure – if it was not the most significant international tax issue before (an argument I frequently had with my VAT colleagues!) then it is now. This is due to a number of factors that have evolved over the past few years to ensure that transfer pricing is no longer a technical issue for the tax director of a few large multinationals in a handful of western countries. Instead it is a matter for the boardroom in locations across the world. Some of the reasons for this and what it means for business now and in future will be discussed in this article.

So where do we start? What is transfer pricing and how did we get here? The concept has been around for a long time and is simple enough. Are the terms and pricing of transactions between connected parties comparable to those between independents? As an example, if you provide tax services to a member of your family then you might provide them for free or at a reduced price compared to that which you would charge to someone with whom you have no connection. This example depends on how well you get on with your family of course! This is the arm's length principle which is the basis for transfer pricing theory and practice.

Transactions between connected parties provide the potential for those involved to control the price of a transaction and potentially to manipulate that price to their advantage. Or they may simply charge a non-arm's length price inadvertently. Either way once the transaction involves countries with different tax rates a potential tax cost saving may result. Tax administrations have been aware of this for at least a century and have taken steps to introduce legislation to prevent transfer pricing mischief.

A US president is quoted as saying:

> "Recently more and more enterprises organised abroad by American firms have arranged their corporate structures aided by artificial arrangements between parent and subsidiary regarding intercompany pricing, the transfer of patent licensing rights, the shifting of management fees, and similar practices... in order to reduce sharply or eliminate completely their tax liabilities both at home and abroad."

Barack Obama? George W Bush? No, John F Kennedy, in 1961. Tackling perceived transfer pricing abuses has therefore been on government policy radars for many years but it is only in comparatively recent times that concerted efforts have been made to tackle the issue. This has happened because globalisation, modern

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business methods and the rise in the importance of technology, the internet and intangible property has led to transfer pricing becoming a potential tax planning tool in the hands of many multinational businesses. Whether this tool has been employed for tax planning purposes or not – and it undoubtedly has by many – administrations have been forced into reviewing the existing rules by pressure from a combination of media sources, non-governmental organisations, developing countries and the general public.

The result of the pressure was that the G20 countries asked the OECD to update transfer pricing rules as part of their Base Erosion Profit Shifting (BEPS) initiative that reported back in Autumn 2015. One of the key outcomes of the OECD's momentous work was that transfer pricing should be consistent with economic substance and commercial reality. That is laudable but it is what I for one thought was supposed to be the case already. I was always taught that transfer prices were calculated by analysing functions, assets and risks. Substance prevailed over form and it was necessary to look beyond legal agreements to understand where value was really being added. The OECD has now clarified this general approach in their BEPS recommendations which is a welcome development but in many respects it is not a fundamental change in transfer pricing thinking.

Now is the time that businesses need to be reviewing their transfer pricing strategies however. There are two reasons for this. The first is that post BEPS tax planning is still an option and is always likely to be as long as countries have different tax rates. Transfer pricing planning should embrace the BEPS mantra that reward accrues to economic substance and genuine value creation and risk taking. For prudent tax planners 'twas ever thus. The tax rate differential will continue to provide tax cost management opportunities for multinationals with mobile and genuinely transferable functions, assets and risks.

The second reason businesses should review their policies is because of a greater level of transparency that should benefit tax administrations that are risk assessing multinationals. Shared master files and, for the largest groups, country by country reports, will potentially provide tax officials with insight that was previously denied to them in the vast majority of cases.

Tax directors should imagine that they are tax officials and critically examine the draft master files and country by country (CbC) report for their own business, then go one step further and analyse local files, benchmarking, underlying agreements and the system that produces transfer pricing figures for returns and accounts. All ok? Good, because there are unprecedented numbers of countries that see transfer pricing as a golden opportunity to raise tax revenues. Given that the subject by its nature may require elements of subjective and objective reasoning to arrive at a supportable position it is not surprising that the scope for challenge and negotiation is seen as high by many jurisdictions. Someone once said that there are no right answers in transfer pricing but plenty of wrong ones and it is an approach which some tax authorities seem to take to heart. Beware – we are potentially on the verge of a new wave of tax authority audits that will catch the unwary or ill prepared.

Finally there is the matter of reputational risk. Now that businesses will be sharing significant amounts of potentially sensitive information the risk of confidentiality failures, cyber attacks on tax administrations or reputational damage in consequence of being splashed across the newspapers is sure to rise. The EU has been debating the introduction of rules requiring groups to publish financial information and the clamour for greater corporate transparency enjoys growing support. Suddenly transfer pricing is no longer a matter for the tax department but also for the boardroom.

PROFILE

Ken leads the UK and European transfer pricing business and advises on all aspects of the subject plus international tax issues including planning, assurance and compliance. He works with multinational businesses to develop and implement effective strategies that are aligned with their commercial and tax policies.

Ken has previously worked at EY, Mazars and as an International Tax Specialist at HMRC's Head Office. Whilst there his role encompassed advising the UK Government on international tax policy, drafting the UK transfer pricing legislation, and leading complex enquiries. He regularly contributes to tax publications, speaks at international events and teaches transfer pricing. His background and contacts at HMRC and in the profession provides him with an excellent insight into transfer pricing policy and practice in the UK and across the world.

He can be contacted at ken.almand@rsmuk.com or on +44(0)20 3201 8625.

YOUR NEW ADIT VOICE

ADIT Voice is also published on the Tax Adviser website

Students, members and international tax affliates will be able to access ADIT Voice, together with its related articles at taxadvisermagazine.com. Initially the site will not require a password but in due course you will need login details to access it.

Publishing on the web will allow us to provide more information to members as well as reaching a wider audience but we would really like to hear your feedback. What do you find useful? What do you want more (or less) of? – please email us at technical@ciot.org.uk

The taxadvisermagazine website has undergone a revamp recently and now has an easy to search function for Personal Tax content under the 'Feature' and 'Technical' tabs. You can also access Tax Adviser magazine via the NewsStand app on a variety of smart devices. The app can be found on the Apple Store (under Tax Adviser (CIOT)) and the App Store via Google Play.

EVENTS

BEPS and EU
Friday 9 September 2016
IBFD, Amsterdam, The Netherlands

9th Young International Corporate Tax Practitioners' Conference
Friday 23 September 2016
Deloitte, London, UK

Milan Half Day Conference on current International tax issues from an Italian Perspective
Friday 21 October 2016
UniCredit Tower, Milan, Italy

19th Cross Atlantic and European Tax Symposium
Friday 18 November 2016
Deloitte, London, UK

Geneva Conference – Swiss and international tax issues
Friday 17 February 2017
UBS SA, Geneva, Switzerland

Indirect Taxes Conference
Thursday 23 February 2017
Michael Ashdown, BDO
Mazars, London, UK

International Taxes Conference
Tuesday 14 March 2017
Jonathan Schwarz, Temple Tax Chambers
King's College London, London, UK

Paris Conference
March 2017 – date TBC
Venue TBC, Paris, France

ONE ADIT VOICE

2,800 current ADIT students, graduates and Affiliates. 110 countries.

So, ADIT Voice is here! We hope this new digest will become a regular fixture in your international tax reading, and that it will serve as a useful, accessible resource – whether you're an ADIT student keen to augment your textbook reading with something a little lighter and more topical, or one of the ever-growing number of ATT members, CTAs and International Tax Affiliates who are interested in the latest international tax news and discussion.

As well as a forum for technical international tax discussion, ADIT Voice also provides an outlet for the latest news about the ADIT qualification itself, and our plans for developing ADIT to make sure it continues to meet the demands of stakeholders around the world.

If you're an ADIT student, you can find information about preparing for and sitting ADIT exams, and the latest ADIT events, in the ADIT Student Newsletter at www.adit.org.uk/newsletter. Below is a digested summary of recent and forthcoming ADIT developments and activities.

ADIT continues to grow…

The ADIT community has expanded rapidly in the years since the qualification was first launched, as tax matters have moved up the international agenda and increasing numbers of institutions and individuals – from governments to businesses to tax advisers and lawyers themselves – have recognised the crucial importance of advanced level, specific and applied learning in the laws and practices underpinning global tax.

We recently saw the 4,000th ADIT student registration, while a record number of new ADIT graduates passed exams in June. Indeed, the June 2016 exam session was our biggest ever, and you can read the press release at www.tax.org.uk/adit-june-2016-exam-session-press-release.

Many of the successful ADIT graduates, and award winners, will be welcomed at the forthcoming CIOT admission ceremony in London on 13 October, where they will receive their certificates and awards alongside new CTAs. The ceremony is always a memorable occasion for successful students and their families, and we look forward to extending our congratulations to them.

…as we continue to promote ADIT

Other forthcoming events at which ADIT will be represented include IFA 2016 Madrid from 25 until 29 September, at which we will be exhibiting to international tax leaders and their firms, and hosting special 'meet and greet' sessions led by members of the academic board; and the Norwegian Petroleum Society's 27th International Petroleum Tax Conference in Oslo on 2 and 3 November, where the Upstream Oil and Gas option will be promoted to tax decision makers from across the energy sector in Norway and beyond.

If you are attending either of these events, make sure to drop by our exhibition stand!

New developments

ADIT has changed considerably in the last few years, with the introduction of a second exam session in December, a pioneering on-screen exam method, new exam options and a more flexible structure that now allows students to select any two option papers in addition to the compulsory 'Principles of International Taxation' paper. However, just as the international tax environment never stops changing, ADIT will continue to evolve to meet the needs of practitioners, employers and clients alike.

Watch this space for further developments, or check out the ADIT Noticeboard at www.adit.org.uk/noticeboard. You can also keep up-to-date with ADIT news via our LinkedIn group (www.linkedin.com/groups/2314603) and Twitter feed (@CIOTADITStudent).

Rory Clarke
CIOT ADIT Examinations Manager

CONTACT US

Suggestions?

If you have any suggestions for further articles, please let us know: technical@ciot.org.uk

To contact Sacha Dalton, CIOT technical officer, International Taxes and EU&HR Sub-Committees, please email: sdalton@ciot.org.uk

To contact Will Silsby, ATT technical officer, please email: wsilsby@att.org.uk

To contact Rory Clarke, CIOT ADIT Examinations Manager, please email: rclarke@ciot.org.uk

Editorial Team

Editor-in-chief	Chris Mattos CTA ATT	cmattos@ciot.org.uk
Editor	Lakshmi Narain CTA	lnarain@ciot.org.uk
Designer	Sophia Bell	sbell@tax.org.uk