INTERNATIONAL ROUNDTABLE

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Susan Morse
Assistant Professor
University of Texas Law School

Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service
Washington, D.C.

Lance Martin
Partner
Baker & McKenzie
Palo Alto, California

Allen Walburn
Partner
Allen Matkins
San Diego, California

Patrick Martin
Partner
Procopio, Cory Hargreaves & Savitch LLP
San Diego, California

I. ENFORCEMENT ISSUES

A. Foreign Account Tax Compliance Act ("FACTA")

1. Enacted in 2010 as Sections 1471-1474 of the IRC.

2. Objective is to have foreign financial institutions ("FFIs") assist in obtaining information on off-shore accounts held by U.S. persons.

3. Proposed regulations issued on February 15, 2012.

4. Final regulations issued on January 17, 2013.

5. Definition of FFI. Under IRC § 1471(d)(5), an FFI is an entity that: (1) accepts deposits in the ordinary course of a banking or similar business, (2) as a substantial portion of its business, holds financial assets for the account of others, or (3) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading securities, partnership interests, commodities or any interests (including futures or forward contract or option) in such securities, partnership interests or commodities.

   (a) Exceptions from FFI definition.

   (b) FFI not otherwise exempt or deemed compliant.

      (i) Exempt Beneficial Owners.

      (ii) Registered Deemed-Compliant FFIs.

      (ii) Certified Deemed-Compliant FFIs.

      (iv) Owner-Documented Deemed Compliant FFI.

6. FATCA imposes a 30% withholding tax on "withholdable payments" of U.S. source income made to FFIs, unless such FFIs enter into an agreement with the IRS to provide information with respect to their U.S. accounts, or are otherwise exempt from FATCA.

7. Subject to certain exceptions, FATCA also imposes a 30% withholding tax on withholdable payments of U.S. source income made to a non-financial foreign entity ("NFFE") (i.e., a foreign entity that is not an FFI).

8. "Withholdable payments" include:

   (a) Payments of U.S. source FDAP income (i.e., interest, dividends, rents, royalties and compensation or other fixed or determinable income).

   (b) Gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from U.S. sources (e.g., sale of corporate stock or repayments of principal on a loan).

(c) Exceptions

(i) "Grandfathered obligations" (i.e., certain obligations outstanding as of 7/1/2014).

(ii) Certain short-term obligations.

(ii) Payments of U.S. effectively connected income ("ECI").

(iv) "Excluded non-financial payments."

9. Section 1471 requires FFIs to enter into an FFI agreement with the U.S. Treasury in order to avoid 30% withholding on withholdable payments to the FFI.

(a) Some countries' privacy laws could restrict FFI's ability comply with FFI agreements requiring provision of information to IRS.

(b) Treasury developed concept of intergovernmental agreements ("IGAs") to address such privacy law issues.

(c) IGAs are agreements between a foreign country and the U.S.

(i) Model 1 IGA: Foreign country agrees to adopt rules to identify and report information about U.S. accounts to the U.S. FFIs in such foreign countries provide information to their home country's taxing authorities to identify U.S. accounts and report specified information about the U.S. accounts to the foreign country. Foreign country then exchanges this information with the IRS on an automatic basis.

(ii) Model 2 IGA: Foreign country signs an agreement with U.S. and agrees to report specified information directly to the IRS in a manner consistent with the final regs., supplemented by a government-to-government exchange of information upon request.

(iii) Model 1 IGAs agreements currently in force between the U.S. and Denmark, Germany, Ireland, Mexico, Norway, Spain and the U.K.

(iv) Model 2 IGAs currently in force with Japan and Switzerland.

(v) Other countries.

10. Responsibilities of a U.S. withholding agent under FATCA.

(a) Documentation and due diligence (e.g., new Forms W-8).

(b) Withholding.

(c) Reporting (e.g., new Forms 1042 and 1042-S).

11. Responsibilities of an FFI under FATCA.

(a) FFI agreement/IGA procedures.

(b) Documentation and due diligence.

(c) Withholding.

(d) Reporting.

12. The preamble to the final FACTA regs. issued on January 17, 2013 announced creation of a new FACTA registration website to serve as the primary way for FFIs to interact with IRS to complete the required registration, agreements and certifications.

13. IRS has implemented a web-based FATCA Registration Portal to manage all required registrations, agreements and certifications between institutions subject to FATCA requirements and IRS. The following types of entities will be expected to register on the Portal:

(a) Participating FFIs.

(b) Registered deemed compliant FFIs.

(c) Reporting Model 1 IGA FFIs.

(d) Sponsored FFIs.

(e) Qualified or intermediaries.

(f) Withholding foreign partnerships and withholding foreign trusts.

(g) Foreign branches of U.S. financial institutions.

14. FFIs may also use the Portal to obtain global intermediary identification number ("GIIN"). IRS will issue GIINs after 12/31/2013 as registrations are finalized.

(a) The GIIN will be used for reporting purposes and to identify an FFI's status to withholding agents.

15. Final regs. provided for a phased implementation of the FACTA requirements beginning on 1/1/2014 and continuing through 2017.

16. Notice 2013-43 issued on July 12, 2013 provides revised timelines for implementing certain FACTA requirements and also provides guidance on the treatment of IGAs that are signed but not in force.

(a) Start of FACTA withholding for U.S. source FDAP payments is postponed by six months (i.e., until 7/1/2014).

(b) Under final regs., withholding begins on foreign pass-thru payments and payments from gross proceeds and disposition on 1/1/2017. No change under Notice 2013-43.

(c) 1/1/2014 is deadline for assignment of GIINs

(d) 4/25/2014 is deadline to register to appear on initial list of participating FFIs by 7/1/2014.

(e) 3/15/2015 is the deadline for participating FFIs to file information reports for calendar year 2014.

B. OVDI, FBARs and IRS Form 8938

II. INTERNATIONAL TAX REFORM

A. Objectives

1. Revenue

2. Competiveness

3. Fairness across industries

4. Simplification

5. Relief from double taxation

6. Changes to existing system

B. Types of International Taxation Systems

1. Taxation based on residence - A country taxes its residents or domestic corporations on all income, regardless of its source.

2. Territorial System - A country taxes only income from sources within its borders, regardless of the residence of the person earning the income.

3. U.S. Hybrid System

(a) All income of U.S. residents and corporations is subject to U.S. tax, with a foreign tax credit for foreign income taxes paid by the taxpayer.

(b) Active foreign income of foreign corporate subsidiaries is generally not subject to U.S. tax on a current basis. U.S. tax is deferred until income of foreign corporate subsidiaries is distributed to U.S. shareholders as a dividend.

(c) Passive foreign income and Subpart F income of foreign subsidiaries is generally subject to U.S. tax on a current basis.

C. Proposals for Reform

1. 2013 OECD Report on Base Erosion and Profit Shifting ("BEPS").

(a) According to the OECD Report, there is a growing perception that governments lose substantial tax revenue because of tax planning designed to shift taxable profits in ways that erode the tax base of developed and developing countries to countries where such profits receive more favorable tax treatment.

(b) The OECD Report states that this type of tax planning can lead to double non-taxation, i.e., situation where income is not taxed anywhere: not in the taxpayer's country of residence nor in the source country.

(c) According to the OECD Report, the consequences of BEPS by some multi-national corporations include:

(i) Unintended competitive advantages for multinational corporations over smaller or domestic companies.

(ii) Distortion of investment decisions.

(iii) Loss of substantial corporate tax revenue for governments.

(iv) Perceived unfairness resulting from BEPS jeopardizes citizens' trust in the integrity of the tax system, undermining voluntary tax compliance.

(v) If businesses reduce their tax burden by shifting income away from jurisdictions through BEPS, other taxpayers in that jurisdiction bear a greater share of the tax burden.

(d) The OECD Report recommends action plan to international tax reform ("Action Plan"), designed to put an end to BEPS, including:

(i) Address the tax challenges of the digital economy.

(ii) Neutralize the effects of hybrid mismatch arrangements.

(iii) Strengthen Controlled Foreign Corporation ("CFC") Rules.

(iv) Limit base erosion via interest deductions and other financial payments.

(v) Counter harmful tax practices more effectively, taking into account transparency and substance.

(vi) Prevent treaty abuse.

(vii) Prevent the artificial avoidance of Permanent Establishment ("PE") status.

(viii) Assure that transfer pricing outcomes are in line with value creation.

(1) Intangibles

(2) Risks and Capital

(3) Other high-risk transactions

(ix) Establish methodologies to collect and analyze data on BEPS and actions to address it.

(x) Require taxpayers to disclose aggressive tax planning arrangements.

(xi) Re-examine transfer pricing documentation. Improve effectiveness of mutual agreement procedures ("MAP") and also consider supplementing existing MAP provisions of tax treaties with a mandatory and binding arbitration provision.

(xii) Make dispute resolution mechanisms more effective.

(xiii) Develop a multilateral instrument to allow countries to implement Action Plan.

(e) OECD Report recognizes that each country has the right to design its tax system in the way it considers most appropriate.

(f) However, increasingly global economies highlights gaps that can be created by interactions among domestic tax laws.

(g) Currently, there are no international standards to address these gaps and prevent double non-taxation.

(h) The Action Plan would develop a fundamentally new set of standards designed to prevent double non-taxation (e.g., preventing companies from making taxable income disappear due to mismatches and different countries' tax rules (referred to as "hybrid mismatch arrangements").

(i) Action Plan will also prevent the use of excessive leverage to erode the tax base via interest payments.

(j) The OECD Report notes that existing transfer pricing rules are effective at preventing double taxation of profits.

(k) However, in some cases these rules facilitate separation of taxable profits from the value-creating activities that give rise to such profits.

(l) Action Plan is designed is designed to restore the alignment of taxation with substance, while preventing double taxation.

(m) OECD Report also highlights the ability of multi-national corporations to artificially shift profits by transferring easily moveable assets (such as intangibles and capital).

(n) Action Plan calls for greater transparency between taxpayers and tax administrations, and among tax administrations.

(i) Create a common template for multi-national corporations to report to all relevant governments their global allocation of profits, economic activity, and taxes paid among countries ("country-by-country reporting").

(ii) More transparency between governments.

(iii) Create mechanisms to better collect data to measure BEPS and monitor developments.

(iv) Make sure that international tax disputes are resolved quickly.

(o) Action Plan invites all interested G20 countries (including those not members of the OECD) to participate in the BEPS project.

(p) Action Plan sets forth deadlines for all actions, which will be delivered within 18 to 24 months. Certain steps in action plan will result in changes to the OECD Model Tax Convention, which would not be directly effective without amendments to bilateral tax treaties. To ensure quick implementation, a multi-lateral instrument to amend bilateral tax treaties will be developed.

(q) Automatic exchange of information between countries.

(r) Formulary apportionment:

(i) Not included in OECD's recommendations.

(ii) Advantages.

(iii) Disadvantages.

D. Obama Administration's International Tax Reform Proposals

1. Overview

(a) Reduce corporate tax rate.

(b) Provide for taxation on a current basis of excess profits from intangibles shifted to low-tax jurisdictions.

(i) Tax excess intangible income under Subpart F.

(ii) Create a separate foreign tax credit basket under IRC § 904.

(c) Defer interest deductions related to unrepatriated foreign-source income.

(d) Incentives and disincentives regarding location of operations.

(i) Eliminate tax deductions for moving operations outside the U.S.

(ii) Provide 20% income tax credit for expenses of moving operations into the U.S.

(e) Determine deemed-paid foreign tax credit under IRC § 902 on a consolidated basis, effectively treating all of the taxpayer's CFCs as a single CFC.

(i) Deemed-paid foreign tax credit would be based on amount of consolidated earnings and profits of foreign subsidiaries repatriated to the U.S. shareholder in the tax year.

(ii) Effectively treats all of the taxpayer's CFCs as a single CFC.

E. Camp Proposal (10/26/11 Discussion Draft)

1. Lower corporate tax rate to 25%.

2. Shift to territorial tax system.

   (a) 95% deduction ("DRD") for the foreign-source portion of dividends received from CFCs.
   (b) No foreign tax credits are allowed for dividends that qualify for DRD.
   (c) 95% deduction for gain on the disposition of stock in certain CFCs.
   (d) First-tier foreign branches are treated as CFCs for all purposes.

3. Modify Subpart F regime.

   (a) Retain Subpart F regime, with foreign tax credits under Section 901s and 960.
   (b) Repeal income inclusion rule under Section 956 for investments in U.S. property (which would allow tax-free loans from CFCs to U.S. affiliates).
   (c) Repeal income exclusion under Section 959 for previously-taxed earnings.

4. Simplify foreign tax credit rules.

   (a) Foreign tax credits would be allowed for foreign-source income that does not qualify for the 95% DRD.
   (b) Repeal indirect Section 902 foreign tax credit on dividends from CFCs and distributions from first-tier foreign branches treated as CFCs.
   (c) Eliminate separate foreign tax credits baskets.
   (d) Eliminate multi-year pooling of foreign tax credits.

5. Options to prevent tax base erosion.

   (a) Excess intangible income taxed under Subpart F.
   (b) Low-taxed cross-border income taxed under Subpart F.
   (c) Intangible income would be taxed under Subpart F.

6. Transition rules.

   (a) Foreign earnings earned before effective date of proposal (other than previously–taxed income) would be deemed distributed to U.S. parent on the effective date.
   (b) 85% DRD allowed for deemed dividend, resulting in effective U.S. tax rate of 5.25%.
   (c) Foreign tax credit carryovers may be used to reduce tax on deemed dividend of pre-effective date foreign earnings.
   (d) Taxpayer may elect to pay tax in up to 8 annual installments with interest charged at the underpayment rate.

F. Key Issues for U.S. International Tax Reform.

1. Will it be part of deficit reduction?

2. Revenue neutral?

3. Will it result in a shift in tax burdens (e.g., from corporations to individuals)?

4. What U.S. corporate tax rate is required to be competitive?

5. What type of international tax reform should be considered?

6. Impact of OECD Report on BEPS?

III. RECENT INTERNATIONAL TAX CASES

A. PPL Corp. v. Commissioner, 133 US 1897 (2013)

1. The UK's "windfall tax" on energy companies was determined to be eligible for the foreign tax credit under Section 901; overturning the previous determination by the IRS that the tax was not eligible for a credit.

B. Park v. Commissioner, 722 F.3d 384 (D.C. Cir. 2013)

1. DC Circuit Court ruled that the measure of ". . . periodical gains, profits, and income . . ." as defined under IRC Section 871(a)(1)(A) was not as determined by the IRS.
2. Non-resident alien gamblers are not subject to taxation on a per play basis; but rather per session.

C. Rodriguez v. Commissioner, 722 F.3d 306 (2013)

1. A Mexican corporation with Mexican citizen shareholders who were lawful permanent residents of the U.S. were not entitled to qualified dividend treatment for Subpart F income includible under Sections 956 and 951.
2. No actual dividends were ever made from the CFC.
3. IRC Section 951 inclusions do not constitute "qualified dividend income" under § 1(h)(11).

<u>Circular 230 Disclosure</u>