American Bar Association Tax Section May Meeting

Committee on Tax Policy and Simplification

Second Panel

Corporate Tax Aggressiveness

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Background Paper and Bibliography

Panel Chair
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I. THE PROGRAM AND SPEAKERS

8:30 AM – 10:30 AM
Tax Policy and Simplification
Chair: Professor Jonathan B. Forman
University of Oklahoma, Norman, OK

9:30 AM **Corporate Tax Aggressiveness** (Co-sponsored with the American Tax Policy Institute)**.**

This panel will discuss common themes of "corporate tax aggressiveness," including signs of tax aggressiveness, financial accounting objectives, risks and challenges of tax-focused transactions, and industry and enforcement perspectives on aggressive transactions

Moderator: Stephen E. Shay, Harvard Law School, Cambridge, MA

Panelists: Professor J. Richard (Dick) Harvey, Jr., Villanova School of Law, Villanova, PA

Professor Edmund Outslay, Michigan State University, East Lansing, MI.

II. CORPORATE TAX AGGRESSIVENESS

A. Tax-related Reporting: FIN 48 and Schedule UTP

B. International: OECD Country-by-Country Reporting Discussion Draft

C. Reputational Risk Factors

III. "FIN 48" AND SCHEDULE UTP

The environment for tax reporting has been undergoing substantial change with the advent of FIN 48 (now incorporated as part of ASC 740-10) and subsequently the promulgation of Regulation §1.6012-2(a)(4) and Schedule UTP. Compared to the pre-FIN 48 world, how has the reporting of tax reserves changed for publicly-traded companies?

- What have taxpayers disclosed to the IRS on Schedules UTP?

- What has been the reaction of the IRS to the information provided on Schedules UTP?
- What are the effects of FIN 48 on companies' assessment of tax risks? Has it enforced greater uniformity?
- What has been the effect of Schedule UTP on establishing tax reserves generally?
- Should the IRS make any changes to Schedule UTP?

IV. OECD'S BEPS PROJECT –COUNTRY-BY-COUNTRY REPORTING DISCUSSION DRAFT

European governments are in a scramble to respond to the volatile politics that have emerged from disclosure of extensive use of offshore accounts by high net worth individuals, a ministerial level personal tax scandal and increasing disclosures of corporate tax avoidance. The OECD, with support from the United States, has initiated a potentially far reaching project to seek international agreement on approaches to counter offshore tax avoidance. On element is enhanced transfer pricing reporting, including country-by-country reporting. The relevant paragraph provides:

> 20. The section of the master file on financial and tax positions includes country-by-country reporting of certain information relating to the global allocation of profits, the taxes paid, and certain indicators of the location of economic activity (tangible assets, number of employees and total employee expense) among countries in which the MNE group operates. It also requires reporting of the capital and accumulated earnings as well as aggregate amounts of certain categories of payments and receipts between associated enterprises.

- How will companies assess these developments?
- Without knowing where these developments will lead in terms of specific law changes, what are the current and potential effects on companies' tax strategies of these and related actions by politicians and international organizations?

V. REPUTATIONAL RISK FACTORS

Senator Levin's U.S. Senate Subcommittee on Permanent Investigations has held three hearings on shifting profits offshore, one highlighting Apple's use of nonresident Irish companies to earn income without paying current tax in any jurisdiction on substantial amounts of income and the most recent one examining Caterpillar’s shifting of parts sales from the United States to Switzerland (drawing on material from a terminated employee’s retaliation claim in a wrongful termination lawsuit based in part on raising objections to management regarding offshore tax planning). The United Kingdom’s Public Accounts Committee has held highly publicized hearings on the low levels of U.K. taxes paid by Starbucks, Amazon and Google in relation to their sales to U.K. customers. The U.K. hearings resulted in public protests directed at “tax avoidance” and a voluntary payment by Starbucks of £20 million in additional “taxes” over two years. The Public Accounts Committee held additional hearings regarding Google’s sale of advertising from Ireland into the United Kingdom and recently issued a report stating the public confidence in Google will not be restored until it establishes a structure that ensures it pays tax where it generates profit.

- How are companies viewing the publicity of these hearings and public responses (which appear to be quite different in the United Kingdom and continental Europe from in the United States)?
- How do these developments affect the standards for assessing tax risks?

Appendix of Materials

- IRS Statistics – UTP Filings TY 2012 available at

  http://www.irs.gov/Businesses/Corporations/UTPFilingStatistics

- Senate Permanent Investigations Subcommittee, Caterpillar's Offshore Tax Strategy (April 1, 2014), Report and Exhibits available at http://www.hsgac.senate.gov/subcommittees/investigations/hearings/caterpillars-offshore-tax-strategy

- OECD Discussion Draft on Transfer Pricing Documentation and CbC Reporting (January 30, 2014) available at http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf

- U.K. Public Accounts Committee Report – Tax Avoidance – Google, available at

  http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf