Corporate Tax Aggressiveness

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Agenda – Corporate Tax Aggressiveness

- History
- Indicators
- Policy Questions

History

History – 1990 to Early 2000s

- Corporate tax departments often viewed as profit centers managing a portfolio of tax issues with bonuses tied to reduced ETR
- Structured transactions sold by bankers, lawyers, and accountants were very common
- Very little transparency; corporations played the audit lottery
- IRS not very aggressive or successful in pursuing corporate tax shelters
- Bottom line - Many corporations were very aggressive

History - Post 2000 (1 of 2)

- Sarbanes-Oxley (2002):
  - BODs significantly more involved in tax, especially if services provided by the auditor
  - Non-auditor tax advisor more likely to perform tax work

- FIN 48 (2007):
  - Substantial footnote disclosure surrounding UTBs
  - No longer allowed to consider audit lottery when establishing tax reserves
  - Generally need to be MLTN to avoid 100% tax reserve

- IRS activity:
  - Reportable/listed transactions (2000)
  - IRS policy of restraint weakened (2002)
  - Sch. M-3 (2004)
  - Sch. UTP (2010)
  - Winning more economic substance cases (e.g., LILO/SILOs)

History - Post 2000 (2 of 2)

- Whistleblowers:
  - New Whistleblower Law (2007)
  - Highly publicized whistleblowers (e.g., Caterpillar and Levi Strauss)

- Significant increase in tax related reputation risk:
  - US Senate PSI hearings (Enron, tax advisors, HP, Microsoft, Apple, and Caterpillar)
  - UK Parliamentary hearings (Starbucks, Google, and Amazon)
  - Newspaper articles and NGO reports

- G20/OECD actions

Corporate Aggressiveness Today

- Are corporations less aggressive today than they were 10 to 15 years ago?

- Reasons to be less aggressive include:
  - Increased transparency (e.g., Sch. UTP and FIN 48)
  - External auditors taking a more detailed look at UTPs
  - Increased reputation risk (e.g., whistleblower, press coverage, and/or Congressional hearings)

- Corporations shifting more income overseas because:
  - It is arguably the only planning left that can materially reduce the ETR
  - They have been relatively successful (e.g., Veritas and Xilinx cases)

Corporate Tax Aggressiveness Indicators

Indicators

- Large Unrecognized Tax Benefits (UTBs) – As a percentage of equity, NI, or other measures of size.
  - Could be total UTBs, and/or additions to UTBs during the year
- High % of Permanent vs. Temporary UTBs
- Low ETR:
  - Overall ETR
  - Foreign ETR
- Amount of pre-tax income allocated to foreign vs. US compared to other measures of activity
- Frequent tax litigation

Policy Questions

Policy Questions - Agenda

- Schedule UTP
- Country-by-country reporting
- Will OECD BEPS project be successful?

Schedule UTP

- Is it working?

- Could it be improved?
  - Close certain loopholes?
    - Reserves recorded, but they are "immaterial"
    - Reserves not recorded,:
      - But posted to "net effects schedule"
      - Because of administrative practices exception
      - Because of expectation of litigation (>50% should be changed to 50%)

  - Need a penalty (e.g., condition IRS Policy of Restraint relief on adequately completing Sch. UTP)

  - Should external auditors be required to attest to Sch. UTP?

Country-by-Country Reporting

- Current status, including EU's efforts surrounding banks
- Major issues:
  - Public vs. reporting to only tax administrators
  - Information to be reported
  - Top down vs. bottoms-up approach?

Will BEPS Project be Successful

- Major hurdles
- Timeframe
- Prospects for implementation

Additional Audience Questions

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