Meeting between the TAXE Chair and Coordinators and Bob Richards - Finance Minister of Bermuda
Wed 24 June 2015, 10.00-11.00
A3E-3

Participants from Bermuda:

Bob Richards – Finance Minister of Bermuda
Alastair Sutton – Bermuda's European Advisor in Brussels

Participants/European Parliament:

Alain Lamassoure (EPP, FR), TAXE Committee Chair
Elisa Ferreira (S&D, PT), TAXE Co-rapporteur
Michael Theurer (ALDE, DE), TAXE Co-rapporteur
Pablo Zalba Bidegain (EPP, ES), TAXE EPP Deputy Coordinator
Peter Simon (S&D, DE), TAXE S&D Coordinator
Miguel Viegas (GUE, PT), TAXE GUE Coordinator
Sven Giegold (Greens, DE), TAXE Greens Coordinator
Marco Valli (EFDD, IT), TAXE EFDD Coordinator

Suggestions for questions

– How is the government of Bermuda assessing the ongoing European Commission investigations on the State aid rulings?
– Has the government of Bermuda any intentions to modifying its corporate tax regimes, or is there any other follow-up envisaged?
– What is/should be the role of tax policy in government of Bermuda's strategy to attract investors?
– What are your intentions as regards the BEPS works at OECD? Do you already discuss or foresee action at government level, for example, on the implementation of the exchange of information system by September 2017?
– Are you aware/conscious that some of your tax practices may be or have been harmful for some of your European partners? Is this issue debated in the public?
– Where would you set the limit between healthy and harmful competition, and how would you consider Bermuda's role in this regard?
– What role do you see for the OECD to lead on the coordination of corporate tax policies internationally, also beyond the BEPS?

Introduction

- In Bermuda there are no taxes on profits, dividends or income; capital gains tax, withholding tax and sales tax. The main tax impinging on companies is **payroll tax**: under the Payroll Tax Act 1995, the tax is charged on every employer and self-employed person at the standard rate. From the Bermuda Tax Commissioner's perspective, entities that are incorporated in Bermuda are not considered to be resident in the country unless they have resident employees subject to the Bermuda Payroll Tax.

- Companies incorporated in Bermuda are either local companies, of which 60% of ownership and directors must be Bermudian, or exempted companies which can be entirely owned by non-Bermudians and which companies are also exempt from any exchange controls.

- Bermudian Local and Bermuda Exempted companies (i e Bermudian companies) are required to maintain a shareholder register in Bermuda. The Registrar is provided with ownership information upon the initial registration of Bermudian companies. Since October 2012, permit companies are required to report to the Exchange Controller the identity of persons who beneficially own 10% or more of their capital, unless their shares are listed on a recognized stock exchange or they have appointed a licensed CSP as their principal representative[1].

- The Bermuda government has extended the tax exemption granted to Bermuda companies under the Exempt Undertakings Act of 1976 from 28 March 2016 until 2035. The extended Undertaking provides protection to companies from any newly enacted taxes on income or capital gains until 2035. Existing companies are required to apply for the tax exemption extension (Source: Pwc - Worldwide Tax Summaries Corporate Taxes 2014/15).

- Every exempted company is obliged to provide to the Regisrar of Companies a declaratin, as to the company's principal business and its assessable capital togehter with the appropriate fee payable.[2] Exempted companies are generally owned by non-Bermudans, and they are subject to annual company fees, based on share capital levels as follows:

Annual Company fees based on share capital levels (2013)

	Assessable capital of the exempted company (BMD)	Annual company fee (BMD)
1)	$0 - $12,000	$1,995
2)	$12,001 - $120,000	$4,070
3)	$120,001 - $1,200,000	$6,275
4)	$1,200,001 - $12,000,000	$8,360
5)	$12,000,001 - $100,000,000	$10,455
6)	$100,000,001 - $500,000,000	$18,670
7)	$500,000,001 or more	$31,120

[1] Peer Review Report – Phase 2 – BERMUDA © OECD 2013
[2] For the purposes of the Companies Act 1981, an exempted company means a local company that does not comply with the requirements of the Companies Act 1981. Sources: www.bma.com and http://www.pwc.com/gx/en/tax/corporate-tax/worldwide-tax-summaries/downloads.jhtml

- When the EU implemented its European Savings Tax Directive (2005) Bermuda was missed out since it did not sign any agreement. Bermuda was not among the jurisdictions included in the taxation agreements, but potential issues emerged. The directive was thought to be problematic for Bermuda-domiciled funds in certain situations, depending on the location of the paying agent and the investors. There was also cause for concern regarding the manner in which certain countries had applied their 'home rules' to give effect to the directive.

- Bermuda, the Cayman Islands, and the Bahamas have a tax rate of 0 per cent. Ireland has a corporate tax rate of 12.5 percent, Switzerland 17.92 percent, and Luxembourg a local rate of 29.22 percent, according to KPMG Global data (see table below)

Foreign - Exchange controls

Exempted companies and permit companies are designated as non-resident for exchange control purposes. The non-resident designation allows these entities to operate free of exchange control regulation and enables them, without reference to the Bermuda Monetary Authority, to make payments of dividends, distribute capital, open and maintain foreign bank accounts, maintain bank accounts in any currency and purchase securities. However, the issuance and transfer of shares and the change of beneficial ownership of shares in a Bermuda exempted company must be approved by the Bermuda Monetary Authority. The remittance and repatriation of funds by exempted companies and permit companies are not subject to exchange controls. Similarly, trust settlements on behalf of non-residents are generally free from exchange controls. Under the Exchange Control Act 1972 and the Exchange Control Regulations 1973, certain exchange controls apply to Bermuda residents and to local companies. No capital or exchange control regulations apply to non - residents.

Offshore Legal and tax Regimes

The term 'offshore' is not used in Bermudian legislation or in describing company forms. Non-residence is the key criterion for obtaining exemption from the statutory requirement for 60% local ownership. Since there are no corporate taxes other than employee-related taxes, which apply to all companies, there is no separate 'offshore' sector as such. Offshore operations may take place within the following forms:

- Exempt Limited Liability Company
- Permit Company
- Exempt Partnership
- Limited Partnership
- Overseas Partnership
- Trust
- Segregated Accounts Companies

Bermuda tax Information Exchange Agreements

- December 2005: Bermuda's House of Assembly voted to approve new legislation facilitating the exchange of tax information with other nations in a bid to cooperate in the stamping out of international tax evasion.

- In December 2007, the UK and Bermuda finally exchanged letters setting up an arrangement for the exchange of tax information, which followed three years of discussions between the two governments.

- In 2009, Bermuda signed 8 new tax information exchange agreements, with 7 Nordic economies – Denmark, Sweden, Finland, Greenland, Iceland, Norway and the Faroe Islands and with New Zealand, bringing the number of agreements it holds to eleven. It had previously signed agreements with Australia, the United Kingdom and the United States. Bermuda's EOI arrangements are incorporated into domestic law by the USA Bermuda Tax Convention Act 1986 in respect of its EOI agreement with the USA, and under the International Cooperation Act in respect of its EOI agreements with other jurisdictions. Bermuda has concluded and signed 35 further agreements, amongst others with Bahrain, Qatar, South Africa and the Seychelles. The confidentiality of information (protection the disclosure of certain types of information, including information subject of attorney client privilege or business and professional secrets) exchanged with Bermuda is protected by obligations imposed under its EOI agreements as well as domestic legislation Under Bermuda's domestic law.

- Bermuda was one of the first jurisdictions to commit to the international standards of transparency and exchange of information in May 2000, and one of 11 jurisdictions that contributed to the development of the Model Agreement on Exchange of Information in Tax Matters in 2002[3]. The Convention on Mutual Administrative Assistance in Tax Matters provides for the automatic exchange of information. Competent Authorities from 61 jurisdictions have signed a multilateral agreement under Article 6 of the Convention. The competent authority agreement implements the Standard for automatic exchange, specifying the details of what information will

[3] Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so In Bermuda, the legal authority to exchange information derives from tax information exchange agreements once these become part of the Bermuda's domestic law.

be exchanged and when. While the agreement is multilateral, the actual exchanges are bilateral. Bermuda has intended its first information exchange by September 2017 under OECD BEPS initiative.

- The latest agreements mark a further acceleration in international efforts to implement the standards developed by the OECD's Global Forum on Transparency and Exchange of Information[4], which brings together both OECD and non-OECD economies to review issues relating to the implementation of international standards in these areas. Effective exchange of information requires the availability of reliable information In particular, it requires information on the identity of owners and other stakeholders, as well as accounting information on the transactions carried out by entities and arrangements.

Tax good governance in the world as seen by EU countries

A number of EU Member States assess how countries and territories around the world apply standards of tax good governance (transparency, exchange of information, and fair tax competition). The criteria (partly common and partly their own) used by the relevant EU countries in their assessment are available: http://ec.europa.eu/taxation_customs/resources/images/taxation/gen_info/good_governance_matters/lists_of_countries/tax_criteria.png.

The Commission amends the list at least once a year to reflect changes to Member States' national lists.

In December 2014, Bermuda is listed by the following Member States:

- Belgium
- Bulgaria
- Croatia
- Estonia
- Greece
- Italy
- Latvia
- Lithuania
- Poland
- Portugal
- Spain

[4] The international standard, which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information (EOI) partners (Source: BERMUDA © OECD 2013).

Annexes

1. CV of Bob Richards
2. "Bermuda Officials in Talks with European Union", bernews.com
3. "Bermuda and Jersey no longer considered tax havens in France", euractiv.com
4. Bermuda PKF Tax Guide
5. Bermuda PwC Tax Summary
6. "From the Double Irish to the Bermuda Triangle", Joseph P. Brothers

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Annex 1

The Hon. Everard Bob Richards, JP, MP

Deputy Premier & Minister of Finance

The Hon. Everard Bob Richards was born and raised in Bermuda attending Purvis School the Central School and the Berkeley Institute. He attained his Bachelors in Economics at Waterloo Lutheran University in Ontario, Canada. Mr. Richards later attained his Bachelor of Commerce and MBA from the University of Windsor, Ontario Canada. After stints with two Canadian banks in Toronto, he returned to Bermuda where he joined the Bermuda National Bank as Assistant Manager of Credit. In 1978 he joined the Bermuda Monetary Authority (BMA), where he worked as an economist and ultimately as General Manager in charge of research and investment of Bermuda's official foreign exchange reserves, consisting of fixed income securities. During his tenure at the BMA, he completed courses at the IMF Institute in Washington D.C. on international balance of payments methodology and at the Federal Reserve Bank of New York on international investments for central bankers. He was a delegate at the Annual General Meeting of the Bank for International Settlements in Basle, Switzerland.

In 1983 Bob became an Investment Manager for Shell Trust Bermuda Ltd. where the Royal Dutch Shell Group domiciled their pension funds for overseas employees. There he successfully managed an international investment fund of about $1 billion and developed the most sophisticated computer tracking, analytical and order execution systems available in the Island. In 1987 he founded Bermuda Asset Management, Ltd. (BAM) as the first independent investment company in Bermuda. In 1995 BAM became affiliated with INVESCO. He was appointed General Manager of INVESCO Global Asset Management Ltd. and a Partner in Amvescap PLC., the ultimate parent of INVESCO. In 1999 INVESCO left Bermuda and BAM reverted to being a family business. In 1997 Bob Richards was appointed to the Bermuda Senate. He served as Government Leader in the Senate and Minister of Telecommunications. During his tenure he negotiated the de-monopolization of the telecommunications industry on the Island, a first for any Island economy. Bermuda's overseas telephone rates have fallen over 90% since de-monopolization.

Mr. Richards has also served on many other public sector boards including the Bermuda Hospitals Board, the Bermuda Monetary Authority, the Public Funds Investment Committee, the Bermuda Association of Securities Dealers, and the Economic Council. He was reappointed to the Senate in 2004. In 2007 Bob Richards was elected a Member of Parliament and since then has served as Shadow Minister of Finance. He currently is Deputy Chairman of Cellular One Bermuda, President of Bermuda Information Technology Services Ltd. He is also a Fellow of the Institute of Canadian Bankers and is married with two sons. Email: brichards@parliament.bm

Annex 2

http://bernews.com/2015/04/bermudas-case-taken-european-community/

Bermuda Officials In Talks With European Union

April 8, 2015 | 16 Comments

Bermuda officials have been in talks with European Union authorities on policy matters of mutual interest, the Government said today, adding that "high on the list of priorities are impending EU laws that may disadvantage Bermuda's insurers and reinsurers."

"But if Bermuda's quest for equivalence with Europe's Solvency II Directive is successful, it would allow Bermuda insurers and reinsurers to retain access to EU markets when new harmonization rules come into effect in 2016," a spokesperson said.

"Deputy Premier and Minister of Finance Bob Richards last month completed a third visit to Brussels and returns there in June to again constructively engage European representatives.

"During the most recent trip, meetings were held with officials from all three EU institutions [the European Commission, The Presidency of the Council of the EU and the European Parliament], as well as with the UK Permanent Representation, and, representatives of the European insurance industry.

"Minister Richards said he felt positive about the meetings, but noted the discussions underscored the continuing work Bermuda must do to ensure it is seen as separate from jurisdictions being targeted as "tax havens".

The Minister said, "During some of these meetings, we felt it necessary to emphasize Bermuda's contribution to the global and EU economies through our insurance and re-insurance sectors.

"Many of these policy makers know the history of Bermuda's adherence to international best practices. But there will always be those who don't. We have to continue telling our story.

"The international climate can be hostile. There are those blaming small countries for the problems facing their economies. We must make our case that Bermuda is unique and there is need for a differentiation in the treatment of smaller island jurisdictions.

"Bermuda has always been ahead of the curve on compliance in tax, financial regulation, transparency and international cooperation. Bermuda's first TIEA [Tax Information Exchange Agreement] with the US dated from 1986. This was a landmark, a launching pad for re-insurance in Bermuda."

The Minister said, "Bermuda's Government, the Legislature and the financial services regulator the Bermuda Monetary Authority have been doing their part to stand on common ground with Europe on Solvency II. And much work has been done by the Association of Bermuda Insurers and Reinsurers [ABIR] in advancing the cause.

"At home, there are still further measures that we are putting in place. There are also outstanding matters that must be realized on the continent. We are in Brussels again in June, where we believe the "Bermuda story" has largely been heard. But we cannot be complacent until we get to the finish line.

"It is clear that Solvency II equivalence for Bermuda is not just good for our companies. The Bermuda markets make an important contribution to the European and global economies.

"Over many years now, payments from Bermuda reinsurers have represented significant relief for public and private claimants in the wake of horrific disasters, including hurricanes and air disasters.

"The importance of these markets to Europe and the world is unquestioned. Our support for them is imperative."

Annex 3

Bermuda and Jersey no longer considered tax havens in France

http://www.euractiv.com/euro-finance/bermuda-jersey-longer-considered-news-532933
23 Jan 2014

The French government's decision to remove Jersey and Bermuda from the tax havens blacklist has angered a large part of the French political class, from left to right.

Officials at the French finance ministry are breathing a sigh of relief, hoping that telephone calls from distressed bankers and insurers enquiring about the "Jersey" file will cease.

The ministry made its final decision regarding Jersey. The small island will no longer be considered a tax haven, according to a decision published in the official journal on 19 January. Money transfers between France and Jersey will no longer be taxed at 60% or more as of September 2014.

Paris blacklisted Jersey and Bermuda last August, only to remain there for four months, as EurActiv France wrote at the beginning of January.

The creation of "black lists" for tax havens is an answer to a European recommendation made in 2012. In May 2013, the European parliament's economic and monetary committee also requested that the European Commission establish a common EU list of tax havens. In the meantime, each country is preparing its own list.

Legal issue

Pierre Moscovici, French finance minister, claims the issue has to be seen from a legal standpoint.

"The criteria of the French list are legal criteria based on fiscal co-operation with France: it would be illegal to keep on this list states that do not fulfill the criteria anymore," Moscovici said.

But not everyone in France shares this opinion, notably Elisabeth Guigou, the president of the French parliament's foreign affairs committee, and Christian Eckert, general rapporteur for the finance committee.

They issued a common statement: "The inclusion on this list entails a hardened tax regime for operations from France with people and companies established there [in the islands]."

"In the view of the recent work of the OECD's Global Forum on Transparency … such a withdrawal is not justified. Neither Jersey nor Bermuda have obtained an overall rating justifying withdrawal," the MPs stressed, adding that "the list of non-cooperative states established by decree automatically excludes any member country despite the reality of fiscal particularities in the EU."

The Green party said it was "surprised" that in times of austerity this "important source of income" could be ignored.

For the Greens, Jersey and Bermuda should be brought back to the list. They also want the anti-fraud provisions that were introduced by the MPs in the draft law and then withdrawn by the Consitutional court be reintroduced as soon as possible in a proper law.

'Surreal' decision

Nicolas Dupont-Aignan, a hardline right-wing French conservative, "wonders whether they've gone mad".

"It is surreal to consider Jersey as something other than a tax haven. It makes you wonder if it's not the banks that govern," the MP said, adding that he wanted to make tax evasion a central topic of the EU elections in May.

The anti-corruption association, Anticor, sent a letter to the finance minister requesting that the ministry expose the motives of its decision.

"In the period of economic and social tension such as the one we are experiencing, French citizens are extremely sensitive to tax justice issues. Laxity against non-cooperative jurisdictions would be unacceptable and even more if it is linked to the intervention of banks, which everyone knows are well established in those territories," their letter says.

PKF

Bermuda Tax Guide

2013

FOREWORD

A country's tax regime is always a key factor for any business considering moving into new markets. What is the corporate tax rate? Are there any incentives for overseas businesses? Are there double tax treaties in place? How will foreign source income be taxed?

Since 1994, the PKF network of independent member firms, administered by PKF International Limited, has produced the PKF Worldwide Tax Guide (WWTG) to provide international businesses with the answers to these key tax questions. This handy reference guide provides clients and professional practitioners with comprehensive tax and business information for over 90 countries throughout the world.

As you will appreciate, the production of the WWTG is a huge team effort and I would like to thank all tax experts within PFK member firms who gave up their time to contribute the vital information on their country's taxes that forms the heart of this publication.

I hope that the combination of the WWTG and assistance from your local PKF member firm will provide you with the advice you need to make the right decisions for your international business.

Richard Sackin
Chairman, PKF International Tax Committee
Eisner Amper LLP
richard.sackin@eisneramper.com

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PREFACE

The PKF Worldwide Tax Guide 2013 (WWTG) is an annual publication that provides an overview of the taxation and business regulation regimes of the world's most significant trading countries. In compiling this publication, member firms of the PKF network have based their summaries on information current on 1 January 2013, while also noting imminent changes where necessary.

On a country-by-country basis, each summary addresses the major taxes applicable to business; how taxable income is determined; sundry other related taxation and business issues; and the country's personal tax regime. The final section of each country summary sets out the Double Tax Treaty and Non-Treaty rates of tax withholding relating to the payment of dividends, interest, royalties and other related payments.

While the WWTG should not to be regarded as offering a complete explanation of the taxation issues in each country, we hope readers will use the publication as their first point of reference and then use the services of their local PKF member firm to provide specific information and advice.

In addition to the printed version of the WWTG, individual country taxation guides are available in PDF format which can be downloaded from the PKF website at www.pkf.com

PKF INTERNATIONAL LIMITED
MAY 2013

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Please visit www.pkf.com for more information.

STRUCTURE OF COUNTRY DESCRIPTIONS

A. TAXES PAYABLE

FEDERAL TAXES AND LEVIES
COMPANY TAX
CAPITAL GAINS TAX
BRANCH PROFITS TAX
SALES TAX/VALUE ADDED TAX
FRINGE BENEFITS TAX
LOCAL TAXES
OTHER TAXES

B. DETERMINATION OF TAXABLE INCOME

CAPITAL ALLOWANCES
DEPRECIATION
STOCK/INVENTORY
CAPITAL GAINS AND LOSSES
DIVIDENDS
INTEREST DEDUCTIONS
LOSSES
FOREIGN SOURCED INCOME
INCENTIVES

C. FOREIGN TAX RELIEF

D. CORPORATE GROUPS

E. RELATED PARTY TRANSACTIONS

F. WITHHOLDING TAX

G. EXCHANGE CONTROL

H. PERSONAL TAX

I. TREATY AND NON-TREATY WITHHOLDING TAX RATES

AT 12 NOON, GREENWICH MEAN TIME, THE STANDARD TIME ELSEWHERE IS:

A
Algeria . . . . 1 pm
Angola . . . . 1 pm
Argentina . . . . 9 am
Australia -
  Melbourne . . . . 10 pm
  Sydney . . . . 10 pm
  Adelaide . . . . 9.30 pm
  Perth . . . . 8 pm
Austria . . . . 1 pm

B
Bahamas . . . . 7 am
Bahrain . . . . 3 pm
Belgium . . . . 1 pm
Belize . . . . 6 am
Bermuda . . . . 8 am
Brazil . . . . 7 am
British Virgin Islands . . . . 8 am

C
Canada -
  Toronto . . . . 7 am
  Winnipeg . . . . 6 am
  Calgary . . . . 5 am
  Vancouver . . . . 4 am
Cayman Islands . . . . 7 am
Chile . . . . 8 am
China - Beijing . . . . 10 pm
Colombia . . . . 7 am
Cyprus . . . . 2 pm
Czech Republic . . . . 1 pm

D
Denmark . . . . 1 pm
Dominican Republic . . . . 7 am

E
Ecuador . . . . 7 am
Egypt . . . . 2 pm
El Salvador . . . . 6 am
Estonia . . . . 2 pm

F
Fiji . . . . 12 midnight
Finland . . . . 2 pm
France . . . . 1 pm

G
Gambia (The) . . . . 12 noon
Germany . . . . 1 pm
Ghana . . . . 12 noon
Greece . . . . 2 pm
Grenada . . . . 8 am
Guatemala . . . . 6 am
Guernsey . . . . 12 noon
Guyana . . . . 7 am

H
Hong Kong . . . . 8 pm
Hungary . . . . 1 pm

I
India . . . . 5.30 pm
Indonesia . . . . 7 pm
Ireland . . . . 12 noon
Isle of Man . . . . 12 noon
Israel . . . . 2 pm
Italy . . . . 1 pm

J
Jamaica . . . . 7 am
Japan . . . . 9 pm
Jordan . . . . 2 pm

K
Kenya . . . . 3 pm

L
Latvia . . . . 2 pm
Lebanon . . . . 2 pm
Luxembourg . . . . 1 pm

M
Malaysia . . . . 8 pm
Malta . . . . 1 pm
Mexico . . . . 6 am
Morocco . . . . 12 noon

N
Namibia . . . . 2 pm
Netherlands (The) . . . . 1 pm
New Zealand . . . . 12 midnight
Nigeria . . . . 1 pm
Norway . . . . 1 pm

O
Oman . . . . 4 pm

P
Panama . . . . 7 am
Papua New Guinea . . . . 10 pm
Peru . . . . 7 am
Philippines . . . . 8 pm
Poland . . . . 1 pm
Portugal . . . . 1 pm

Q
Qatar . . . . 8 am

R
Romania . . . . 2 pm

Russia -
- Moscow . . . . .3 pm
- St Petersburg. . . . . .3 pm

S

Singapore . . . . .7 pm
Slovak Republic . . . . .1 pm
Slovenia . . . . .1 pm
South Africa. . . . . .2 pm
Spain . . . . .1 pm
Sweden. . . . . .1 pm
Switzerland . . . . .1 pm

T

Taiwan .8 pm
Thailand . . . . .8 pm
Tunisia . . . . 12 noon
Turkey. .2 pm
Turks and Caicos Islands . . . . . . .7 am

U

Uganda .3 pm
Ukraine .2 pm
United Arab Emirates . . . . .4 pm
United Kingdom . . . .(GMT) 12 noon
United States of America -
- New York City. . . . . .7 am
- Washington, D.C. . . . . .7 am
- Chicago. . . . . .6 am
- Houston. . . . . .6 am
- Denver . . . . .5 am
- Los Angeles. . . . . .4 am
- San Francisco . . . . .4 am

Uruguay . . . . .9 am

V

Venezuela . . . . .8 am

Z

Zimbabwe . . . . .2 pm

BERMUDA

Currency: Bermuda Dollar (BD$) at par with USD

Dial Code To: 1441

Dial Code Out: 011

Correspondent Firm:

City: Hamilton

Name: Dudley R Cottingham

Contact Information: 292 7478 drc@cml.bm

A. TAXES PAYABLE

FEDERAL TAXES AND LEVIES

COMPANY TAX

Companies incorporated in Bermuda are either local companies, of which 60% of ownership and directors must be Bermudian, or exempted companies which can be entirely owned by non-Bermudians and which companies are also exempt from any exchange controls.

Bermuda companies pay no tax on income or capital gains.

All companies are subject to annual company fees, based on share capital levels as follows

Exempted companies	Fee
US $ Equivalent	US $
Up to 12,000	1,995
12,001 – 120,000	4,070
120,001 – 1,200,000	6,275
1,200,001 – 12,000,000	8,360
12,000,001 – 100,000,000	10,455
100,000,001 – 500,000,000	18,670
500,000,001 and above	31,120

Where the exempted company's business includes the management of any unit trust scheme, the fee will be US $2,905 in respect of each unit trust scheme managed by the company.

Where the exempted company is one limited by guarantee, but is not a mutual company, the fee will be US $1,995.

Local companies (BD$)	BD$
Up to 50,000	650
50,000 – 250,000	970
250,000 – 500,000	1,620
500,000 – 1,000,000	3,225
1,000,000 – 5,000,000	6,445
5,000,000 – 10,000,000	12,275
500,000,001 and above	18,410

CAPITAL GAINS TAX

There is no capital gains tax in Bermuda.

BRANCH PROFITS TAX

There is no branch profits tax in Bermuda. Non-Bermudian companies who wish to establish a place of business in Bermuda will require a permit to do so and the company will then be subject to an annual company fee which is currently US $1,995

for general companies. Where the company's principal business is raising money from the public by the issue of bonds or other securities or insurance business or open-ended mutual fund business, the fee is US $4,125. If the business of the company includes the management of any unit trust scheme, the fee is US $2,905 in respect of each unit trust scheme managed by the company.

SALES TAX/VALUE ADDED TAX (VAT)

There are no sales taxes or value added taxes in Bermuda. Certain goods are subject to a customs duty which is payable upon entry in Bermuda.

B. DETERMINATION OF TAXABLE INCOME

This is not applicable as there are no taxes on income.

C. FOREIGN TAX RELIEF

This is not applicable as there are no double taxation arrangements because there is no taxation on income in Bermuda.

D. CORPORATE GROUPS

There is no group tax relief legislation as there are no taxes on income or capital gains.

E. RELATED PARTY TRANSACTIONS

There is no transfer pricing or related party legislation in Bermuda.

F. WITHHOLDING TAX

There are no withholding taxes in Bermuda.

G. EXCHANGE CONTROL

Exempted companies which can be entirely beneficially owned by non-Bermudians and who trade or operate from Bermuda, but not in Bermuda, are entirely exempt from any exchange controls. Exchange control regulations which have applied for some time to Bermudian local and/or Bermudian owned companies, are now being dismantled.

H. PERSONAL TAX

There are no income taxes or capital gains taxes on individuals in Bermuda.

PAYROLL TAX

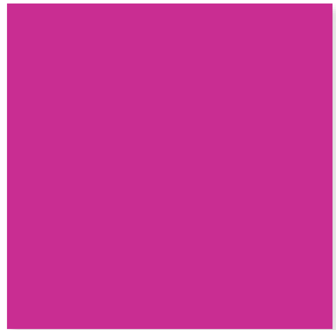
Both employers and employees are subject to payroll tax if they carry on a business or profession in or from Bermuda. Employers deduct the employee's contributions from their salary. With some exceptions, the rates are as follows:

Employer has an annual payroll of:	Tax rate
BM$ to 200,000	7.25%
BM$ 200,000 – 500,000	10.75%
BM$ 500,001 – 1,000,000	12.75%
over BM$ 1,000,000	14.00%
Exempt undertakings	14.00%

Provided an employee is on the payroll at the end of the tax period and worked for the employer for at least 180 hours during the quarter, a special relief is available in respect of that employee, equal to BM$ 600 per employee per quarter. The payroll tax payable in respect of that employee must not be less than 5.75% of their gross remuneration.

I. TREATY AND NON-TREATY WITHHOLDING TAX RATES

No withholding tax is payable in Bermuda.



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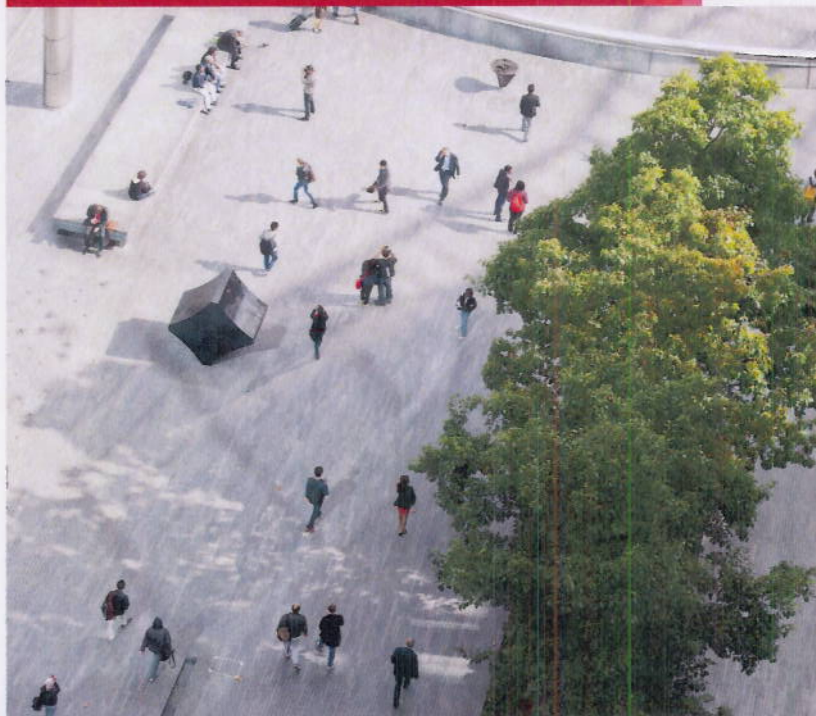

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Bermuda

B

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Significant developments

The Bermuda government has extended the tax exemption granted to Bermuda companies under the Exempt Undertakings Act of 1976 from 28 March 2016 until 2035. The extended Undertaking provides protection to companies from any newly enacted taxes on income or capital gains until 2035. Existing companies are required to apply for the tax exemption extension.

Taxes on corporate income

Income tax and taxes on capital gains are not imposed on corporations in Bermuda.

Corporate residence

From the Bermuda Tax Commissioner's perspective, entities that are incorporated in Bermuda are not considered to be resident in the country unless they have resident employees subject to the Bermuda Payroll Tax.

Other taxes

Value-added tax (VAT)
There is no VAT or sales tax in Bermuda.

Customs duties
Customs duties are imposed on almost all goods arriving on the island at varying rates.

Excise taxes
There are no excise taxes imposed in Bermuda.

Property taxes
A land tax is imposed on all developed land throughout Bermuda, with certain exceptions. The tax is assessed on the annual rental value (ARV) of each valuation unit, depending on whether such unit is a private dwelling or any other dwelling. The owner of the valuation unit is liable for the land tax.

A progressive scale of tax rates ranges between 0.6% and 23% based on the ARV of the unit, while commercial properties are taxed on a single rate of tax of 4.4%.

Transfer taxes
There is no transfer tax imposed in Bermuda.

Stamp taxes
Bermuda does impose a stamp duty on certain types of legal instruments; however, exempt companies are not subject to stamp duty.

Social insurance
If an employer has employees in Bermuda for 26 or more weeks in a calendar year, the employer will have to register and obtain an account number from the Department of Social Insurance (DSI) (unless previously registered) and pay social insurance tax for its employees. At the same time, the employer must also apply for and obtain from the DSI a social insurance number for each employee, which is required to pay social insurance. Once the employer has registered for a social insurance account number and the employees have obtained social insurance numbers, the DSI will automatically send an electronic print-out to the employer with an itemised list of employees as well as the amount of social insurance tax due for the month. Under certain facts and circumstances, the employer may also file an Employee Amendment Form, which shows any change in status (i.e. termination or unpaid leave) of employees that could affect the amount of social insurance tax due.

The amount of social insurance tax due is calculated as 64.14 Bermudian dollars (BMD) per employee per week, with the employer and employee each paying half of the liability (or BMD 32.07). The employer must pay and remit monthly (for all employees), to the DSI, the total social insurance tax due per employee. The amount of social insurance tax due per month is based on the number of Mondays in the month and must be paid by the end of the following month. Employed persons over the age of 65 are not required to pay their half (BMD 32.07). The employer continues to pay their half (BMD 32.07).

Payroll tax
Under Section 3 of the Payroll Taxes Act 1995, an employer (viewed as the entity that has control over an individual's remuneration) is required to remit payroll taxes (currently 14% on all remuneration paid or given, up to a maximum compensation of BMD 750,000) for each of its employees whose employment in Bermuda exceeds four consecutive weeks in a calendar year (whether or not with one or more employers). If an employee's stay in Bermuda is for a period of less than four consecutive weeks, the employer is not obligated to remit the payroll taxes.

Once an employee's service period in Bermuda has exceeded four consecutive weeks, the employer must register the employee with the Office of the Tax Commissioner (OTC). The employer must obtain a payroll tax account number by filing an application with the OTC, if no previous account exists for such employee. The application must be filed within seven days after the end of the quarterly tax period (the four quarters end on 1 January, 1 April, 1 July, and 1 October) in which the employee's stay exceeded four consecutive weeks. A payroll tax return and remittance of tax must be filed with the OTC 15 days after the end of each quarterly period (i.e. 15 January, 15 April, 15 July, and 15 October). A return is due only when an employee's stay exceeds four consecutive weeks in a tax period. The employer may recover from the employee a maximum of 5.25% of the 14% payroll tax, and the employer is allowed an exemption of BMD 600 (of remuneration paid) per employee for each quarterly tax period. Penalties for tax returns filed late are 5% of the payroll tax due for each month (or part thereof) that the tax return is late (with a maximum of 30%).

Compensation subject to the payroll tax under the Payroll Taxes Act includes all remuneration paid or given to the employee. Remuneration includes:

- Wages, salary, leave pay, commission, gratuity, fee, bonus, perquisite, or allowance.
- Money paid under a profit-sharing scheme.
- Money or anything of value paid or given to an employee or ex-employee in connection with the permanent termination of employment.

- Any amount paid with respect to a retirement or provident fund, scheme, or society, or under a hospital or health insurance scheme.
- The value of meals, boarding, lodging, or other benefit of any kind, whether provided in cash or otherwise.
- The rental value of any place of residence provided rent-free, or the difference between the rent paid and the rental value if the rent paid is lower than the rental value.
- Any gain on the exercise or right to acquire company stock based on services rendered.

All employers or self-employed persons are required to report remunerations up to a maximum of BMD 750,000 per annum per employee, deemed employee, or self-employed person. There is no payroll tax on remunerations above BMD 750,000.

Please note that the Payroll Taxes Act is extremely broad in its definition of remuneration. Therefore, a Bermuda employer should take caution when calculating the amount of remuneration paid to an employee.

Annual company fee

Every exempted company shall, in the month of January, forward to the Registrar of Companies a declaration, signed on behalf of the company, as to the company's principal business and its assessable capital together with the appropriate fee payable. For the purposes of the Companies Act 1981, an exempted company means a local company that does not comply with the requirements of the Companies Act 1981. Exempt companies are generally owned by non-Bermudans.

Assessable capital of the exempted company (BMD)	Annual company fee (BMD)
0 to 12,000	1,995
12,001 to 120,000	4,070
120,001 to 1,200,000	6,275
1,200,001 to 12,000,000	8,360
12,000,001 to 100,000,000	10,455
100,000,001 to 500,000,000	18,670
500,000,001 or more	31,120

Corporate services tax

A 4% corporate service tax is imposed on a provider of corporate services in respect of gross earned revenue derived from an exempted undertaking for taxable corporate services provided during a tax period. Corporate services include corporate administrative services, corporate management services, corporate secretarial services, the provision of a registered office, the performance of functions in the capacity of director or resident representative, and the provision of accounting and/or financial services.

Hotel occupancy tax

A 7.25% tax is imposed on revenue received from hotels and other forms of accommodation.

Betting duty

There is a betting duty charge of 20% imposed on all bets made, received, or negotiated by a person licensed under the Betting Act of 1975.

Branch income

Branches are treated the same as other corporations doing business in Bermuda.

Income determination

Since income taxes are not imposed on corporations in Bermuda, income determination is not relevant in the context of Bermuda taxation.

Deductions

Since income taxes are not imposed on corporations in Bermuda, deductions from income are not relevant in the context of Bermuda taxation.

Group taxation

Since income taxes are not imposed on corporations in Bermuda, group taxation is not relevant in the context of Bermuda taxation.

Tax credits and incentives

Bermuda offers no specific tax incentives.

Withholding taxes

There are no withholding taxes in Bermuda.

Tax administration

Since income taxes are not imposed on corporations in Bermuda, tax returns are not required to be completed for corporate income tax compliance purposes. *For information regarding tax returns, due dates, and the payment of tax for non-income taxes imposed in Bermuda (e.g. Social insurance and Payroll tax), please see the Other taxes section.*

Other issues

Foreign exchange controls

Exempt companies and permit partnerships are considered as non-residents for exchange control purposes. This allows these entities to make dividend payments, distribute capital, open and maintain foreign bank accounts, maintain bank accounts in any currency, and purchase securities.

There is a Foreign Currency Purchase Tax imposed at the rate of 1% on foreign currency purchased by a resident from a local bank.

Tax treaties

There are no tax treaties between Bermuda and other nations due to the fact that Bermuda does not impose direct taxes. However, Bermuda has a double taxation agreement (DTA) with the Kingdom of Bahrain and a limited tax treaty with the United States, which only applies to 'enterprises of insurance'. Bermuda also has

tax information exchange agreements (TIEAs) with the following 24 countries: Aruba, Australia, Canada, China, Denmark, Faroe Islands, Finland, France, Germany, Greenland, Iceland, India, Ireland, Italy, Japan, Mexico, Netherlands, Netherlands Antilles, New Zealand, Norway, Portugal, Sweden, the United Kingdom, and the United States.

Under certain circumstances, the United States-Bermuda Tax Treaty provides for relief from taxation of insurance business profits. The business profits of a Bermudian insurance company will not be taxed in the United States unless a company has a permanent establishment (PE) in the United States. The United States-Bermuda Tax Treaty also provides for mutual assistance on tax matters. The purpose of a mutual assistance provision is to prevent or decrease tax avoidance. The Unites States also believed that having a tax treaty with Bermuda would be beneficial for United States-Bermuda diplomatic relations.

Bermuda's DTA with the Kingdom of Bahrain includes a provision for the full exchange of information on criminal and civil tax matters, consistent with the internationally agreed standard for transparency and the exchange of information for tax purposes set by the Organisation for Economic Co-operation and Development (OECD).

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FEATURED PERSPECTIVES

From the Double Irish to the Bermuda Triangle

by Joseph P. Brothers

Joseph P. Brothers is an associate with Caplin & Drysdale in Washington.

The ''double Irish'' tax planning strategy employed by Apple and other multinational companies has been in the mainstream press of late, as has the challenge brought by the European Union. This article explains how the strategy works, the gist of the EU position, and the reaction of the Irish government.

Recently, the EU's antitrust and competition regulators have criticized aspects of the so-called double Irish arrangement, suggesting that some details of this scheme constitute unlawful state aid from the Republic of Ireland to Apple in contravention of article 107(1) of the Treaty on the Functioning of the European Union (TFEU). The investigation relates specifically to Apple, but similar complaints could be lodged against many other firms who employ the scheme (or parts of it).

This article is divided into four parts. Section I describes the mechanics, beginning with a generalized ''double Irish Dutch sandwich'' avoidance structure. At each stage, the ways in which Apple's use of the double Irish structure differs from the typical arrangement are identified. Section II articulates the basic elements of the state aid doctrine under EU competition law and how it is relevant to the current controversy. It also describes and analyzes the EU's investigation of Apple. Section III describes measures recently undertaken by Ireland's Finance Ministry in response to the criticism. Section IV is devoted to commentary.

In brief, the Irish Finance Department's decision to toughen Ireland's idiosyncratic corporate residency determination rules is unlikely to significantly impede the basic mechanics of the strategy or to allay the EU's concerns. The double Irish structure depends most crucially on the U.S. check-the-box entity classification rules to create a hybrid entity mismatch arrangement, as well as the cost-sharing provisions of Treas. reg. section 1.482-7.

At its most basic level, the point of the structure is simply to shift income from an Irish operating subsidiary into a holding company located in a zero-tax jurisdiction, while also avoiding inclusions to the U.S. parent that might result from outbound intellectual property transfers. From the U.S. perspective, the operating subsidiary is disregarded under the check-the-box regime so that the cash flowing into the holding company does not trigger subpart F inclusions to the U.S. parent. At the same time, the separate status of the holding company is recognized for Irish tax purposes so that these payments can be deducted against the taxable income of the Irish subsidiary. The structure depends in large part on the cost-sharing rules of Treas. reg. section 1.482-7 to avoid the possibility of deemed royalty inclusions under section 367(d) or other transfer pricing adjustments between the U.S. parent and the foreign subsidiaries.

By contrast, Ireland's current management and control test for corporate residency (the rule behind the double Irish neologism) plays a much smaller role in the structure compared with the other elements. It also has attracted outsized media and regulatory attention compared with the more important factors. It appears that the EU is attacking the wrong target. It is focusing on Irish domestic tax law, when the real culprits, if any exist, are:

- the U.S. check-the-box rules;
- the U.S. cost-sharing safe harbor under Treas. reg. section 1.482-7; and

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- the general international tax principle that wholly owned shell entities located in tax havens (regardless of whether the term ''located'' means incorporated, managed, or something else) should be respected as economically independent entities rather than mere instrumentalities of their parent companies or overall corporate groups.

Accordingly, the Irish Finance Department's response (changing Ireland's corporate residency rules so that the double Irish may give way to the Irish-Bermuda) will likely prove unsatisfactory to the EU.

I. Mechanics of the Strategy

This section describes in broad terms a generalized or prepackaged double Irish or double Irish Dutch sandwich structure, and at each stage describes whether and how Apple's specific structure differs from this generalized model.

A. A Generalized Structure

A typical version of the double Irish or the double Irish Dutch sandwich structure involves at least three or four business entities. The group's top level parent is usually tax resident in the United States. In Step 1, the parent entity forms a wholly owned entity organized under the laws of Ireland but managed and controlled in a tax haven such as Bermuda (hereinafter ''Ireland HoldCo''). In Step 2, Ireland HoldCo forms another wholly owned entity at a level one tier below, which is organized, managed, and controlled in Ireland (hereinafter ''Ireland OpCo''). The lowest level operating entities are sometimes (as in Apple's case) branches or permanent establishments of Ireland HoldCo rather than separately incorporated subsidiaries (that is, ''Ireland Operating PE'' or ''Ireland Operating Branch'' rather than Ireland OpCo). But in most cases the operating entities are separately incorporated, wholly owned, Irish-registered, and Irish-controlled companies. Apple is also unique in that its version of Ireland HoldCo (the intermediate level, tax haven resident entity) is not resident in Bermuda but rather is resident ''nowhere.'' This article explains below how this subsidiary, Apple Operations International (AOI), avoids filing a residence-based tax return in any jurisdiction, in addition to skirting inbound tax obligations in any jurisdiction.

Many businesses have recently added another step to the structure. Ireland HoldCo, rather than directly forming Ireland OpCo, forms a Dutch holding entity (Netherlands HoldCo). Netherlands HoldCo, in turn, forms Ireland OpCo.

Regarding actual business operations, Ireland OpCo typically sells products to consumers in Europe and the Middle East and collects the corresponding gross receipts. Operating subsidiaries in other countries typically perform customer service and marketing functions (for example, ''France ServiceCo''); these entities are usually reimbursed on a cost or cost-plus basis by Ireland OpCo.

U.S. parent company and Ireland HoldCo jointly develop the IP embedded in the business's products. These entities typically enter into a cost-sharing arrangement in order to jointly fund and develop new IP (such as new software code). Under this arrangement, the U.S. parent typically retains the domestic IP rights as well as legal ownership of the IP, with Ireland HoldCo making a buy-in payment in exchange for the right to co-develop and exploit the software in the foreign marketplace. Ireland HoldCo sublicenses the foreign IP rights to Ireland OpCo in exchange for a royalty payment (in a Dutch sandwich scenario, there is an additional layer of sublicensing, this time from Ireland HoldCo to Netherlands HoldCo, and then from Netherlands HoldCo to Ireland OpCo). Ireland OpCo is responsible for manufacturing and selling digital products to customers in Europe and elsewhere.

Ireland OpCo is taxed on income from sales to European customers at the Irish ''trading income'' rate of 12.5 percent. However, the entity's taxable income base is reduced via the deductible royalty payments flowing up the corporate structure to Netherlands HoldCo or Ireland HoldCo. In Apple's case, the company's equivalent of Ireland OpCo does not actually sublicense the IP from further up the corporate chain; instead, it may simply sell its digital products with the IP embedded in its product inventory.

On the U.S. side, the parent minimizes potential subpart F inclusions by checking the box and electing to treat Ireland OpCo as a disregarded entity (along with Netherlands HoldCo, if it exists). This has the effect of:

- combining the foreign operations into a single entity so that the combined entity's manufacturing activities are substantial enough to prevent base company sales income; and
- causing the intra-entity royalty payments to be ignored, in order to avoid any foreign personal holding company income (FPHCI).

Graphically, the structure is shown in Figure 1.

B. U.S. Tax Treatment

1. Subpart F

Ireland HoldCo is typically a wholly owned subsidiary of the U.S. parent company. It therefore qualifies as a controlled foreign corporation under subpart F of the Internal Revenue Code.[1] Cognizant of Ireland HoldCo's controlled foreign corporation status, tax planners carefully craft the structure to ensure that little or none of the income flow taking place within it gives rise to foreign base company sales income (FBCSI) under IRC section 954(d) or FPHCI under IRC section 954(c).

[1] *See generally* IRC section 957.

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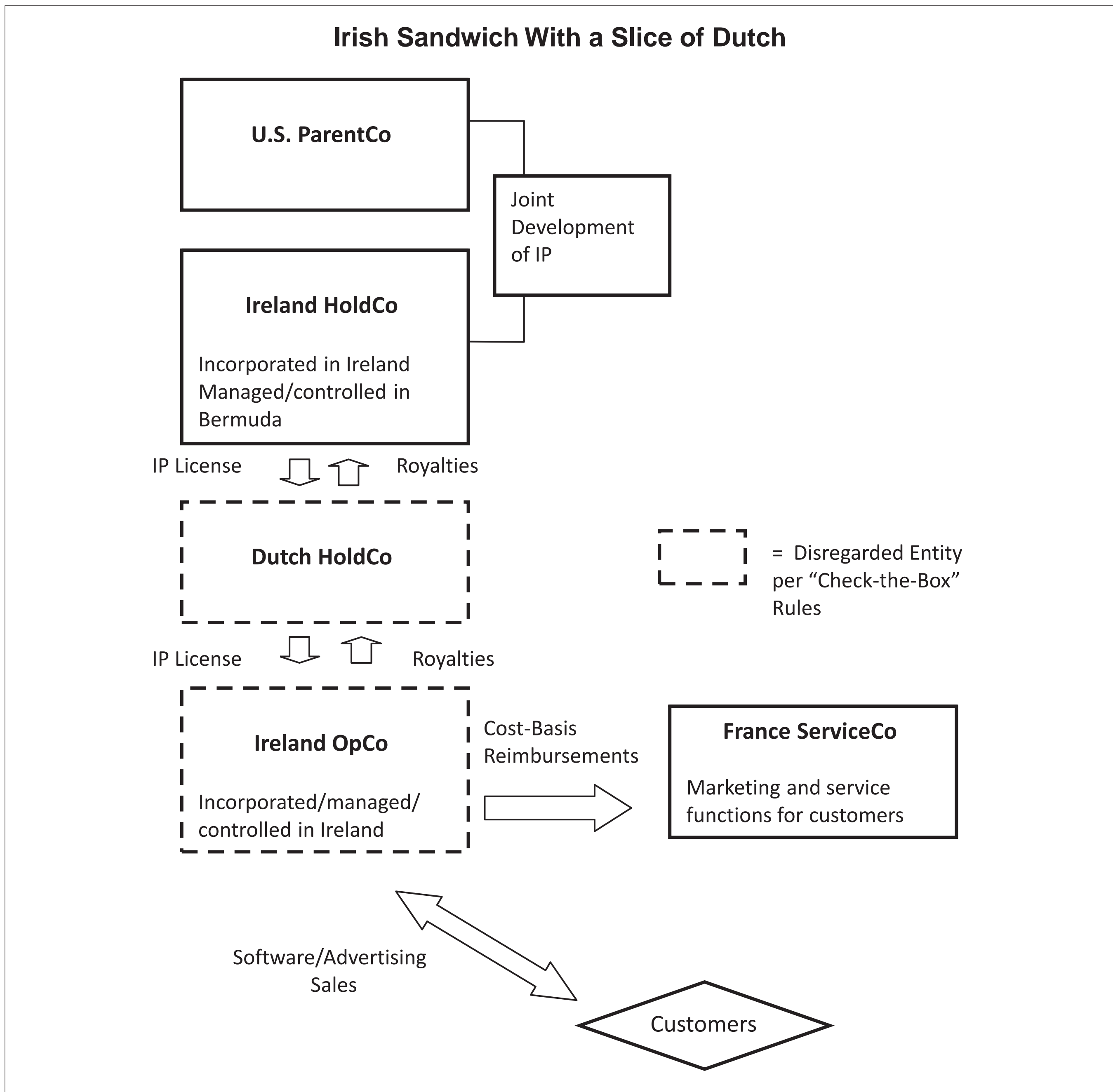

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The parent company achieves both of these objectives by electing to disregard the wholly owned Ireland OpCo (and Netherlands HoldCo conduit entity, if it exists) as separate entities for U.S. tax purposes, while retaining separate entity treatment of Ireland HoldCo.[2]

a. 'Manufacturing' activities of combined subsidiaries sufficient to avoid FBCSI. At all times during the double Irish scheme, Ireland OpCo conducts real business activity and has a tangible, physical presence in Ireland. The entity is managed and controlled in Ireland[3] and typically employs at least a handful of software engineers or other highly educated, value-adding employees. In Apple's case (and many others), Irish activities also

[2]*See generally* Treas. reg. section 301.7701-1.

[3]But not in Apple's case (Ireland Operating PE); Apple's software engineering and sales activities take place in Ireland, but the entity is managed and controlled in a tax haven jurisdiction.

include distribution and sales functions by purchasing inventory from controlled entities or third-party manufacturers and reselling them to European customers. Irish subsidiaries or branches usually participate in the joint development of new IP alongside their U.S.-based counterparts.[4]

The Ireland-based IP development activity is crucially helpful from a U.S. tax perspective, since it allows the company to credibly rely on the manufacturing exception to the FBCSI rules.[5] According to this exception, a CFC that ''substantially transforms'' the input materials into a final product or otherwise engages in activities that are ''substantial in nature'' and that are ''generally considered to constitute the manufacture, production or construction of property'' does not suffer FBCSI on the resulting sales (which would trigger income inclusions to the U.S. parent).

Treasury regulations relating to FBCSI apparently provide little guidance regarding sales of software-embedded products whose constituent components are predominantly intangible in nature. The IRS has been similarly reluctant to issue guidance on its view regarding application of the manufacturing exception in these contexts.[6] Nonetheless, firms employing the double Irish have relied on the exception in taking the position that they are not subject to the current inclusion requirements established by section 954(d).

Ireland OpCo is usually disregarded as a separately taxable entity. As such, the manufacturing activities are imputed to Ireland HoldCo, which is credited with all of the IP and software design functions that would have been limited to Ireland OpCo absent such an election.

b. Royalty payments flowing up the corporate chain are ignored, and therefore do not give rise to FPHCI. Without the election to disregard Ireland OpCo and Netherlands HoldCo as separately taxable entities, the FPHCI rules might be implicated. FPHCI might arise from Ireland HoldCo's passive receipt of royalty income from its wholly owned subsidiary Ireland OpCo or Netherlands HoldCo.[7]

However, the royalty payments are ignored for U.S. tax purposes[8] as a result of the election to disregard the lower level subsidiaries. The structure therefore gives rise to no FPHCI and thus no subpart F inclusions to the U.S. parent.

c. Same-country exception for some items of passive income (but only absent the Dutch sandwich component). FPHCI includes most forms of passive income, including royalties. However, some categories of passive income flowing to a CFC that qualify under the same country exception of section 954(c)(3) do not trigger subpart F inclusions to the U.S. parent. Interest and dividends are excluded from FPHCI if they are received from a related entity incorporated in the same country as the recipient CFC and substantially engaged in business in such country.[9] Also, rents and royalties are excluded from FPHCI if they are received from a related entity for the use of, or the privilege of using, property within the CFC's country of incorporation.[10]

Since both Ireland HoldCo and Ireland OpCo are incorporated in Ireland, and Ireland OpCo uses sublicensed IP rights (that is, ''property'') within Ireland to carry out its operations in Ireland, interest, dividend, and royalty payments from Ireland OpCo moving into Ireland HoldCo might not generally trigger subpart F inclusions even absent the check-the-box election. This rule would only matter, of course, if Ireland HoldCo were receiving payments directly from the operating subsidiary rather than through Netherlands HoldCo.

2. Avoiding Section 367(d) Deemed Royalties

A U.S. company that transfers specific items of intangible property to a foreign transferee is deemed to have sold the property in exchange for payments that are contingent upon the income generated by the property.[11] For the double Irish or the double Irish Dutch sandwich, this means that software rights transferred to Ireland HoldCo might give rise to deemed income to the U.S. parent ''commensurate with [the] income'' generated by that software.[12]

From the perspective of section 367(d), software represents an especially taxpayer-friendly form of IP in that it usually becomes obsolete not long after its initial creation. In the scheme at issue, the U.S. parent may exploit this taxpayer-friendly characteristic of software by transferring a nearly obsolete form of the code to Ireland HoldCo, then jointly developing subsequent versions alongside the Ireland HoldCo-disregarded entities group.

The U.S. parent may be required to recognize some de minimis section 367(d) income inclusions on the initial transfer, but these inclusions are usually minor because of the limited income-generating potential of that barely marketable version of the software code.

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[4]*See* Treas. reg. section 1.482-7 (discussed in more detail below).

[5]*See generally* Treas. reg. section 1.954-3(a)(4).

[6]*See generally* IRS Memorandum, Vaughan #8083 (Apr. 1, 1991) (stating that the manufacturing exception would *not* be satisfied merely by imprinting completed software code onto floppy disks, but providing little guidance regarding when it *would* be satisfied).

[7]*See generally* IRC section 954(c)(2)(A), (c)(1)(A).

[8]But (fortunately) not for Irish tax purposes, as explained below.

[9]*See* IRC section 954(c)(3)(A)(i).

[10]*See* IRC section 954(c)(3)(A)(ii).

[11]*See generally* IRC section 367(d)(2)(A), (C).

[12]*Id.*

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Software updates are developed under a qualified cost-sharing arrangement between the U.S. parent and Ireland HoldCo.[13] The group's U.S. parent usually retains the legal ownership and domestic exploitation rights, while Ireland HoldCo makes a buy-in payment in exchange for the right to exploit the underlying property overseas. As long as the cost-sharing agreement remains in effect, the U.S. parent should have no additional section 367(d) income regarding the jointly developed software once the initial transfer of code (which is not particularly marketable in light of its imminent obsolescence) has occurred.

C. Foreign Tax Treatment

1. Ireland OpCo

Irish domestic corporations are generally taxed at 12.5 percent on net ''trading income'' but at a higher 25 percent rate for ''passive income.''[14]

Irish tax law does not provide a succinct or precise definition of the term ''trading income,'' but the Irish Revenue authorities have published guidance about when business activity qualifies for the taxpayer-friendly ''trading'' rate.[15] According to this guidance, key factors determining whether income from corporate operations qualifies as ''trading income'' include:

- whether value-adding activities take place in Ireland;
- whether skilled employees are located in Ireland; and
- the nature of the activities performed and the commercial rationale for locating the business in Ireland.

Ireland OpCo's net income from its European sales transactions should be taxed at the (lower) trading rate because of the IP development activities and distribution functions physically based in Ireland.

Importantly, Ireland OpCo employs a variety of techniques to minimize the taxable income base upon which this 12.5 percent rate is assessed. One of these may involve exploiting Ireland's relatively permissive transfer pricing regime. Until 2010, Ireland had an informal and loosely structured statutory scheme regarding transfer pricing. The country promulgated its first detailed transfer pricing legislation in 2010.[16] Generally, this legislation codified the arm's-length principle into Irish statutory law.

Before 2010, Ireland OpCo would exploit Ireland's lack of formal transfer pricing rules by paying an aggressively overpriced royalty in exchange for the IP sublicense (or a high price for inventory purchases) from Ireland HoldCo. Moreover, as explained below, Ireland negotiated advance pricing agreements with Apple and other firms in which the Irish transfer pricing authorities may have allowed some firms to operate at below arm's-length profit levels. The EU's current antitrust investigation is focused primarily on these taxpayer-favorable APAs. The gravamen of the EU's claim is that Ireland's *selective* acquiescence to these below arm's-length prices amounted[17] to illegal state aid to Apple (and possibly others) in violation of EU competition law.

In some circumstances, Ireland OpCo may be required to withhold taxes on the royalty payments flowing up the corporate chain to Ireland HoldCo (whether via the intermediary of Netherlands HoldCo or not). According to Irish domestic law, companies must withhold taxes on ''annual payments'' of royalties. An ''annual payment'' clearly includes payments made regarding patents, but does not necessarily include other types of royalties, such as copyright or trade secret royalties.[18] Apparently, Irish IP law is ambiguous on whether a license to use software code should be placed into the former or the latter category. Ireland OpCo typically construes this ambiguity in its favor, taking the position that its royalty payments are not captured by the ''annual payments'' provision and therefore not subject to withholding tax. As a caveat, note that these provisions of Irish law draw no distinction between resident and nonresident recipients of royalty payments. The withholding tax would apply whether the royalty payments coming out of an Irish entity are bound for another Irish entity or, for example, a Bermuda entity.[19]

The uncertainty regarding the annual payment rules may be responsible for the increasing popularity of the Dutch sandwich step. This provides additional protection to Ireland OpCo regarding its position that it is not required to withhold tax on outgoing royalty payments.

2. Ireland HoldCo

From the perspective of Irish tax law, Ireland HoldCo is not an Irish corporation but rather a resident of Bermuda (or, in Apple's case, a California resident corporation; see below). Generally, Ireland's domestic tax law follows the U.S.-style place-of-incorporation rule for determining corporate tax

[13]*See generally* Treas. reg. section 1.482-7.

[14]*See* TCA 1997, section 21 and 21A.

[15]*See* ''Guidance on Revenue Opinions on Classification of Activities as Trading,'' Irish Revenue Guidance Document, *available at* http://www.revenue.ie/en/practitioner/tech-guide.

[16]*See* 2010 Finance Act, section 42, *codified at* TCA section 835A-835H.

[17]And continue to ''amount,'' since the APAs are apparently still in force.

[18]*See In Re Hanbury,* 38 TC 588 (defining the term ''annual payment'' as a ''pure income profit''), TCA 1997, section 237.

[19]As explained below, Irish tax law considers an Irish-incorporated company managed in Bermuda to be a tax resident of Bermuda, not Ireland, so even if Irish domestic law *did* distinguish between foreign and domestic royalty recipients, the Irish incorporation of the holding entity would be without consequence on the Irish side.

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residency. However, there is an important exception. A company incorporated in Ireland may claim residency in its country of ''management and control,'' but only if two prerequisites are satisfied:

- the company must be ''in control'' of a resident Irish corporation; and
- the company must be ''controlled'' by a company that is resident in a state with which Ireland has an income tax treaty.[20]

Ireland HoldCo satisfies both of these criteria. It ''controls'' Ireland OpCo, which is fully tax resident in Ireland, and it is ''controlled'' by its U.S. parent company, which is entitled to the benefits of the Ireland-U.S. tax treaty.

Consequently, Ireland HoldCo is ordinarily not taxed by Ireland. The royalties flowing into the company's coffers from lower-tier subsidiaries therefore escape Irish income taxation that would have resulted if Ireland followed the U.S. place of incorporation rule.[21]

Also, Apple's corporate structure does not involve any entities located in tax havens such as Bermuda. In Apple's structure, the analogue to the generalized Ireland HoldCo (that is, the tax haven entity collecting the company's non-U.S. profits) is a company known as AOI. AOI is a shell entity incorporated in Ireland and whose directors mostly reside in California. It is not liable for any U.S. tax. In fact, AOI files no residency-based corporate income tax returns in any jurisdiction. From a U.S. perspective, it is resident in Ireland,[22] but from an Irish perspective, it is resident in California.[23] As a result, it has been described as being tax resident ''nowhere.''[24]

How AOI manages to avoid triggering U.S. inbound taxation is not entirely clear, but it may be on the basis of the higher inbound threshold afforded by the Ireland-U.S. tax treaty.[25]

Despite these differences, AOI fulfills a role that is substantially similar to that of an entity filing tax returns in the Cayman Islands or Bermuda (that is, declaring a tax residency, and remitting a tax of zero dollars on the basis of that residency status).

It may matter at the margin whether the generalized Ireland HoldCo is resident ''nowhere'' or resident in Bermuda, but the overall functioning of the generalized double Irish structure would seem to be minimally affected by this difference.

3. Netherlands HoldCo

Some firms,[26] especially in recent years, have elected to ''sandwich'' a Netherlands conduit entity between Ireland OpCo and Ireland HoldCo. This company acts as a tax treaty conduit entity, allowing Ireland OpCo to avoid withholding taxes that *may* be owed (but are not *necessarily* owed, as explained above) on its royalty payments to Ireland HoldCo.

According to the Ireland-Netherlands tax treaty, royalty payments may only be taxed in the country of residence (assuming the receiving entity does not have a PE in the source country).[27] Thus, Ireland OpCo is relieved of the uncertainty described above about whether it must withhold tax on the royalties under the ''annual payments'' provision of Irish domestic law. Moreover, there is no limitation on benefits clause in the Ireland-Netherlands treaty, so there is no requirement[28] that Netherlands HoldCo be anything more than a shell entity. Little or no taxable profits remain in the Netherlands, since Netherlands HoldCo pays virtually the same royalty to Ireland HoldCo as it receives from Ireland OpCo. The arrangement relies on the same bilateral treaty in mirror-image fashion to avoid Dutch withholding taxes on this second transfer. Importantly, according to Dutch domestic law, Ireland HoldCo is an Irish tax resident entitled to the benefits of the Ireland-Netherlands treaty (even though Irish domestic law regards it as a Bermuda tax resident).

The entities involved in the scheme may take additional comfort regarding their (lack of) withholding obligations from a number of EU-wide laws that seek to eliminate withholding taxes within the Union. For example, the interest and royalty directive eliminates tax on cross-border interest and royalty payments made between associated companies of different EU member states. For the purpose of the directive, two companies are ''associated'' if, in relevant part, one owns at least

[20]*See generally* TCA 1997, section 23A (defining ''control'' as 50 percent ''commonality of shareholding'').

[21]A substantially identical result would occur if the holding company had simply been incorporated in Bermuda.

[22]Perhaps because its California directors perform activity sufficient to qualify under the ''management and control'' test in Irish tax law.

[23]Those same directors *avoid* carrying out sufficient activity to trigger inbound U.S. taxation obligations.

[24]*See, e.g.,* Carl Levin and John McCain, ''Offshore Profit Shifting and the U.S. Tax Code — Part 2 (Apple Inc.),'' Memorandum — Permanent Subcommittee on Investigations (Senate Committee on Homeland Security & Governmental Affairs), 2 (May 21, 2013) (hereinafter ''Senate memorandum'') (stating that from 2009 to 2012, AOI ''reported a net income of $30 billion, but declined to declare any tax residence, filed no corporate income tax return, and paid no corporate income taxes to any national government for five years'').

[25]*See* Ireland-U.S. treaty article 4(1)(a) (defining ''resident of a Contracting state'' as a person liable to taxation on a residency basis under the domestic laws of either country). It is not clear how Ireland's unique tests of residency mesh with the ''liable to tax'' requirements.

(Footnote continued in next column.)

[26]But not Apple, apparently.

[27]*See* Ireland-Netherlands tax treaty, articles 10(1) and 10(4).

[28]For treaty purposes, at least.

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25 percent of the other.[29] In the double Irish Dutch sandwich scheme, this requirement is easily satisfied because each subsidiary is usually wholly owned by the one above it. The interest and royalty directive attempts to ferret out abusive schemes by incorporating a general antiabuse provision in its text, but this is rarely enforced.

Finally, Dutch domestic law does not levy any withholding tax on royalty payments to nonresident companies lacking a Dutch PE.[30] Thus, even under ordinary Dutch domestic law, Netherlands HoldCo would probably not be required to withhold tax on the royalties it pays to Ireland HoldCo.

In sum, the scheme provides at least four layers of insurance regarding withholding tax obligations. If tax enforcers try to claim that the companies involved in the scheme have neglected their withholding tax obligations on royalties passing up the chain, the company under scrutiny may rely on one or more of:

- Irish domestic law;
- the Ireland-Netherlands tax treaty;
- the EU directive on interest and royalties; and
- Dutch domestic law.

II. The EU Crackdown

The EU has begun to pressure the Irish government into curbing some taxpayer-favorable rules. The crackdown has been spearheaded by the European Commission's Directorate General for Competition, State Aid Registry office.

In general, the European Commission acts as the EU's executive branch and is responsible for implementing and enforcing EU treaty law. The commission derives its jurisdiction from article 17 of the Treaty of the European Union (TEU), as well as articles 244-250 of the TFEU. These treaties, which have gradually evolved from the original legal instruments establishing the European Coal and Steel Community (ESOC), were recently ratified again by the 2007 Treaty of Lisbon.

The TEU and TFEU are directly binding on all EU member states. Article 107(1) of the TFEU forbids any EU member state from selectively providing aid to businesses in a manner that distorts competition or is otherwise ''incompatible with the common market'' among EU member states. Article 108(2) of the same treaty gives the European Commission broad authority to investigate potential violations of this prohibition, while other articles allow the commission to order a ''suspension'' of the offending aid.[31]

The commission's State Aid Registry Office is investigating whether some of Ireland's APAs, which it negotiated with Apple in 1991 and 2007 and which are still in force, amount to illegal state aid in violation of Ireland's obligations under the treaty provisions described above.

In a letter dated June 11, 2014, and published on September 30, 2014 (referred to below as ''EC letter''), European Commission Vice President Joaquín Almunia informed Ireland's Foreign Minister Eamon Gilmore that the commission was initiating a formal investigation into whether Irish transfer pricing practices regarding Apple amount to prohibited state aid in violation of the TFEU's competition rules.

According to the letter, two APAs, originally negotiated in 1991 and amended in 2007, have allowed Apple to operate several unincorporated Irish branches in the country at below arm's-length profit levels.[32] These APAs relate to two of Apple's Irish incorporated but non-tax-resident Irish branches — Apple Operations Europe (AOE) and Apple Sales International (ASI). AOE is a 100 percent owned subsidiary of AOI, which is an Irish incorporated, nonresident company lacking any branch or otherwise taxable presence in Ireland.[33] ASI is a 100 percent owned subsidiary of AOE, and is subject to Irish taxation in the same general manner as its parent company, that is, as an Irish branch or PE, but not as an Irish tax resident (ASI's management and control activities, like those of AOE, occur outside Ireland). ASI's primary function is described as:

> procurement of Apple finished goods from third-party manufacturers . . . onward sale of those products to Apple-affiliated companies and other customers, and logistics operations involved in supplying Apple products from the third-party manufacturers to Apple-affiliated companies and other companies.[34]

The EC letter argues that by allowing ASI and AOE to operate at below arm's-length profit levels, the Irish government unlawfully and selectively provided and

[29] *See* TCA 1997, sections 267G-267L (Irish domestic legislation promulgated under the EU directive).

[30] *See generally* KPMG Country Profile — Netherlands, at 2, *available at* http://www.kpmg.com/Global/en/services/Tax/regional-tax-centers/european-union-tax-centre/Documents/eu-country-profiles/2013-netherlands.pdf.

[31] *See generally* BNA Tax Management Portfolio, ''Business Operations in the European Union,'' 999-2nd, A46(8)-(9) (2013).

[32] *See* EC letter, at 16-19.

[33] AOI also lacks any taxable presence anywhere (even in a tax haven). By analogy to the more generalized ''double Irish'' scheme described above, AOE resembles Ireland OpCo and AOI resembles Ireland HoldCo. One potentially important distinction is that AOE's Irish tax liability is imposed on the basis of its branch/PE in Ireland rather than its residency status — even though AOE maintains an office in Ireland, its management and control is situated elsewhere (perhaps in a tax haven).

[34] EC letter, at 8. AOE's Irish branch apparently ''manufactur[es] a specialized line of personal computers.'' EC letter, at 8.

continues to provide indirect state aid to Apple that threatens the fairness of the EU's common market. In crafting its argument, the EC letter cites case law promulgated by the Court of Justice of the European Union, which has held that article 107(1)'s ban on state aid captures not only direct state subsidies but also ''measures which in various forms mitigate the charges which are normally included in the budget of a [commercial] undertaking.''[35] On the basis of this principle, the letter contends that granting Apple selectively favorable transfer pricing treatment violates the relevant article of the TFEU.

The bulk of the EC letter consists of complaints that Ireland incorrectly employed the cost-plus method in order to calculate appropriate profit levels for ASI and AOE's branch activities. The implication is that Ireland selectively permitted Apple to operate in Ireland at below arm's-length profit levels, allowing the company to misallocate what should have been ASI and AOE's profits either to other subsidiaries in the corporate group or to other taxable branches.

It is difficult to assess whether the agreed-upon cost-plus markups for ASI and AOE are appropriate or whether they are below what would be acceptable or sustainable for a company (or branch) operating at arm's length. Some experts believe the profit levels are not inappropriately low; indeed, according to knowledgeable observers, these profit levels probably are at the high end of what a similarly situated company would expect to collect. The European Commission apparently thinks otherwise.

The EC letter concludes by conveying the commission's decision to open a formal investigation into Ireland's putative violation of the state aid prohibition according to its procedural powers under article 108(2), and warns both Apple and the Irish state that ''all unlawful aid may be recovered from the recipient [Apple, in this case].''[36]

III. Irish Legislative Response

On October 14, 2014, Irish Finance Minister Michael Noonan announced that the country would be strengthening some of its domestic tax rules, a decision undertaken partly in reaction to the negative attention wrought by the current EU investigation.[37]

These measures include eliminating (though not necessarily with immediate effect) the ''management and control'' exception to the tax residency rules, so that any Irish-incorporated business entity would also and without exception be an Irish tax resident liable for tax on its worldwide income.[38] However, Noonan also defended other taxpayer-friendly aspects of Irish tax policy, particularly the country's 12.5 percent tax rate on trading income. The EC letter does not criticize that 12.5 percent tax rate. Indeed, the EU's state aid doctrine is supposedly *not* intended to affect ''legitimate'' tax competition among or between member states.

IV. Comment

In light of the heavy media and legislative attention focused on the idiosyncratic ''management and control'' test for Irish corporate residency, it is odd that the substance of the EU's state aid investigation of Ireland essentially amounts to an allegation that Irish APA negotiators *might* have committed errors in their cost-plus analysis regarding the profitability of Apple's Irish branches. As noted, the EC letter does not focus on or criticize the residency rule.

It may be that the transfer pricing complaint is just a subterfuge for venting frustration at the residency rule. After all, the state aid doctrine under EU law requires that Ireland has provided a *selective* advantage to a firm or groups of firms.[39] Ireland's management and control exception is (or was) available to any company with Irish corporate charters, so it would not provide a sufficient legal basis for a European Commission competition complaint. This may explain why the profit levels discussed in the EC letter do not seem, at first glance, to be inappropriately low; in reality, there may have been little wrong with the APAs under scrutiny. It may also shed light on why Ireland's legislative response (eliminating the double Irish possibility) is often characterized as a response to the EU's aid investigation, even though the two are not directly linked.[40]

There is, however, another possibility, which is that Ireland's residency rules may not actually play an especially important role in allowing this avoidance arrangement to work. Rather than a subterfuge for attacking Ireland's domestic tax law, the EU investigation may reflect a generalized set of grievances regarding the U.S. check-the-box rules, the cost-sharing regime, and legal fictions shared by most domestic tax laws

[35]EC letter, at 15 (*citing Adria-Wien Pipeline* (C-143/00) [2001] ECR, I-8365, para. 38).

[36]*See* EC letter, at 21 (*citing* article 14, Council Regulation (EC) No. 659/1999).

[37]*See generally* John Campbell, ''Irish budget: Michael Noonan is to abolish 'Double Irish' tax structure,'' BBC News (Oct. 14, 2014), *available at* http://www.bbc.com/news/world-europe-29613065.

[38]*See id.*

[39]*See* EC letter, at 19.

[40]*See, e.g.,* Casey Egan, ''Ireland ends 'double Irish' tax loophole favored by Apple, Google, Facebook,'' Irish Central (Oct. 15, 2014), *available at* http://www.irishcentral.com/news/Ireland-ends-double-Irish-tax-loophole-favored-by-Apple-Google-Facebook.html (''The 'double Irish' has permitted corporations registered in Ireland to be tax resident in other countries. . . . However, Ireland's allowance of the double Irish has come under heavy fire in recent months, *with European Union . . . officials calling for an end to the loophole*'' (emphasis added)).

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that allow U.S. and European value creation to be redirected to Bermuda, the Cayman Islands, or, in the case of Apple's AOI subsidiary, ''nowhere.'' The double Irish may at bottom represent a colorfully named yet fairly standard hybrid entity mismatch arrangement, one that would not necessarily be damaged by Ireland's elimination of its management and control exception.

It is probably best to explore this possibility via a counterfactual. The counterfactual assumes that in the general avoidance structure described in Section I, Ireland HoldCo has been transformed into Bermuda HoldCo (in Apple's case, assume that AOI, rather than claiming residency ''nowhere,'' asserts that it is a Bermuda resident, is run (minimally) by some Bermuda resident directors, and timely files whatever documents are required by the Bermuda authorities reflecting a residency-based Bermuda tax of nil — since Bermuda has no income tax).

On the U.S. side, most of the crucial details would function more or less identically. The check-the-box election does not require any same country showing, so the activities of the Irish operating subsidiary would still be imputed to Bermuda HoldCo, thus avoiding FBCSI. By the same token, any royalties paid from Ireland OpCo to Bermuda HoldCo would still be ignored from the U.S. perspective so that no FPHCI income would result. At the same time, these royalties would still be deductible against the trading income of the Irish operating subsidiary. The cost-sharing arrangement would not be affected.

Admittedly, Bermuda HoldCo would no longer be able to take advantage of the Irish tax treaty network, but the consequences here are not especially severe. Even if the royalties went directly to Bermuda from Ireland, Irish domestic law would likely not require a withholding tax, as noted above (and any uncertainty would relate to the eligibility of the royalty payments, not the identity of the destination country). If the royalties were indeed paid as a result of a *patent* license, thus triggering Irish withholding, this could be eliminated by routing the payments through Netherlands HoldCo and triggering available tax treaty entitlements. Dutch domestic law does not impose withholding even on patent royalties, so there would be no need to use a tax treaty on the back end of this conduit arrangement, when the royalties would be transferred from Netherlands HoldCo to Bermuda HoldCo. Bermuda HoldCo would no longer be entitled to benefits under the Ireland-U.S. tax treaty, but this never seemed to matter in the first place because Ireland HoldCo may never have been in danger of triggering inbound U.S. tax obligations (and almost surely would not be in danger of U.S. inbound taxation if the directors lived in Hamilton, Bermuda rather than Cupertino, California).

One potentially significant drawback to using Bermuda HoldCo rather than Ireland HoldCo would be that the ''same country exception'' for some passive income under subpart F would no longer be available (because the name on the corporate charter would have changed from ''Ireland'' to ''Bermuda''). However, the protection from inclusions to the U.S. parent afforded by this rule is redundant in light of the check-the-box rules. If check-the-box is eliminated, the change from Ireland HoldCo to Bermuda HoldCo may represent a more significant change. Under current law, the situation would be little different than before.

This counterfactual is intended to illustrate that the Irish ''management and control'' residency rule is not doing heavy lifting in this avoidance arrangement. The double Irish works mainly because of the hybrid entity mismatch possibilities available because of the check-the-box and the cost-sharing regime under U.S. domestic rules.[41] The elimination of the residency rule may entail significant tax costs for companies already employing the structure in terms of reorganizations or recognition events, but these costs would relate to the costs of corporate restructuring rather than any unique avoidance opportunity afforded by the residency rule itself.

In sum, whatever flaws are being exploited in structuring the double Irish, they are not related to flaws or lack of coherence in the Irish domestic tax system. As a result of Ireland's residency rule change, the double Irish may soon become the ''Bermuda Triangle''; indeed, AOI, which is tax resident ''nowhere,'' seems to have already disappeared into it. This may excite headline writers but will likely cause few problems for tax planners (at least as long as check-the-box remains in place). Accordingly, the EU is likely to be left unsatisfied. ◆

[41]In his testimony to the U.S. Senate hearings on Apple's tax structuring, Harvard Law School professor Stephen Shay said that ''In sum, for its non-U.S. sales Apple's use of cost sharing transfers the return to R&D performed in the United States to Ireland (or the ocean).'' Testimony of Stephen Shay, Permanent Subcommittee on Investigations (Senate Committee on Homeland Security & Governmental Affairs) (May 21, 2013).

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