



ANTI-ABUSE CLAUSES IN TREATIES AND BEPS

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Context (1)

- Increased attention of mainstream media to corporate tax affairs
- Spreading perception that MNEs dodge taxes all around the world and in particular in developing countries
- Businesses consider reducing taxes a duty towards shareholders

Context (2)

Bloomberg Our Company | Professional | Anywhere

The New York Times | International Herald Tribune

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U.S. Companies Dodge \$60 Billion In Tax With Global Odyssey

By Jesse Drucker - May 13, 2010 9:00 PM GMT+0200

BUT NOBODY PAYS THAT U.S. Business Has High Tax Rates but Pays Less

By DAVID KOCIENIEWSKI
Published: May 2, 2011

The United States may soon wind up with a distinction that makes business leaders cringe — the highest corporate tax rate in the world.

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A third of UK's 700 biggest businesses pay no corporation tax

By GWYNETH F **theguardian**
Last updated at

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Nearly a third of businesses paid 2005-2006 financial year has revealed.

A further 30 per cent of businesses paid 2007-2008 financial year. And of the tax paid, two-thirds came from banking, insurance, while the alcohol and estate sectors paid 1 million pounds.

News Technology Amazon.com

Amazon: £7bn sales, no UK corporation tax

Online retailer's British operation owned by company in Luxembourg which receives all payments for books, DVDs and other goods

Ian Griffiths
guardian.co.uk, Wednesday 4 April 2012 21.16 BST



Enlarge This Image Topping out at 35 percent, America's official corporate income tax rate trails that of only Japan, at 39.5 percent,

The New York Times | International Herald Tribune

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BUT NOBODY PAYS THAT G.E.'s Strategies Let It Avoid Taxes Altogether

By DAVID KOCIENIEWSKI
Published: March 24, 2011

General Electric, the nation's largest corporation, had a very good year in 2010.



Enlarge This Image The company reported worldwide profits of \$14.2 billion, and said \$5.1 billion of the total came from its operations in the United States.

Its American tax bill? None. In fact, G.E. claimed a tax benefit of \$3.2



What is BEPS? (1)

BASE EROSION and PROFIT SHIFTING

- There are a number of structures, technically legal, which take advantage of asymmetries in domestic and international tax rules
- Several studies and data indicate there is increased segregation between the location where actual business activities take place and the location where profits are reported for tax purposes



What is BEPS (2)

Key pressure areas:

- hybrid mismatch arrangements and arbitrage
- digital economy
- related party debt-financing
- transfer pricing
- anti-avoidance measures
- the availability of preferential regimes



Why is BEPS a problem?

- It distorts competition
- It distorts investment decisions
- It is an issue of fairness



Key Tax Principles and Opportunities for BEPS (1)

In practice any structure aimed at BEPS will need to incorporate a number of coordinated strategies, which often can be broken down into four elements:

1. minimisation of taxation in a foreign operating or source country either by shifting gross profits via trading structures or reducing net profit by maximising deductions at the level of the payer
2. low or no withholding tax at source
3. low or no taxation at the level of the recipient (via low-tax jurisdictions, preferential regimes, hybrid mismatch arrangements) with entitlement to substantial non-routine profits via intra-group arrangements
4. no current taxation of the low taxed profits at level of ultimate parent.



Key Tax Principles and Opportunities for BEPS (2)

Elements with a direct relevance in the context of treaty anti-abuse clauses:

- low or no withholding tax at source (the 2nd element)
 - e.g. through *conduit companies*
- low or no taxation at the level of the recipient of the income (the 3rd element)
 - notably through the use of *preferential tax regimes*



Anti-Abuse Clauses in the OECD MC (1)

Commentary on Article 1, par. 9.5:

- *“A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.”*



Anti-Abuse Clauses in the OECD MC (2)

- Concept of “**beneficial owner**” in Articles 10 (dividends), 11 (interest) and 12 (royalties)
 - proposals to change the Commentary dealing with the meaning of “beneficial owner” - revised discussion draft published Oct. 2012
- **Capital gains** derived from the alienation of shares in immovable property-companies (Art. 13, par. 4)
 - right to tax allocated to the Contracting State where the immovable property is situated
- **Rent-a-star-companies** (Art. 17, par. 2)
 - where income derived by artistes and sportsmen accrues to others persons: right to tax allocated to the Contracting State in which the activities are exercised
- **Switch from exemption to credit** (Art. 23A, par. 4)
 - To avoid double non taxation the exemption method is *not* applied in certain cases where Contracting States disagree on the facts of a case or on the interpretation of the treaty



Anti-Abuse Clauses in the OECD MC (3)

Commentary on Article 1, par. 7-26.2:

- Conduit company cases (par. 13-20), inter alia:
 - example of *subject-to-tax clause* (par. 15) to be aimed at conduit situations, e.g. by adding a “bona fide” provision (par. 19)
 - example of *limitations-of-benefits* provision (par. 20)
- Preferential tax regimes for entities (par. 21-21.2)
 - examples of provisions denying treaty benefits to (nearly) tax-exempt companies benefiting from a *preferential regime*
- Preferential tax regimes for particular types of income (par. 21.3)
 - example of provision denying treaty benefits with respect to income subject to low or no tax under a preferential regime
- Dealing with source taxation of certain types of income:
 - example of a *main purpose test* (par. 21.4)



Anti-Abuse Clauses in the OECD MC (4)

Commentary on Article 4, par. 24.1:

- Example of provision as alternative for “regular” tie-breaker (place of effective management):
 - the competent authorities determine the residence by *mutual agreement*;
 - in the absence of such agreement, in principle no relief or exemption from tax under the tax treaty
- Dual resident companies: opportunities for double non-taxation



Treaty abuse and BEPS

- Taxpayers urge cooperation to eliminate double taxation, but at the same time exploit opportunities to achieve double non-taxation
- ***Sustaining the elimination of double taxation will not be possible unless we also deal with double non-taxation – more effective treaty anti-abuse clauses are part of this***



BEPS Next steps

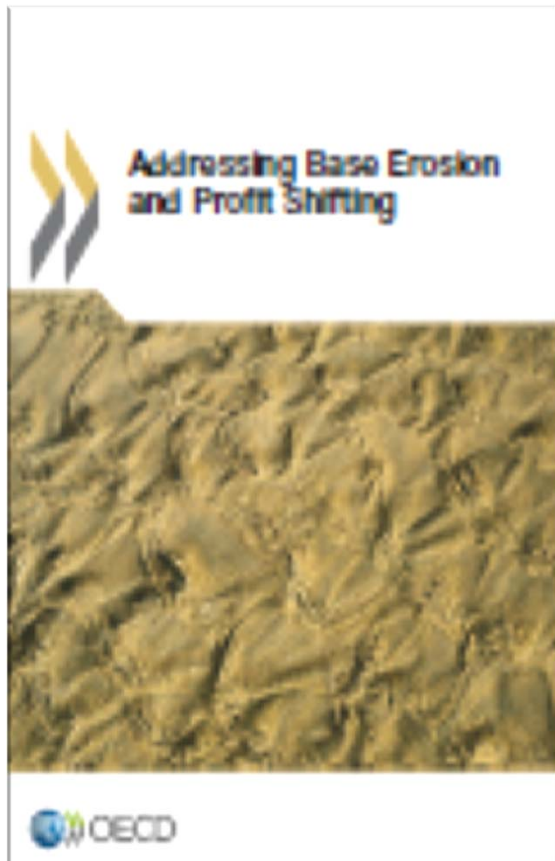
- *Addressing Base Erosion and Profit Shifting* published in February 2013
- Endorsed at Moscow G20 Finance Ministers' meeting:
 - Strong support for the work done
 - Urged the development of a comprehensive action plan to be presented at the G20 meeting in July.
- The action plan will provide a sense of direction for actions to be undertaken
- Objective: Comprehensive, coordinated strategies to tackle BEPS, while at the same time ensuring a certain and predictable environment for business.



Questions?

For more information and updates on BEPS please visit

<http://www.oecd.org/ctp/beps.htm>



G20 Finance Ministers (February 2013)

... we welcome the OECD report on addressing base erosion and profit shifting and acknowledge that an important part of fiscal sustainability is securing our revenue bases. We are determined to develop measures to address base erosion and profit shifting, take necessary collective actions and look forward to the comprehensive action plan the OECD will present to us in July...