CARIBBEAN TAX LAW JOURNAL

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LETTER FROM THE EDITOR

For over a decade, both the OECD and the EU have successfully taken up the fight against harmful tax competition. The artificial reduction of fiscal profit and profit shifting has been addressed through the global roll-out of the BEPS Project. For Caribbean small islands developing states (SIDS) with a tax-related economy, the possibilities to stimulate the economy with preferential tax regimes, have become extremely limited, even more so because the BEPS Project has had a follow-up in the form of the Pillar Two solution. All in all, the international tax system is changing in a fundamental way and other alternatives to raise tax revenue should be considered. In this edition, Nazna Ishaak and Indrah Maduro kick off with an opinion about the value added tax (VAT), to be introduced in Suriname and Aruba, including suggestions for a better functioning tax system. Another option to be considered, especially for SIDS, is building a tax treaty network. At the same time, it should be noted that for some SIDS, like Curaçao, building a tax treaty network is a major challenge due to its constitutional structure. On September 28, 2022, I defended my PhD Thesis 'A Tax Treaty Policy for Curaçao'. I am very excited to share the outcomes of my PhD thesis with you in this edition.

Thayisa Farro has engaged in an exclusive interview with Mrs. Evelyn Wever, the Prime Minister of Aruba in which Mrs. Wever elaborates extensively on the new tax legislation of Aruba to be introduced at the end of this year. Later in this issue we present to you articles on DAC7 by Ian de Brabander, the proposed tax reform of Aruba by Lance Henriquez, Tax, sustainability and ESG by Maarten Koper, the EU State Aid by Wessel Geursen, Cryptocurrency in Sint Maarten by Marco Aalbers and the Curaçao territorial profit tax regime by Lennart Huijsen and Josue Matos de Leon.

Last but foremost, we would like to mention the captivating contribution by Francisco Luis and Samira Yassin on the US federal tax fiscalization over Puerto Rico businesses and residents seeking incentives. In the infamous insular cases, the United States Supreme Court upheld that territories such as Puerto Rico belong but are not part of the US. Such differences have resonated within the US federal tax code provisions. Francisco Luis and Samira Yassin discuss the US federal tax authority over Puerto Rico businesses and residents.

We hope this second edition will spark your interest in the ongoing developments of tax law in the Caribbean region.

Stay with us – and expect more as we will be issuing our third edition in the first quarter of 2023.

Germaine Rekwest

OPINION

SURINAME AND ARUBA, READY OR NOT, VAT IS AROUND THE CORNER

By Nazna Ishaak, Sr. Tax Manager at HBN Law & Tax Suriname & Indrah Maduro, Tax Lawyer at HBN Law & Tax Aruba

It's getting closer and closer... a value added tax (hereinafter 'VAT') in Suriname and Aruba. The VAT in Suriname has been adopted as per August 30, 2022 and will become effective as per January 1, 2023. Aruba also had the same implementation date set in the first place. However, this has been postponed until further notice, whereby the government is discussing an implementation date of January 1, 2024 with various stakeholders.

ARE WE READY FOR A VAT? TO BE HONEST, WE THINK YES.

Taxation cannot and should not be underestimated. Tax revenue is an important source of income for a country, one of the pillars of our public finances. However, in practice the government could ignore relevant specifics of the country's business environment, which may lead to an incorrect way of implementation of law and regulations. Therefore, laws must be put in place in such a way that they also 'work' in practice. In this article, we will guide you through some VAT specifics to provide an overview of what is clear at this moment.

SURINAME

If we look across the border to Guyana, the VAT was implemented as of 2007. The Netherlands – the country with the largest Surinamese diaspora – has a VAT since 1969.

VAT is a value added tax. This is different from the sales tax currently in force, in which the entire turnover is subject to tax. In principle, a VAT affects all services and goods at every link. The current Sales Tax Act is limited in comparison with VAT. Sales tax is only applied to specific services mentioned in an appendix to the Sales Tax Act. As a result, Suriname Sales Tax Act has not been able to anticipate to new developments. New types of services are actually not subject to tax, because they are simply not (yet) included in this 'taxed' list.

The Sales Tax Act makes an important distinction between services and goods. Services mentioned on the taxed list are always taxed at each link in the sales chain. However, goods are taxed only once upon import or local production. There should be no sales tax on the invoice/receipt when purchasing goods in the store by the consumer. That sales tax is thus included in the retailer's cost price.

For VAT purposes, every supply of goods or services is taxed, unless an exemption applies. In principle, all goods and services will be included in VAT and therefore this should benefit the tax revenue. A VAT can be used to anticipate on new types of services, for example digital services, and prevent Suriname from falling behind.

During the discussions, the Minister of Finance several times announced to evaluate the VAT one year after the implementation date. This should be seen as an opportunity. This will allow us to evaluate the practical functioning of the VAT, for example if the refund deadlines were met.

What is certain: **VAT will be impactful.**

DEDUCTION OF INPUT TAX – REFUND OF TAX – PRACTICAL APPROACH – EXEMPTIONS – CASCADE EFFECT

There are various elements of importance which should be considered for a well-functioning VAT.
One of the important elements of a VAT is the right to deduct input VAT. In Europe, they even call the right to deduct, the cornerstone of VAT. The current Sales Tax Act also has the right to deduct 'Input sales tax', but only for manufacturers. A manufacturer can deduct the sales tax charged from the sales tax due on the sale of local manufactured goods. For other entrepreneurs/companies after the production stage – in particular service companies/traders – the charged sales tax will have a cost-increasing effect.
In the case of VAT, every performing entrepreneur is in principle entitled to deduct input VAT. It is this deduction mechanism that ensures that, from an economic point of view, VAT is usually borne by the final consumer.
Within the VAT in principle there should be no cumulation, because in every link of supply chain the imposed VAT can be deducted. Each entrepreneur providing goods or services is in principle entitled to recover the tax paid. Thus, based on the aforementioned principle of the VAT, the VAT will not lead to an increase of the costs - if at every stage it will be possible to deduct the taxes paid - which is beneficial for consumers. The sales tax, unlike the VAT, has a cost-increasing effect. This is because every service is taxed, without applying the deduction of input sales tax.

If an entrepreneur only performs exempt services (for instance, a hospital or an educational institution), then there is no right to deduct input tax. The VAT that is not deductible for the entrepreneur therefore becomes part of his cost price. Although the intention of the exemption is to exclude the exempt entrepreneur from VAT, the entrepreneur may get involved with VAT indirectly, which in this scenario actually may have a price increasing effect. Also known as the VAT paradox.

It's also relevant to consider, if an exemption applies or zero rate will be applicable. The zero rate will indeed not limit the possibility to deduct the paid VAT but may lead to more unpractical consequences.
The adequate functioning of the right to deduct input tax may lead to more entrepreneurs being willing to submit a VAT return. A refund of tax in Suriname is currently often a very difficult process. A period of up to 3 months should be considered for getting a refund back. The question arises whether the Tax Office will manage to actually apply the refund mechanism in time.

CASH METHOD VERSUS ACCRUAL METHOD

In Suriname, we currently use the cash system when paying sales tax, which means that tax is only due at the moment of receiving the payment for services and goods. VAT will be due in the period of issuing the invoice. When switching from a cash accounting system to an accrual system, this undoubtedly has consequences for the accounting of the taxable person, who will have to record and pay the VAT debt earlier (since the issuance of an invoice generally takes place at an earlier moment than the payment). At the same time, an entrepreneur is also more likely to be entitled to deduct input tax at an earlier moment, namely at the moment he receives the invoice.

RATE

Currently, the sales tax rate of 12% applies to taxable goods and taxable services. After a lot of discussions within the Parliament and with various stakeholders, the general VAT rate of 10% has been approved on August 30, 2022. There is also a zero-rate list, a list with exemptions and a 25% rate on specific goods.

DOCUMENTATION - INVOICES - CASH REGISTRATION SYSTEM

Documentation of the taxes due and invoices received will now become even more important than before, partly because of the right to deduct input tax. To ensure VAT will be levied effectively, it has to be accompanied by the establishment of a so-called certified cash registration system. This means that all retailers should have a certified cash registration system. This is intended to prevent fraud. It seems to be quite a challenge to roll this out, but it will be a crucial condition for the success of VAT.

DIRECT TAXES VERSUS INDIRECT TAXES – PAYROLL TAX EXPECT TO BE LOWER WITH THE IMPLEMENTATION OF A VAT

The VAT will have an impact and may increase prices. Recently, various changes have been made in the Wage Tax Act, as a result of which the net wage has increased 'slightly'. It's a fact that the payroll tax brackets are outdated because these have not been corrected with inflation for many years. It is therefore important to make the necessary adjustments to the Wage Tax Act and the Income Tax Act to effectively shift the tax burden from labor to consumption. During the Parliamentary discussions, the Minister of Finance has mentioned that the Wage Tax will be adjusted on the short term but is it not quite clear when the changes will be announced or effective.

ARUBA

CURRENT SYSTEM

Currently Aruba has a system called in Dutch "Belasting over bedrijfsomzetten (BBO) en additionele voorziening PPS-projecten (BAVP) en Bestemmingsheffing AZV (BAZV)" (hereinafter: "BBO/ BAVP/ BAZV") which is similar to a Turnover Tax system. The rate is 3% for BBO/ BAVP and 3% for BAZV. Under the BBO/BAVP/ BAZV a tax is levied from an entrepreneur on the turnover of the business realized by entrepreneurs gained in the course of their business or profession through the delivery of goods and by performing services in Aruba and is levied on a cash-basis. The total BBO/ BAVP/ BAZV due by delivering goods and by performing services depends on the number of

entrepreneurs in the supply chain (accumulating tax on tax). Therefore, the current system promotes service provision in-house to keep the number of transactions within supply chains low and ultimately the price for consumers low. All prices offered must include BBO/ BAVP/ BAZV and the tax may not be mentioned separately on the invoice.

Unlike the current system of Suriname, BBO/ BAVP/ BAZV is not levied on import of goods. Also, a refund of paid (input) BBO/ BAVP/ BAZV is not possible. On the other hand, total BBO/ BAVP/ BAZV paid during a certain year can be deducted by the entrepreneur as costs in the profit and loss statement of the financial statement of the company, which ultimately lowers the profit tax due in a certain year. This benefit is only noticed at the end of the calendar year when the financial statements of the company is prepared. Since the non-entrepreneur consumer can neither deduct paid BBO/ BAVP/ BAZV, nor deduct the BBO/ BAVP/ BAZV paid as costs, it is sometimes more tax efficient to import goods themselves. This is also the reason why entrepreneurs must contain the number of transactions in the supply chains low, to keep their prices low in order not to price themselves out of the market.

VALUE ADDED TAX

During the Covid-19 pandemic period Aruba received several tranches of liquidity support from the Netherlands. As part of the finance agreements Aruba agreed upon so-called "country packages" (additional agreements to receive the liquidity support), which included amongst other a suggestion to introduce a VAT. Aruba chose to have a broad tax reform towards a more efficient and simple tax system to further modernize tax legislation. There must be a shift from direct taxes to indirect taxes.
In the original plan this shift will happen in three phases:
- Foundation (2023): Shift to indirect taxes and implementation of VAT
- Equalization (2025): Updating legislation to improve compliance
- Modernization (2027): Further modernization of tax system and focus on innovation

During different stakeholder's meetings information has been provided on the proposed rates. During the first meeting various different possible tax rates were proposed, while during the second meeting one general tax rate was also considered as an option. Until the press release in August, when Aruba decided not to implement the VAT per January 1, 2023, the proposed tax rates were most likely going to be:
- a low rate of 6% for food, drinks and basic commodities (excluding alcoholic beverages);
- a standard rate of 14% on all other goods, services and import with an exception for casinos;
- 0% on the export of goods;
- Exemption of VAT on certain services such as education, the medical sector, banks, the utility sector and hotels (for the room charges, subject to tourist tax);
- Exemption of VAT for insurance services, implementation of a 6% insurance charge.

Aruba will implement the VAT with a system offsetting the output VAT and carry forward, instead of refunding input VAT when larger than output VAT. Unlike the BBO/ BAVP/ BAZV, the tax is no longer due from the moment of receiving the compensation (cash basis principle) but from the moment of issuance of the invoice (accrual basis principle). The VAT will be due within 15 days after the end of the month of the issuance of the invoice. This may have a huge impact on the cashflow of the companies in Aruba, when offering customers accustomed to layaway plan. For some entrepreneurs it will be a challenge to find a new way of doing business to always have a cash flow buffer to comply with the VAT. Nevertheless, this is not a reason to fear, nor oppose the introduction of the VAT. The VAT mechanism provide the possibility to offset the input VAT against VAT payable, but in the current

system this cannot lead to a refund of VAT, but rather the excess input VAT will roll-over to the following periods. To help entrepreneurs who might encounter cashflow problems during the year, it could be considered to introduce the possibility for the entrepreneur to request a refund when the input VAT exceeds the output VAT, as will be the case in Suriname.

The government of Aruba decided to not implement the VAT per January 1, 2023, but rather to increase the current BBO/ BAVP/BAZV with 1% or 1.5% to 7% or 7.5%. The reason for this is the short period for entrepreneurs and the government to adjust to the implementation of the VAT system. With regards to the short implementation period, most of the private sector of Aruba seems to agree with the government, especially since the legislation has not been presented at the Parliament of Aruba yet. Therefore, postponing the implementation date with 6 months, would have suited Aruba better considering that various preparations already started with regards to the VAT implementation. As long as the VAT legislation is not made available and/ or adopted, entrepreneurs will remain in uncertain circumstances, which may have a negative impact on the current sales prices.

Given the aforementioned uncertainties, increasing the current BBO/BAVP/BAZV would have an inflammatory effect on the prices in Aruba and thus an impact on the costs for the economy of Aruba. Furthermore, BBO/ BAVP/ BAZV is not levied on importation of goods. Due to the accumulation of tax in the BBO/BAVP/ BAZV the importation of goods will be even more attractive for consumers per January 1, 2023.

ADMINISTRATIVE BURDEN

The implementation of VAT will require a change in the administration of turnover and costs with regard to the monthly tax returns and may lead to an increase in the administrative burden of the entrepreneurs, especially with multiple tax rates. It is now even more important to properly register the different services and goods supplied. However, this additional registration may be an advantage for compilation of the annual financial statements and profit tax returns. Nevertheless, with the various proposed rates, restaurant services for example will encounter a heavier burden given that the provision of services in a restaurant will become taxable against the standard rate (14%), whereas the delivery of food or take-out of food will be considered delivery of food and drinks and taxable against the lower rate (6%).

The filing of the return will remain through the online portal of the tax authorities called “BO impuesto (BOi)”, which has proven to be a great switch to digital filing, user friendly and is available in Dutch and English.

With regards to the proposed rates, the idea of a general tax rate would have suited Aruba better, as is the case in Suriname and as several commercial organizations have suggested. Suriname opted for a general tax rate of 10%. A lower rate than their current system of 12%. For Aruba a rate of 10% (average of the proposed rates right now) or 12% would have been more fitting. Aruba will have to get used to a new system and calculations and research are necessary based on actual day to day transactions to see the impact. After a year or maybe two, Aruba can decide if a higher rate is necessary or not.

A SHIFT FROM DIRECT TAXES TO INDIRECT TAXES

As Suriname, Aruba will make a shift from direct taxes to indirect taxes, meaning that together with the implementation of the VAT, tariffs of the wage tax and income tax would be lowered. This is necessary for consumers to have more left over to spend. Both have to go hand in hand, if not, the purchasing power will unfortunately lower.

CONCLUSION

With the implementation date of January 1, 2023 for Suriname it seems that Suriname will be some time ahead of Aruba in terms of implementation. The Minister of Finance of Suriname several times has announced to evaluate the VAT one year after the implementation date. This will allow Suriname to evaluate the practical functioning of the VAT, for example if the refund deadlines will be met. Given that Suriname and Aruba are almost in the same process, we hope we can learn, improve and complement each other with regards to the implementation of the VAT.

With the above, an attempt has been made to express the differences between the turnover tax and a VAT, including the (possible) pitfalls of the tax system for Suriname and Aruba.

It is certain, the VAT will be impactful!

Nazna Ishaak

Indrah Maduro

A TAX TREATY POLICY FOR CURAÇAO

By Germaine Rekwest, University of Curaçao & Leiden University

INTRODUCTION

Curaçao is an autonomous country within the Kingdom of the Netherlands (hereinafter: the Kingdom) and has just one single tax treaty for the prevention of double taxation, namely the tax treaty with Norway. Although Curaçao has concluded a large number of tax information exchange agreements (the so-called TIEAs), it has proven unsuccessful in the conclusion and ratification of full tax treaties. This is problematic, as tax treaties generally stimulate the economic development of a country. Until now, little attention has been paid to the underlying reasons why Curaçao has proven unsuccessful in building a tax treaty network. In addition to this, at the end of 2021, Curaçao still did not have any published policy on tax treaties. This gap is an important reason for my doctoral thesis research 'A Tax Treaty Policy for Curaçao'. The central research question is: "How should Curaçao design its tax treaty policy in order to build a tax treaty network?" This study does not aim to provide recommendations on the technical aspects of a tax treaty policy or a model convention. Rather, the objective of this study is to identify the conditions for building a tax treaty network.

Based on a review of literature, as well as qualitative and quantitative research, I have on the one hand researched the obstacles for Curaçao when it comes to the conclusion and ratification of tax treaties. On the other hand, I have conducted research into which considerations are relevant for Curaçao when it comes to building a tax treaty network. The outcome of this research is an evaluation framework that can act as a guide for Curaçao when designing a tax treaty policy or adjusting a potentially existing (but unpublished) tax treaty policy. This research was conducted in light of the constitutional, EU law, economic and fiscal context.

CONSTITUTIONAL, EU LAW AND ECONOMIC CONTEXT

According to the Charter for the Kingdom, the countries within the Kingdom are equal partners that can in principle arrange their own affairs autonomously, the so-called 'Affairs of the Countries', which include the negotiation and conclusion of (tax) treaties. However, the ratification of (tax) treaties is considered to be an 'Affair of the Kingdom', which means that only the Kingdom (read: the Netherlands) is competent to ratify Curaçao's tax treaties. Consequently, Curaçao is de facto dependent on the Kingdom when it comes to building a tax treaty network.

The EU law status of Curaçao as one of the overseas countries and territories (OCTs) is also addressed in the research. The OCTs do not belong to the territory of the European Union (EU), and EU law is in principle not applicable to the OCTs. The OCTs are included on a list that has been added to the Treaty on the Functioning of the European Union as an Annex. However, it is possible for OCTs to obtain the status of outermost region (OR), in which case the entire EU acquis would be applicable. The doctoral thesis explores the question of whether the OR-status could help speed up the process of building a tax treaty network for Curaçao. The research establishes that the current ORs do not have their own tax treaties. The ORs are within the territorial scope of the tax treaties concluded by the parent Member State.

Historically, tax treaties are concluded in order to prevent double taxation. The prevention of double taxes is primarily important if there are economic relationships with other countries. For this reason, this study also focuses on the economy of Curaçao. The economy of Curaçao has been in a recession since 2016 (the economic crisis in Venezuela) as a result of economic contraction and high levels of unemployment. In 2020, the economic contraction in Curaçao as a result of the COVID pandemic was relatively stronger than in other Caribbean countries. It is evident that there is a need for the use of new fiscal instruments in order to stimulate economic growth in Curaçao.

THE TAX STATUS OF CURAÇAO

As the tax status of countries in part determines whether countries want to enter into treaty negotiations with each other, the tax status of Curaçao is addressed in the study. This shows that the specific characteristics of Curaçao as one of the Small Island Developing States (SIDS) (e.g. the small scale, an open economy, and a small and limited domestic market) have meant that Curaçao has for several decades had a tax policy that was mainly aimed at providing favourable tax facilities. As a result of offering low tax rates to non-residents for non-local activities without substance or transparency or information exchange, Curaçao was considered to be a tax haven. It is partly due to this status that the United States terminated the tax treaty with the former Netherlands Antilles (NA/Curaçao). This termination and changes to the Tax Agreement for the Kingdom are the most important reasons for the decline of the financial services sector in Curaçao. In addition to this, both the Organisation for Economic Co-operation and Development (OECD) and the EU have successfully taken up the fight against harmful tax competition. The OECD has addressed the artificial reduction of fiscal profit and profit shifting through the global roll-out of the BEPS (base erosion and profit shifting) Project. Curaçao too has committed itself to the OECD standards. The OECD and the EU have both placed countries that do not meet the international tax standards on a blacklist.

Since the last tax reform in 2019, Curaçao is no longer on the OECD/EU list and is officially no longer a tax haven. However, the possibilities for Curaçao to stimulate its economy with (new) preferential tax regimes, have become extremely limited, all the more because the BEPS Project has had a follow-up in the form of BEPS 2.0. Part of BEPS 2.0 is the introduction of a minimum profit tax for Multinational Enterprises, the so-called Pillar Two. This means that fiscally beneficial regimes must be brought in line with the required level of minimum profit taxation. In light of this, Curaçao will need to focus more explicitly on building a tax treaty network in order to attract foreign investors. In this way, the economy of Curaçao can be stimulated.

BUILDING A TAX TREATY NETWORK: THE DIFFICULTIES

In this study, the difficulties which Curaçao is experiencing in the process of building a tax treaty network have been identified through interviews with treaty negotiators, who have in the past been closely involved with the negotiations that Curaçao has carried out. This research shows that the difficulties mainly concern a combination of factors. For example, most of the difficulties can be traced to specific characteristics of Curaçao as one of the SIDS. Curaçao's limited capacity in terms of administration and implementation, as well as the lack of sufficient economic relations with potential partner countries, are obstacles when it comes to concluding treaties.
It is noticeable that for a long time now, Curaçao has not (or no longer) applied the territorial extension which is included in a number of tax treaties concluded by the Netherlands. Furthermore, Curaçao still suffers from the reputation as a tax haven, which makes potential partner countries reluctant to start treaty negotiations. In addition to this, the partner countries tend not to acknowledge the importance of a tax treaty in cases where Curaçao has concluded a TIEA.

The fact that Curaçao is dependent on the Netherlands for the ratification of a tax treaty, is an important obstacle.
In practice, the ratification process is extremely difficult. The tax treaties which Curaçao has concluded, and which are notified in The Hague, are not being ratified. The exact cause of this remains unclear. This can be illustrated by the tax treaty that Curaçao concluded with Malta in 2015, which was forwarded through Foreign Affairs for ratification but has still not been ratified. According to the so-called PA List I 2021, as well as the PA List I of 2017, 2018, 2019, and 2020, the tax treaty between Curaçao and Malta has been held back because "the Explanatory Memorandum is being changed following the advice of the Council of State".
Apparently, this change to the Explanatory Memorandum has not been completed since 2017. What the change entails and why it has not been completed, cannot be determined.

A treaty negotiator cites the many official questions posed by the Netherlands as the most important reason why the ratification process has ground to a halt. According to this treaty negotiator, these questions remain unanswered, often by Fiscal Affairs (Curaçao). When Fiscal Affairs (Curaçao) does answer questions, these are followed by more questions from the Netherlands, which then go unanswered. It is certainly remarkable that this generally concerns tax questions regarding the treaty provisions. This is especially jarring as tax treaty provisions in fact fall under the fiscal autonomy of Curaçao. Incidentally, it is the case that these treaty provisions can affect the foreign policy of the Kingdom, and for that reason the questions are legitimate. Nevertheless, there are good reasons for a critical look at the way in which the fiscal autonomy of Curaçao is limited during the ratification procedure.

HOW SHOULD CURAÇAO DESIGN ITS TAX TREATY POLICY?

Based on an assessment framework and the outcomes of the research into the difficulties which Curaçao is experiencing in building its tax treaty network, I have sought to answer the central research question of my doctoral thesis: “How should Curaçao design its tax treaty policy in order to build a tax treaty network?” I have presented the manner in which Curaçao should design a tax treaty policy as an evaluation framework.

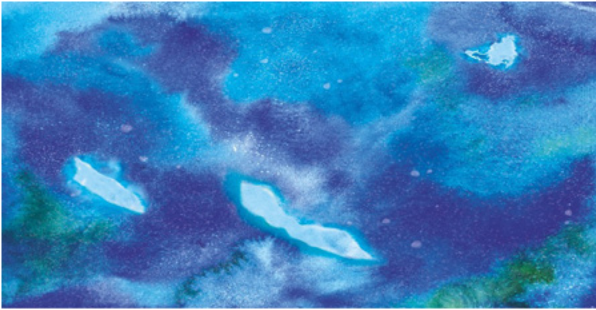
The evaluation framework that has been presented is based on the model conventions of the OECD (OECD MC) and the UN (UN MC), as well as the UN Handbook and the toolkit of the Platform for Collaboration on Tax Treaty Negotiations (PCT Toolkit), which itself is based on the Handbook. While designing the evaluation framework, I have sought to align with the approach of the so-called ‘catalogue of circumstances’. Although the circumstances which follow from this research have been identified in this study, these circumstances have not been weighted. This is because weighting is inherently subjective and dependent on the circumstances. Moreover, it is ultimately up to the politicians to weigh the considerations in order to form a basis for decision-making. For this reason, I have not made a value judgement regarding which circumstances are, in my view, more important or less important when it comes to the design of the tax treaty policy. Without assigning a specific weighting factor for the first phase of the treaty negotiations, I have however weighted the factors that are essential for the question of which treaty countries Curaçao will most likely be able to conclude a tax treaty with.

In addition to the countries with which the Netherlands has concluded a tax treaty with a provision on territorial extension to Curaçao (most recently these are: Colombia, Cyprus, Chile, Liechtenstein, Kosovo, and Bulgaria), it is important when choosing a partner country, to seek alignment with the countries with which Curaçao has economic transactions. In 2020, this was mainly the United States and Venezuela; and in the Caribbean region: the Cayman Islands, Trinidad and Tobago, the Bahamas, the British Virgin Islands, Puerto Rico, Jamaica, and Cuba. Curaçao should make more use of the opportunities that arise from being part of the Kingdom and should request that the Netherlands provides (more) active coordination of the ratification process of the Curaçao tax treaties. In this regard, the fiscal autonomy of Curaçao does not necessarily preclude cooperation between the countries in the Kingdom.

Germaine Rekwest

LECTURES

Following her PhD-defense, Germaine Rekwest will be giving a series of lectures and symposiums in Aruba, Curaçao, St. Maarten and the Netherlands:



- Mini symposium at University of Curaçao: 'A tax treaty policy for Curaçao', 25 October 19.00-20.00

- Public lecture at University of Aruba: 'A tax treaty policy for SIDS', 1 November 17.00-18.00

- Public lecture in the Netherlands: 'Facts and fictions of a tax treaty network for Curaçao', Nieuwspoort, The Hague 7 December 2022.

- Public lecture in St. Maarten: 'Why Caribbean SIDS should focus on a tax treaty network', location yet to be announced, Spring 2023.

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DAC7 AND ITS GLOBAL REACH – EXPANDING AUTOMATIC INFORMATION EXCHANGE TO DIGITAL PLATFORMS

By Ian J. de Brabander, Tax Manager at Ernst & Young Curaçao

INTRODUCTION

On 22 March 2021, the Council of the European Union (EU) adopted Directive 2021/514 (DAC7). This directive aims to expand the Directive on Administrative Cooperation 2011/16/EU ("DAC").

In short, DAC7 introduces a reporting obligation for 'digital platforms' located both inside and outside of the EU, and an automatic exchange of information between EU Member States' Tax Authorities, on revenues generated by 'reportable sellers' performing 'relevant activities' through these digital platforms as of 1 January 2023. This would enable the Tax Authorities in the EU to better track and tax the goods and services that are being sold through digital platforms by private individuals and businesses in the EU. On 23 March 2022, the Dutch State Secretary of Finance presented the bill for the implementation of DAC7 in the Dutch legislation to the Dutch House of Representatives (in Dutch: 'Tweede Kamer der Staten-Generaal').

BACKGROUND

Typically, a digital platform enables providers of goods and services to reach consumers across country-borders. This does not require operators of digital platforms to maintain a physical presence in the country of residence of the consumers, nor is it necessary for the sellers which make use of the platform to maintain such presence. As a result, the economic activities conducted through the digital platform are hardly traceable for the Tax Authorities of the countries where the trade is conducted (digitally). This often makes it almost impossible for Tax Authorities to obtain information to determine whether the remittance of taxes in respect of these activities is performed properly. To date, this information cannot be obtained from the operator of the digital platform either, due to the presumption that the platform is 'merely' the intermediary with respect to the economic activities. This is further hampered by the fact that Tax Authorities often lack the resources to obtain the necessary information to carry out tax audits. Therefore, the cross-border dimension of services offered, and goods sold through these digital platforms has created a complex environment where it can be difficult for Tax Authorities to enforce tax rules, ensure tax compliance and collect taxes.

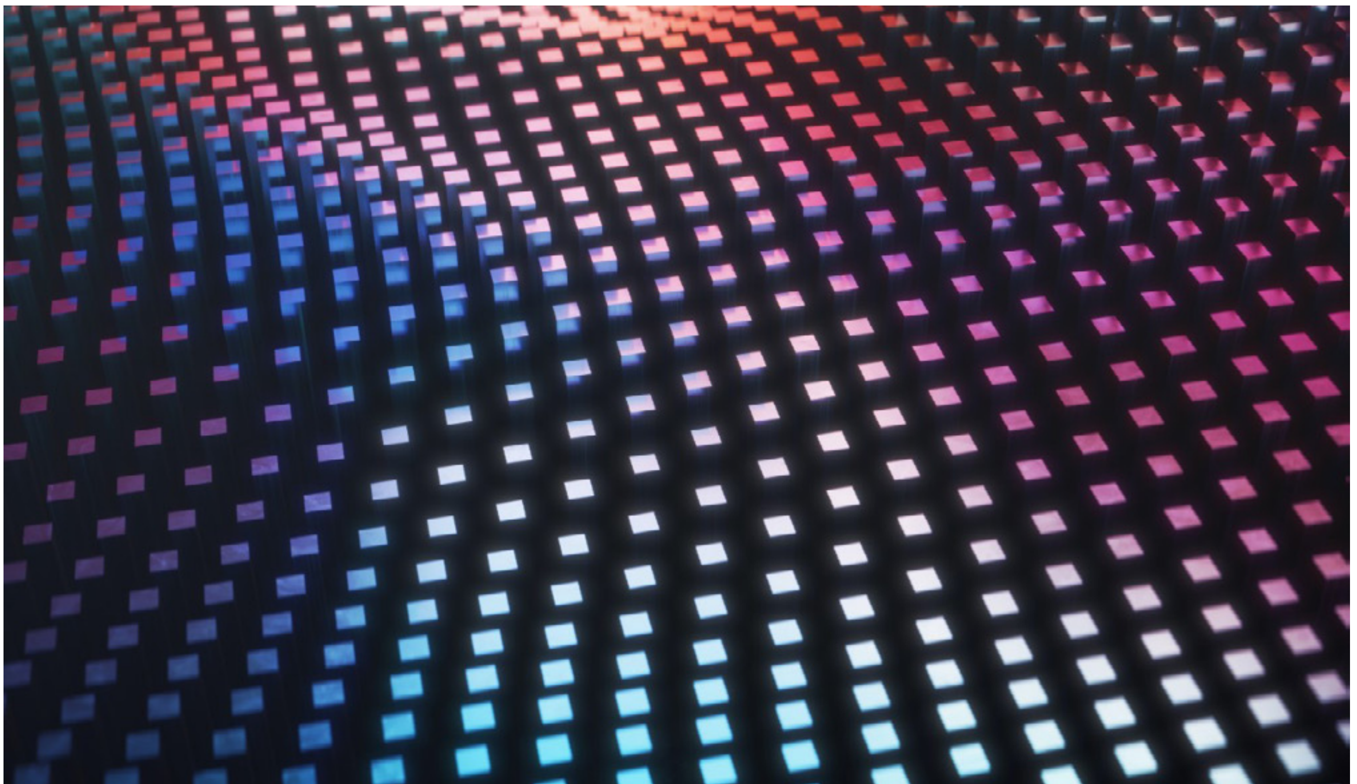
Given this background, DAC7 introduces a uniform reporting standard for reportable digital platforms, as they are generally in a better position to gather the necessary information and verify which economic activities are carried out on their platforms. In addition, the Directive requires an automatic exchange of this information between Tax Authorities of the EU Member States. This way, the EU wants to create more transparency in order to counteract tax avoidance, in line with previous EU and non-EU initiatives intended to promote transparency in the field of taxation. The Country-by-Country Reporting ("CbCR") regulations are a prime example of such initiative.

CbCR rules have been introduced in both the EU and in the Caribbean parts of the Kingdom. Under CbCR rules, certain multinationals must, briefly said, report data with respect to foreign group entities and transactions that take place within a group to the Tax Authorities in a certain jurisdiction, which in turn can exchange this information internationally. At both the EU and OECD level, governments currently want to expand the scope of the CbCR regulations, by requiring the CbCR information to also be made publicly available. In this context the information would then have to be published by the companies in scope on, for example, their websites. Contrary to these CbCR transparency initiatives, the information that will be exchanged under DAC7 is not public. Thus, in the absence of public disclosure of this data, DAC7 should in principle not affect competitive considerations of reportable sellers or, more broadly, the public opinion. On the other hand, reportable sellers are unable to use DAC7 as a marketing tool; in fact, full transparency is generally appreciated.

DIGITAL PLATFORMS

Under the DAC7 rules, a digital platform can generally take any form of software, including an app, a website or a similar digital resource that allows sellers to offer relevant activities through the platform. The most obvious examples are Amazon, Airbnb and Uber. The relevant activities in the context of DAC7 are the rental of real estate or any means of transportation, a personal service and the sale of goods.

However, the term digital platform for purposes of DAC7 does not include software that, without any further intervention in carrying out a relevant activity, exclusively allows processing of payments in relation to relevant activities, listing or advertising of a relevant activity, or redirecting/transferring users to a platform. As the DAC7 reporting requirement is particularly aimed at platforms connecting buyers to a third-party sellers, online stores and similar digital platforms that only sell their own products fall outside of the scope of the DAC7 reporting requirements.



REPORTABLE DIGITAL PLATFORMS

The DAC7 rules will apply to digital platforms located both within the EU and outside of the EU. However, non-EU digital platforms only fall in scope of the DAC7 rules if they facilitate the performance of a relevant activity by reportable sellers or a relevant activity related to the rental of real estate located in an EU Member State. In these cases, non-EU digital platforms should in principle register in an EU Member State to submit the required information. Given this global reach of DAC7, the reporting requirements may in certain cases also extend to Caribbean operators of digital platforms and Caribbean residents (sellers) who use these platforms that, for example, rent out real estate in the EU.

REPORTABLE SELLERS AND REPORTABLE INFORMATION

The reporting requirement pertains to all information relevant for the correct identification of the reportable seller (including service providers) and information relevant to determine the revenue and profit realized by the reportable seller. In this context, a reportable seller is any person who is (fiscally) resident of an EU Member State and persons who are not (fiscally) residents of an EU Member State but rent out real estate property located in an EU Member State. However, the following are not considered reportable sellers for purposes of DAC7:

- Government entities.
- Entities whose shares that are regularly traded on a recognized stock exchange.
- Real estate operators (hotel chains) to the extent that real estate (hotel rooms) is rented out more than 2,000 times per year.
- Persons who sell less than 30 items (goods) via the platform during a calendar year and for which the turnover does not exceed Euro 2,000.

DEADLINES

As of 1 January 2023, reportable digital platforms must report information related to the reportable sellers the competent tax authorities of the EU Member State where they are registered annually. For 2023, reporting must be done by ultimately 31 January 2024. The relevant receiving EU Member State will then exchange the data annually with the tax authorities of the EU Member States to which the information may be relevant. In order to meet these reporting requirements in a timely manner, reportable digital platforms must be registered in an EU Member State timely and must have due diligence procedures in place by ultimately 1 January 2023 in order to appropriately identify reportable sellers and verify the gathered information.

IMPLICATIONS

DAC7 underlines the EU's ongoing efforts to develop and expand global tax transparency to ensure tax compliance. The obligation to report income earned through digital platforms and the exchange of such information between Tax Authorities of the EU is intended to obtain all relevant information related to relevant economic activities performed on a digital platform. An EU harmonized reporting framework is further aimed at increasing legal certainty and providing greater clarity to digital platform operators, who may currently face different unharmonized reporting obligations in the jurisdictions in which they operate.

As the DAC7 reporting obligations expand to non-EU platforms with EU sellers or with respect to real estate property located in the EU, it is safe to say DAC7 has a global reach. Companies in scope of DAC7, which could also include Caribbean digital platforms, need to assess which internal procedures should be set in place in order to timely and appropriately meet the DAC7 requirements.

Ian J. de Brabander

THE CURAÇAO TERRITORIAL PROFIT TAX REGIME; LACK OF PRACTICAL GUIDANCE

By Lennart Huijsen and Josuë Matos de Leon, Tax Partner and Senior Tax Advisor of Grant Thornton in the Dutch Caribbean

In this article, we briefly discuss the territorial profit tax regime that was introduced in Curaçao on January 1, 2020. Even though it has been in place for about two years already, there is still quite some unclarity and discussion about it.

TERRITORIAL PROFIT TAX REGIME IN A NUTSHELL

The Curaçao offshore tax regime was terminated on December 31, 2019. The worldwide tax system was no longer valid in the amended profit tax legislation. As per January 1, 2020 all Curaçao companies became subject to the territorial profit tax regime. This entails that only income from a domestic enterprise is included in the taxable base. Domestic profit consists of income from a domestic business where the income generating activities take place in Curaçao and where the income is generated with assets linked to Curaçao. Profit is subject to the Curaçao profit tax rate of 22%.[1] Non-domestic profit is excluded from the tax base if the taxpayer is willing to apply the non-domestic income exemption.

The main rule is that all taxable profit qualifies as domestic profit. The same applies for passive income, which can best be explained as income that is not generated with the core activities of the company (for example: dividend, interest, rent and royalty income). [2] Non-domestic profit (to be exempted) can be calculated based on the formula below.

Non-domestic profit = (non-domestic causal costs / total causal costs) * total profit they operate.

Causal costs are costs which companies make to achieve turnover. Non-causal costs do not have a direct connection with turnover achieved. See below examples of costs that can be appointed as causal costs and non-causal costs:

CAUSAL COSTS	NON-CAUSAL COSTS
Production costs (excluding materials)	Daily management
Transportation and logistic costs	Secretarial services
Specific product advertisement	Bookkeeping
Licenses	IT costs
Marketing	External consultants

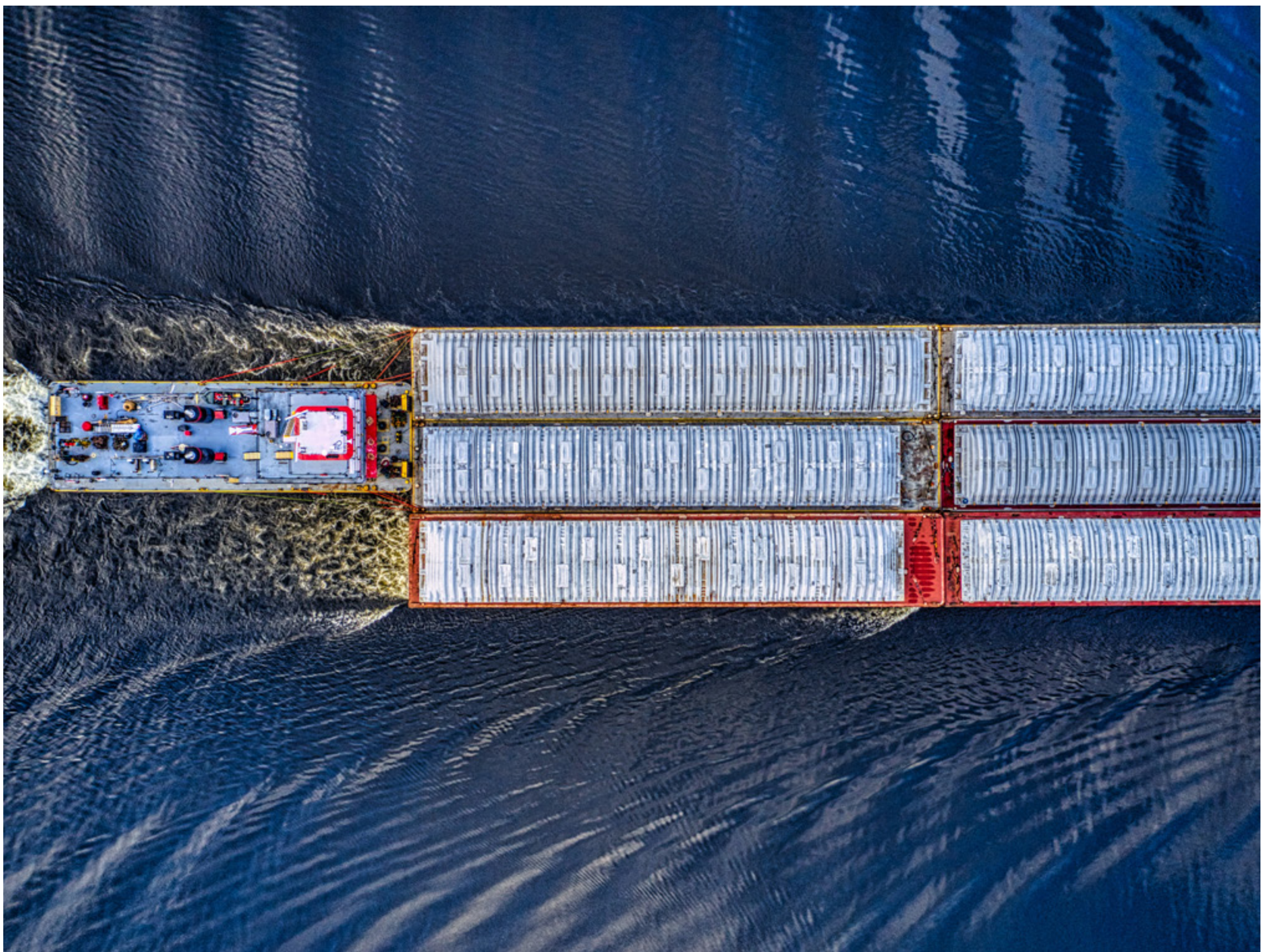
To determine whether causal costs are domestic or non-domestic, it should be analyzed where the value is added. More specifically, where the activities are performed, and costs are made that added value to the delivery of goods or services of the company. Costs for which underlying value adding activity is performed in Curaçao can be appointed as domestic costs. Costs for which underlying value added activity is performed in another jurisdiction can be appointed as non-domestic costs.

When a taxpayer for profit tax purposes is willing to exempt non-domestic profit, the taxpayer should meet the following (additional) circumstances:

1. SUBSTANCE REQUIREMENTS: the company should employ (directly or indirectly) a number of qualified employees that commensurate with the nature and extent of the activities of the company. In addition, the company should have annual recurring expenses in Curaçao that commensurate with the nature and size of the company's activities. [3]

2. PERMANENT ESTABLISHMENT: the company's activities should (if the company was a foreign taxpayer) qualify as a permanent establishment. [4]

A fine of ANG 50,000 up to a maximum of ANG 500,000 can be imposed to companies that do not meet the substance requirements intentionally or resulting from gross negligence. It should be noted that it is still possible to exempt non-domestic profit in case the substance position of the company is not fulfilled.



A PROFIT TAX REGIME THAT MEETS INTERNATIONAL CONDITIONS AND SHOULD BE SIMPLE

The territorial profit tax regime is introduced to meet (international) conditions of the Organisation for Economic Co-operation and Development (hereinafter: OECD) and the EU Code of Conduct Group. It also was the intention to improve and simplify the Curaçao profit tax regime.[5] Nevertheless, we cannot imagine that this simplification really worked out as intended.

The Profit tax Ordinance 1940 and the Explanatory Notes leave (too) much room for interpretation and discussion. If you would look for it, you cannot find a definition of non-domestic profit in the tax legislation. Taxpayers may encounter situations of uncertainty regarding labeling costs as causal and non-causal. It may also be difficult in practice to determine whether costs are foreign or domestic. This can be illustrated with the following examples. An online gaming company based in Curaçao owns a digital file with information of all online players. This file is being used by the company in Curaçao and its subsidiaries abroad. When this file is sold, the question arises how the capital gain on this file should be labeled. Is this capital gain considered as domestic profit or non-domestic profit? The answer to this question may have different outcomes, since the file was being used locally and abroad. Another example is the determination of profits of a bank versus that of an international trading company. For a bank, the source of income is determined based on the place of residence of the counterparty. Is the counterparty or customer located outside of Curaçao, the profit is considered non-domestic. For international trading companies, the source of income may not be determined on the basis of the place of the counterparty. The formula should be used here, looking at the location of the causal costs. This may raise all sorts of questions. For instance, if costs allocated to a provision of doubtful accounts or costs of sales should be considered as causal costs or indirect costs or domestic or non-domestic?

Taxpayers can and will therefore encounter situations of uncertainty regarding labeling of costs and the question whether the company meets the required substance requirements or not. We cannot imagine that any taxpayer would like to risk a penalty with a maximum of ANG 500,000! And then we haven't even touched upon the administrative burden and additional costs which are associated with the territorial profit tax regime, which was introduced to make things simple.

CONCLUSION AND FINAL WORD

The lack of clear guidance for taxpayers, the Tax Authorities, Trust Offices and Tax Advisors, could be a result of the rush in which the authorities were involved with the introduction of the territorial profit tax regime. For example, the changes of the profit tax law were introduced as per December 30, 2019 with effect as per January 1, 2020.

At this moment we still need to explain the territorial profit tax regime as the "new" profit tax regime, despite the fact that it was introduced almost two years ago. In our opinion, it is completely detrimental for all parties concerned (i.e. taxpayer, Tax Authorities, Trust Offices and Tax Advisors) and for the business climate of Curaçao that the profit tax regime is not clear.

Question is whether the authorities can introduce such guidance without complaints of the OECD that safe harbours are being created. We refer to the introduction of further guidance with regard to the substance requirements, which was introduced in the Substance Decree of September 10, 2019 and already rejected in the Ministerial Decree of July 23, 2020 under pressure of the OECD.[6]

Clear tax law and guidance in which definitions, calculations and examples are included to explain the territorial profit tax regime, cannot only be a wish but definitely are a must-have. More specific guidance on the criteria to determine where the income generating activities of specific sectors of industry have taken place would be welcome. And lastly, stakeholders would benefit if detailed guidance on the substance requirements for the specific sectors of industry in Curaçao will be provided.

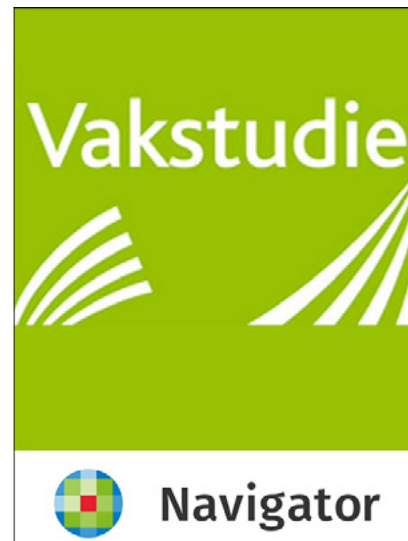
Josuë Matos de Leon

Lennart Huijsen

[1]Article 4, paragraph 4 of the Profit tax Ordinance 1940.
[2]Article 4, paragraph 5 of the Profit tax Ordinance 1940.
[3]Article 1C, paragraph 1 sub a and sub b of the Profit tax Ordinance 1940.
[4]Article 1C, paragraph 2 of the Profit tax Ordinance 1940.
[5]2019-92, nr. 3, Explanatory Notes.
[6]P.B. 2019, no. 56 and P.B. no. 77.

DE VAKSTUDIE – THE DUTCH CARIBBEAN ENCYCLOPEDIA

In the Netherlands, many tax professionals turn to “De Vakstudie”, when it comes to looking up case law and literature on tax matters. De Vakstudie, by Wolters Kluwer, is a very extensive encyclopedia, divided into 16 different chapters. Chapter 16, the last part, but certainly not the least, contains information about Caribbean Tax Law. There is legal history, but also recent case law, commented on by a team of authors, all tax professionals who have earned their spurs in Caribbean tax law.



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INTERVIEW WITH THE PRIME MINISTER OF ARUBA: EVELYN WEVER-CROES

By Thayisa Farro, Senior Tax Advisor at Grant Thornton Aruba

On July 1, 2022, I had the honor to interview the first female Prime Minister of Aruba, Mrs. Evelyn Wever-Croes. During this interview, we covered topics such as the upcoming tax reform of 2023, the economy of Aruba, Aruba's investment climate, and Aruba as a sustainable island.

A DAY IN THE LIFE

The Prime Minister's normal workday starts at 6.00 a.m. with some quality family time before she starts checking her WhatsApp and e-mails. By 8.00 a.m. she arrives at the "Bestuurskantoor" (Government's office) where she attends a day filled with meetings. These usually tend to end at around 7.00 p.m. Once she arrives home and after having dinner, her workday continues. It is at nighttime when the Prime Minister digs deeper into the paperwork, reviewing and drawing up of advices, and finalizing pending matters until the wee hours of the morning. In her free time, the Prime Minister loves spending time with her family. She also enjoys going to the beach and takes pleasure in reading a good book.

Mrs. Evelyn Wever-Croes

FROM MEDICINE TO POLITICS

Being born and raised in a political family, the Prime Minister lacked the same interest in politics. After graduating from high school in Aruba she moved to Costa Rica to pursue a degree in medicine. However, after 6 months she returned to Aruba to be close to her family. Notwithstanding being in Aruba, she enrolled in the University of the Netherlands Antilles where she studied Antillean law. However, since the University of the Netherlands Antilles withdrew Antillean law, she had to move abroad to the Netherlands to complete her degree. The Prime Minister obtained her master's degree in tax law at Leiden University. She then quickly returned to Aruba. At 22 years old, the Prime Minister started working at the tax authorities. After 13 years, she left the public sector and started working at a law office, determined to become a lawyer. In the meantime, the Prime Minister received various remarks and requests (from amongst others the Prime Minister of back then, Mr. Nelson Oduber) to go into politics. After a while, the Prime Minister realized that by being involved in politics she can have a greater impact and can better help the community of Aruba compared to working in the private sector. In 2009 she participated in her first political election and has been active in politics ever since.

LET'S TALK ABOUT TAX

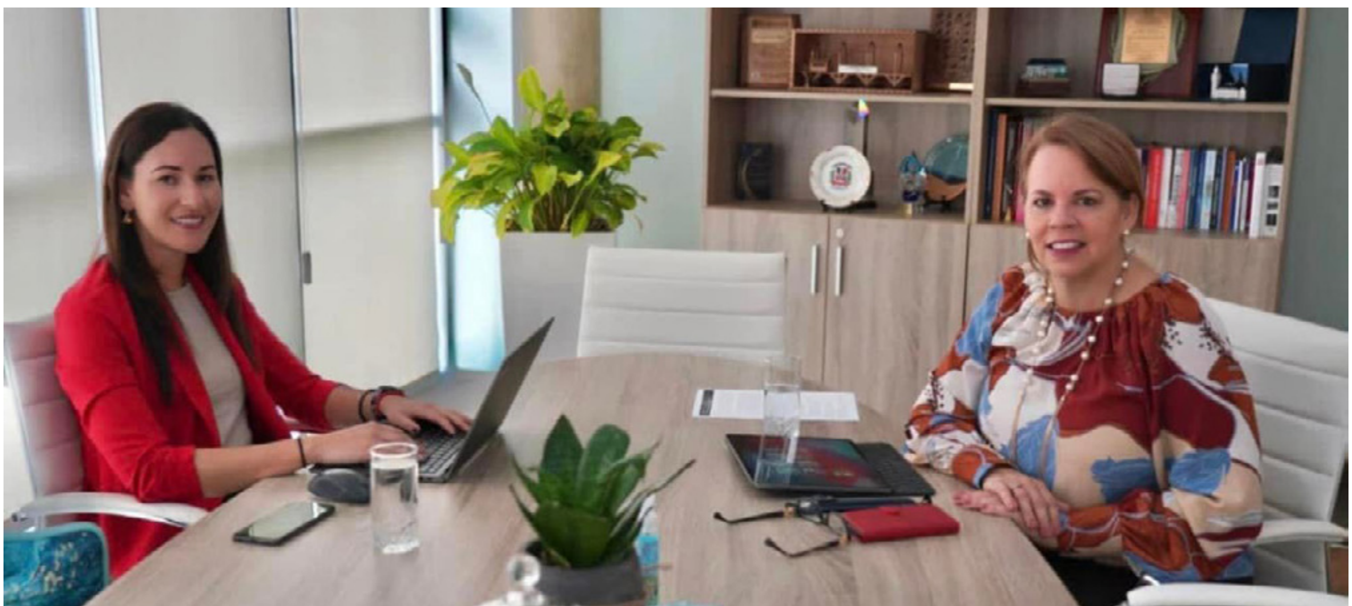
When asked for the Prime Minister's opinion on the ongoing worldwide shift from direct to indirect taxes the Prime Minister mentioned that since the beginning of her career, she was an advocate for the shift from direct to indirect taxes. As of 1989 when the Prime Minister started working at the tax authorities, there were talks about shifting in the direction of indirect taxes (at that time the "omzetbelasting"). There was a high demand to modernize the Aruba tax system. However, it was not until 2007, that the turnover tax ("BBO") was introduced.

One of the Prime Minister's commitments since entering politics was to modernize and simplify the Aruba tax legislation. In January 2019, it was announced that a reform of the Aruba tax system will take place, split into four phases. Only phase one could be completed before the Covid-19 pandemic. The remaining phases were set on hold due to the pandemic. During the pandemic, the Netherlands provided a funding package to amongst others Aruba. One of the conditions tied to the funding package provided is that Aruba will introduce the new indirect tax (the VAT) in coordination with the Netherlands as of January 1, 2023. The Prime Minister agreed with the introduction of a VAT system. However, she is concerned with the proposed introduction date considering the ongoing war in Ukraine, the after-effects of the Covid-19 pandemic, and the potential inflation.

ARUBA'S ECONOMY AND THE INVESTMENT OPPORTUNITIES

It goes without saying that Aruba is highly dependent on tourism and that the Covid-19 pandemic has had an effect on Aruba's economy. We asked the Prime Minister if Aruba should introduce and/or focus on other sources of income. She explained that before the Covid-19 pandemic, the Government of Aruba together with the World Bank organization drafted a policy that analyzed the potential areas of Aruba which might be attractive for investors. This resulted in six Promising Sectors:

- Diversification of tourism.
- Knowledge economy.
- Agriculture.
- Logistics.
- Blue economy.
- Creative industry (orange economy).



Prime Minister of Aruba, Mrs. Evelyn Wever-Croes interviewed by Thayisa Farro (left).

The Prime Minister further mentioned that they are not limited to the abovementioned sectors. Nonetheless, all other sectors are more than welcome in Aruba. In addition, the focus is also on the so-called accelerators such as eliminating the "red tape" when establishing a business in Aruba -ideally, a one-stop shop where investors can submit all the required documents. Other accelerators are digitalization and labor law reforms. Another factor that inhibits investors, and is a point of attention, is our tax legislation. The Aruban tax legislation is complicated and is usually unfamiliar to foreign investors. The goal is to simplify and modernize the Aruban tax legislation to make it more appealing.

SUSTAINABILITY

It is no secret that Aruba has gone through a major transformation over the years and that there is a lot of construction going on. We asked the Prime Minister of Aruba for her thoughts on sustainability and the future of Aruba. She indicated that what happened in the past is difficult to change. However, going forward, she hopes that with more guidelines in place we can preserve our island for the upcoming generation. There is already a moratorium in place for hotel rooms. In addition, another guideline in place as of 2021 is the regulations of the spatial development plan Aruba ("ROPv"). The ROPv is set for a period of five years. The goal of the ROPv is to bring more balance and structure as well as improving the infrastructure of Aruba. For instance, the ROPv points out the areas which are strictly destined for amongst other residential, commercial, and natural reserves.

There is also a task force group for the purpose of the Sustainable Development Goals ("SDGs") in place. They drafted a National Strategic Plan ("NSP") together with various governmental entities in order to commit to the SDGs. It should also be mentioned that the national budget of Aruba for the last few years is also based on the SDGs. The ultimate goal is to allocate the budget per SDG. Furthermore, Aruba's annual report also includes items relating to the SDGs including designation per ministry.

The Prime Minister finalized by mentioning that being sustainable has a high priority when it comes to construction. Certain ongoing projects were even put on hold since they discovered protected subspecies and had to relocate these subspecies to a different location.

WORDS OF MOTIVATION

The Prime Minister of Aruba encourages students and professionals to be determined and work hard toward their goals. There may be obstacles along the way, but one has to stay persistent. The goal may even change, but it is important to remain disciplined, committed, and dedicated so that we can all contribute to a better Aruba.

Food for thought: what advice would you give to your younger self? For the Prime Minister of Aruba, her advice would be to not stress on the little things too much. In the end, everything will be all right.

PROPOSED TAX REFORM 2023 ARUBA

By Lance Henriquez, Tax Manager at Grant Thornton Aruba

INTRODUCTION

During the year 2020 the Netherlands agreed to provide Aruba with financial support in order for Aruba to overcome the economic crisis brought on by the COVID-19 pandemic. In connection herewith a so-called "Landspakket" was agreed to between the Netherlands and Aruba containing various conditions and reforms that Aruba needs to implement in order to receive the necessary financial support from the Netherlands. One of the conditions included in the agreement was the execution of a comprehensive tax reform, which should focus on broadening the taxable base by incorporating a shift from direct to indirect taxation by means of the introduction of a VAT-system.

During the month of February of 2022 various stakeholder's meetings took place in which the Government of Aruba by way of the Tax Reform Committee announced the proposed changes for the upcoming tax reform. In the following months a second round of stakeholder's meetings took place in which different updates were given and multiple scenarios were also proposed which will be deliberated by the Government of Aruba before a definitive choice is made on the various items of the tax reform. The below article will discuss the latest information that is publicly known and is still only considered as proposals since no draft bills have been presented to the Parliament of Aruba as of the time of writing of this article.

THREE PHASE IMPLEMENTATION

The tax reform is proposed to be introduced in three distinct phases. Phase 1 is proposed for January 1, 2023. In this phase the 'foundation' will be set in which the main component of the reform will be implemented, which is the introduction of a value added tax system ("VAT") to replace the current turnover tax systems ("BBO & BAZV"). The implementation of the VAT-system will coincide with various other changes that mainly should revolve in reducing and broadening the direct taxes to compensate for the introduction of a more comprehensive indirect taxation system. Phase 2 of the reform is called "equalization" and is scheduled for implementation in 2025. This phase will consist of updating and modernizing the existing tax laws with the goal of improving the tax compliance. Lastly, phase 3 will take place in 2027 and is called the "innovation" phase. However, no further information has been shared on the exact contents of this last phase.

VAT TO REPLACE THE BBO & BAZV

The current indirect tax system which is the BBO & BAZV will be replaced by a VAT-system. The BBO & BAZV is a combined tax of 6% that is levied over the revenue realized through the sale of goods or the provision of services by an entrepreneur in the course of its business. The BBO & BAZV is an entrepreneur or production tax rather than a consumer tax. The BBO & BAZV is also a cumulative tax as there is no right of deduction for the entrepreneurs. Since 2019 it is not allowed anymore to mention the BBO & BAZV on the invoice. The entrepreneur charges the BBO & BAZV to the costumer as part of the business costs. The unwanted effect of the BBO & BAZV is that it influences the economic processes in Aruba. In order to avoid the BBO & BAZV, entrepreneurs could avoid steps in the production process. For example, an entrepreneur could decide to avoid buying from the

wholesaler in Aruba and buys directly from the supplier abroad, to avoid the 6% BBO & BAZV which is due by the wholesaler. In indirect tax terms, the BBO & BAZV is not a “neutral tax system”. The VAT is considered a neutral tax system. For this reason, Aruba has been advised by the IMF and The Netherlands to switch to a VAT system.

The original proposal was to repeal and replace the BBO & BAZV as of January 1, 2023 with a VAT-system. A total of three scenarios have been proposed for the VAT-system up to now. The first, regarded a two-rate system with a low rate of 6% which would only apply for food and non-alcoholic beverages and a high rate of max. 18% for all other goods and services, restaurant dining included. During the second round of stakeholder’s meetings two additional scenarios were proposed, which solely regarded the rates. One of which included maintaining the two-rate system in which the high rate is maximized at 14% (this scenario would exclude casinos from the taxable base) and the other included a one-rate system of 12.5% (this scenario would include casinos in the taxable base). Furthermore, the VAT-system will also apply for the importation of goods by entrepreneurs and private persons, meaning that the VAT will be due to the Customs Authorities at the border on the importation of the goods. The basis for calculating the VAT due at import will be the CIF-value, which is the cost of goods, insurance and freight. It is not known as of yet how the taxation of imported services will take place, however it is likely that the implementation of a reverse charge mechanism, which is common in other VAT-systems, will be considered. This means that in case of business-to-business (B2B) services, the (Aruban) company receiving the services will have to report the taxable amount to the Tax Authorities and pay the VAT due.

In line with the aforementioned, the exportation of goods and services will be subject to a 0% rate. Because a VAT-system only aims to tax the added value in each chain of the supply chain, entrepreneurs will be able to offset their input VAT suffered on their purchases from the output VAT charged on their sales and the net remaining amount of VAT should be remitted to the Tax Authorities. In the event that the input VAT exceeds the output VAT during a specific period then the implementation of a carry forward (credit) system has been proposed instead of a refund system. It is not yet known whether the carry forward system will have a statute of limitations before the possibility to offset expires. Lastly, it has been proposed to maintain the already existing exemptions of the BBO & BAZV system for the VAT-system. This also includes the room revenue of resorts and lodges which will remain taxable with the tourist levy. The latter is not usual in a VAT-system as the hotel sector's main source of revenue consists of the room revenues. Therefore, it is not clear how these entrepreneurs are going to be able to offset the input VAT suffered during their normal course of business as there would be minimal output VAT in their case under such a scenario.

AMENDMENTS TO THE PERSONAL INCOME TAX

To compensate for the price increases as a consequence of the introduction of a VAT-system with higher rates, the Tax Reform Committee also proposes various amendments to the other existing direct taxes. One of them being the personal income tax. Various amendments have been proposed, both positive and negative for the personal income taxpayer. To start off with the positive amendments, it has been proposed to increase the tax-free sum from Afl. 28,861 to Afl. 36,000 while also adjusting the current tax brackets by narrowing these and reducing the applicable rates by a few percentage points. In addition, the purchasing power allowance and the financial aid and welfare sums will be increased slightly. The remaining amendments solely regard broadening of the taxable base and limitation or abolishment of certain tax benefits and deductions. Such as, the abolishment of the self-administered pension, limitation on the depreciation of real estate, including tips in the taxable base (tips under the current system are exempt from personal income tax), abolishment of the investment allowance and the introduction of a fictitious minimum wage for directors who are majority shareholders.

AMENDMENTS TO THE PROFIT TAX AND DIVIDEND WITHHOLDING TAX

Similar to the personal income tax, the amendments to the profit tax include both amendments to compensate for the additional indirect tax burden and amendments related to broadening the taxable base by abolishing beneficial tax regimes and allowances and limiting the deduction of expenses. The only compensating amendment regards a rate reduction of the current 25% profit tax rate to a rate of 22%. Other changes include, abolishment of the reformed IPC-regime (10-15% rates) for qualifying activities (such as hotels, holding, and financing to name a few) with a grandfathering period up to and including the year 2025. The old (2%) IPC-regime will remain grandfathered up to and including 2025. Also, the existing grandfathering period for the

Tax-Holiday regime will be abolished for any remaining entities applying this regime. Other changes include stricter requirements for deduction of expenses owed to related entities in combination with a more inclusive definition of the term "related entity". Lastly, some of the same changes already mentioned in the personal income tax also apply for the profit tax, which are the abolishment of the self-administered pension and the

investment allowance and a limitation on the depreciation of real estate.

With regard to the dividend withholding tax, an abolishment of the 5% rate for stock exchange listed entities has been proposed.

OTHER PROPOSED AMENDMENTS

Other changes worth mentioning include changes to the transfer tax on real estate. The selling of shares in real estate companies would become subject to real estate transfer tax as of January 1, 2023. While the transfer of the economic ownership of real estate assets will also become subject to real estate transfer tax as of the aforementioned date. The tourist levy, cited earlier in this article, which is currently 9.5% over the room revenue realized from non-residents, will be increased to 12.5%. Furthermore, a simplification of the import duties is also being considered with respect to the different rates applicable per category. Currently, the import duties consist of 12 different rates, which would be reduced to either 7 or 5 depending on the chosen scenario. Depending on the choice, certain items will either have an increase or decrease in the rates. Worth mentioning is that the Tax Reform Committee also announced that it is the intention that the current beneficial policy of a reduced 12% import duty rate for the importation of furniture and fittings in connection with the renovation of a resort will be abolished. Another proposal is to introduce a new insurance tax of 6% on certain types of insurances, however no further information has been provided as yet. Lastly, the introduction of a mandatory notification obligation between the Tax Authority and financial institutions has also been put on the table for implementation as of January 1, 2023.

On August 18, 2022, the Government of Aruba held a press conference to announce that they will be postponing the introduction of the BTW until further notice (possibly January 1, 2024) and will opt to increase the current BBO/BAZV rate (possibly from 6% up to 7.5%). The Government also mentioned during the press conference that the rate hikes for the BBO/BAZV will be accompanied by compensating measures such as lower rates for the personal income tax and profit tax. No other specifics were mentioned nor has any legislation been presented up to the time of writing of this article. Therefore, it not clear as yet what tax payers can still expect from the original proposed tax reform or what exactly the Government of Aruba intends to introduce as of January 1, 2023.

Lance Henriquez

A CLOSER LOOK AT US FEDERAL TAX FISCALIZATION OVER PUERTO RICO BUSINESSES AND RESIDENTS SEEKING INCENTIVES

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In the infamous insular cases, the United States (US) Supreme Court upheld that territories such as Puerto Rico (PR) belong but are not part of the US.[1] Such differences have resonated within the US federal tax code provisions. In light of this, the present article discusses the US federal tax authority over PR businesses and residents. This writing contains an overview of its political status to situate the reader on where PR's legal and economic system currently stands. It is divided into the following sections:
i. Background
ii. PR General Tax & Incentives Regime
iii. Interplay between PR and US Federal Tax Rules
iv. IRS Audit Campaign
v. Conclusions and Recommendations

I. BACKGROUND
Since 1898, PR has been an unincorporated territory of the United States of America (US). In 1952, PR formally established its Commonwealth status by the enactment of its own Constitution. Thereafter, PR residents and businesses are under the protection of both the US and PR constitutions. The people born in PR are granted US citizenship. In addition, PR utilizes the same merchant marine, currency, financial, and banking system as the US. As a commonwealth, PR has legal authority over its internal affairs to the extent that the US laws do not preempt local laws on the subject matter.[2]

During the last decades, the island's economy has undergone financial distress which has led to a long-lasting recession. This situation has precluded PR from being compliant with its fiscal plan and meeting its creditors' commitments.
On June 30, 2016, Act 114-187, commonly known as "PROMESA"[3] was enacted by the US Government to allow PR to restructure its debt and achieve fiscal responsibility. The US Congress appointed a Financial Oversight and Management Board ("FOMPR") to address PR's public finances and ensure that PR restores its credibility on the credit markets after being in default for its first time ever in the repayment of its public debt. As part of its oversight prerogatives, the FOMPR requested the filing of the PR Government's fiscal plan for their review and approval. Moreover, while in place, the FOMPR requires that PR laws and certain rules, regulations, and executive orders are submitted for its approval.[4]

In terms of its tax autonomy, PR has its own tax code which governs the fiscal imposition of revenues derived in PR. Similar to the US, PR follows a worldwide tax regime. However, as further explained later, the US Internal Revenue Code provides that PR bona fide residents are not subject to US federal taxation on their income from PR sources. Nonetheless, it is paramount to note that US tax laws have overarching jurisdiction over foreign or US-sourced income derived by US citizens.

As US citizens, Puertorricans generating foreign-sourced revenues will be taxed on this income in both jurisdictions and may claim a credit in PR for the foreign and US income taxes paid limited to the PR liability corresponding to such income.

Historically, the island's economy has been strongly driven by economic tax incentives granted by the PR government to foster employment and attract foreign investment. With this goal in mind, a myriad of local legislation has been approved to bestow local incentives to certain industries. On July 1, 2019, PR's legislature enacted Act 60, as amended, known as the "PR Incentives Code", to compile, reshape, and streamline all incentives formerly scattered in separate incentives laws such as Acts 20-2012 and 22-2012. These incentives have the potential of highly increasing business returns if they are properly structured. As discussed below, adequate planning is crucial before moving out of the mainland to enter PR.

II. REGULAR PR TAX & TAX INCENTIVES REGIME

Legal entities formed in PR are considered foreign and thus are not generally subject to US federal tax unless they are engaged in a US trade or business or receive US effectively connected income.
Likewise, US entities conducting business in PR or deriving PR effectively connected income will be subject to PR tax.

- Regular PR Tax Regime

PR is a tax-intensive jurisdiction with impositions pouring from the central government and municipalities upon different streams of revenue. A business will be directly taxed at the state level by its net income and by the locality by its gross income. Its personal and real property will be taxed by the municipality and its purchases and imports by a combination of central and local authorities.

Individuals are subject to progressive income tax rates that top at 33%. Long-term capital gains and dividends may be subject to a preferential rate of 15%. The regular PR corporate tax rate is 18.5% plus a progressive surtax that can escalate

it to a maximum tax of 37.5%. For both, individuals and corporations, a minimum alternate or basic tax may apply. In the case of partnerships, the distributive share of the operations of a partnership will be subject to the partner's income tax rate.

- PR Tax Incentives Regime

- Industries incentivized under Act 60

Under the PR Incentives Code, many eligible industries are granted state and local tax incentives. Among the most popular qualified industries incentivized in the PR Incentives Code are:

- Individual Resident Investors
- Exportation of goods or services
- International financial entities (IFEs)
- International insurers and reinsurers
- Private equity funds
- Tourism
- Manufacturing
- Film and creative industries
- Priority Projects for qualified opportunity zones (OZs)

- General Tax Incentive Benefits

The following are some of the general benefits conferred by Act 60 to exempt businesses:

- 4% fixed income tax rate on eligible income;
- 100% exemption on dividend distributions arising from eligible income;
- 75% exemption on municipal property taxes; [5]
- 50% exemption on municipal volume of business taxes; [6]
- tax exemption grant period standardized to 15 years, with an extension of 15 additional years;
- research and development tax credits for exempt businesses that incur in eligible expenses.

These benefits are generally applicable irrespective of the form of business chosen by the taxpayer (i.e., corporation, partnership). Until recently, US disregarded entities doing business in PR were treated by default as partnerships[7] for PR tax purposes since the disregarded entity treatment was not available under Act 1 of January 31, 2011, as amended, known as the "PR Internal Revenue Code" ("PR Code"). With the approval of Act 52 of June 30, 2022, the disregarded entity treatment is now recognized for PR tax purposes.

Individual Resident Investors' incentives grant a total exemption on capital gains derived by the appreciation of securities accrued after becoming a PR bona fide resident. In addition, these benefits confer PR tax exemptions on passive income, such as interest and dividends. For these reasons, high-net-worth US residents are attracted to moving to the Island to benefit from available tax exemptions at the individual and business level. The relocation of these individuals has increased the demand for export of goods tax incentives, as many of them seek to move their businesses to the Island.

III. INTERPLAY BETWEEN PR AND US FEDERAL TAX RULES

US citizens are subject to US federal tax on worldwide income. However, pursuant to §933 of the US Internal Revenue Code of 1986, as amended, ("US Code") PR bona fide residents are entitled to exclude their income attributable to PR sources from US taxation. For this reason, it is crucial to have a general knowledge of US sourcing rules and PR residency requirements.

- US General Sourcing Rules

The following table presents a summary of the most common income types and their general sourcing rules per the US Code:

TYPE OF INCOME	FACTOR DETERMINING SOURCE
Salaries/compensation for labor or personal services	Location where the service was performed
Rents	Location of property
Real Property	Location of property
Personal Property	Seller's tax home (special rules apply)
Interest	Residence of payer
Dividends	Where corporation was created or organized

- Special Sourcing Rule in the US for the Sale of Personal Property

In general, income from the sale of personal property is attributed to the residency of the seller. Nonetheless, there are Special Rules under §1.937-2(f) of the US Code Regulations ("US Regs") for gains from dispositions of certain investment property (e.g., debt and equity securities) owned by a US citizen or resident alien prior to becoming a bona fide resident of a US territory (such as PR). Under the Special Rules, such gains will generally be treated as US-sourced.

The Special Rule is applicable to a taxpayer that meets the following conditions:
1. For the tax year in question, he/she was a bona fide resident of the possession,
2. Had a gain from certain investment property that was acquired before the move to the possession,[8] and
3. For any of the 10 years preceding the year of sale, he/she was a citizen or resident of the US (other than a bona fide resident of the possession).

Notwithstanding said Special Rule, §1.937-2(f)(1)(vi) of the US Regs allows taxpayers to elect to bifurcate the gain between the US and the possession according to the individual's holding period. The cutoff for the commencement of the possession holding period lies when the individual has fully attained bona fide residency in such possession. This election is most beneficial when the holding period allocable to the US is shorter than the period allocable to PR, as more gain can be brought to PR. The allocation of gains will be computed differently depending on the classification of the security held (i.e., marketable, or non-marketable).

- PR bona fide residency requirements

Individuals claiming PR bona fide residency seeking to exclude PR source income will have to comply with the tests of §937 of the US Code and the regulations thereunder as well as the requirements of the PR Code.

§1.937-1 of the US Regs has the following three-prong test that individuals must annually meet to be considered PR Bona fide residents: (1) the presence test, (2) tax home test, and (3) closer connection test. The presence test generally is met when individuals are physically present

in PR for at least 183 days. The tax home test requires the main place of business for the taxpayer to be PR. Lastly, the closer connection is a circumstantial test that requires the individual to prove their personal and family life is grounded in PR. The PR Code has a general presumption that the individual is a bona fide resident if he or she is present in PR for 183 days or more.[9] PR Case law points out that the intention of the individual to permanently reside in PR is another factor to be considered when determining if PR bona fide residency has been attained.[10]

- Controlled Foreign Corporation Implications

In general, US shareholders of a foreign corporation are not subject to tax until it makes a dividend distribution. However, an exception applies to foreign corporations that fall into the Controlled Foreign Corporation (CFC) regime. Under the CFC rules, US shareholders are taxed on the corporation's income at US regular income tax rates. A foreign corporation will be considered a CFC if more than 50% of its stocks' total combined voting power or value is owned directly, indirectly, or constructively by US shareholders.[11] Constructive attribution rules are highly technical and must be carefully examined in light of the taxpayer's circumstances.

As explained, entities created in PR are considered foreign entities for US tax purposes and thus may fall into the CFC regime. Nevertheless, PR bona fide residents are exempted from this regime if the following conditions are met: (a) such individual is a bona fide PR resident during his entire taxable year in which the taxable year of the foreign corporation ends, and (b) dividends received from said foreign corporation are treated as derived from PR sources.[12] There are other US anti-deferral regimes (e.g., Passive Foreign Investment Company and Accumulated Earnings Tax) that may apply.

IV. IRS AUDIT CAMPAIGN

In January 2021, the IRS formally established the "Puerto Rico Act 22, Individual Investors Act" Campaign by adding it to the list of active audit areas targeted by its Large Business and International division. The IRS has publicly expressed this campaign will address the following matters through examinations, outreach, and soft letters.[13]

- Act 22 Individuals that relocated to PR without meeting the residency requirements of Section 937 of the US Code that allow PR source income exclusion under Section 933, and
- Assess if such individuals that are availing themselves from the exclusion of Section 933 are inappropriately claiming non-PR source income as PR source income to escape US federal taxation.

As a result of this campaign, there will be heightened scrutiny of these individuals' US federal compliance filings. Individuals should be prepared to present solid evidence to decimate IRS worries of a wrongfully claimed residency status or any erroneous reporting of income. Maintaining residency in PR goes beyond buying a house or apartment, it requires individuals to comply with the three PR bona fide residency requirements previously mentioned. Special emphasis must be placed on the closer connection test which requires individuals to move their personal, social, cultural, and family lives to the island. The burden of proof will be on the taxpayer's hands if the IRS chooses to conduct an audit.

Although not directly mentioned, it could also be inferred that the IRS will be closely monitoring and examining the export businesses held by these individuals. In this sense, potential targets for IRS examination would be to assess if the PR business activities conducted are a continuation of a former US business, if it engages in US business activities, or if there have been any transfers of property from the US to PR, among others. Strong documentation will be key to supporting that the business has been completely developed and its operations are fully conducted locally. Finally, the IRS may also

analyze the complete business structure to assess if there are CFCs that are not compliant in the US federal arena or if other anti-deferral implications apply.

V. CONCLUSIONS AND RECOMMENDATIONS

Due to the intricacies involved within the PR and US tax framework, securing proper tax planning is paramount for any individual relocating and structuring a business on the Island. There are many moving pieces that can turn a successful investment into a defective structure ultimately subject to unintended tax consequences.

Focal points of assessment before moving and commencing a business on the island are:

- Individuals

- Explore the island, study the culture, and evaluate if PR fits your family's social, professional, and educational needs.
- On the technical side, seek counsel from a US tax advisor that works in conjunction with a PR firm to plan ahead, ensure an understanding of the sourcing rules, residency, US and PR tax. filings, and tax grant requirements that must be complied with, and weigh if the move is convenient tax-wise, and if pre-steps need to be taken before jumping the ocean.
- One key consideration is to analyze pre-emigration appreciation of assets and compare it with expected yield after relocation to have a general estimate of the potential savings after the move.

- Businesses

- Pursue PR tax counsel to assess if the proposed business is viable and eligible to benefit from PR tax incentives. Furthermore, insights from local advisors should be obtained to build a business structure that maximizes PR tax benefits. Also, it is important to be aware of local business requirements, tax and grant compliance filings to ensure a deadline is not overlooked.
- Simultaneously, it is recommended taxpayers consult with US tax counsel to be certain of the US tax implications that must be considered as part of the analysis, especially, if other US investors or US-related entities are part of the structure. These last two factors can unfold in US tax consequences for the business. US investors may serve as agents that cause the unintended result of engaging the PR business in a US trade or business. Transactions with US affiliates may require the preparation of a transfer pricing report to deduct the expenses for income tax purposes. A parallel requirement is present in the PR Code for PR operations that are not covered under a tax grant.
- Caution must be exercised with functions performed by the business outside of PR, as they will not be covered by the grants and may prompt tax consequences for the entity in the foreign country.

- Bringing a US business to PR may entail an outbound transaction of intangibles (e.g., intellectual property) triggering a US tax imposition on such transfer. In addition, if certain circumstances are met, moving a US corporation to the Island may activate US anti-inversion rules by deeming the new PR entity to be taxed as a US domestic corporation, thereby, frustrating the end goal of the incentives.

In recent times where the IRS has turned the spotlight on Act 22 incentives, the first course of action if the taxpayer has been established in PR should be to perform a compliance readiness assessment of the individual and business structure. This can shed light on areas that should be addressed prior to facing an audit to pass the tests without major inconveniences. Planning and remaining compliant are the key priorities.

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[1] Downes v. Bidwell, 182 U.S. 244, 282 (1901); Dorr v. United States, 195 U.S. 138, 24 S. Ct. 808, 49 L. Ed. 128 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922); Examining Bd. Of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976); Califano v. Torres, 435 U.S. 1, 98 S. Ct. 906, 55 L. Ed. 2d 65 (1978).
[2] This requirement hinges on the preemption doctrine, derived from the Supremacy Clause of the US Constitution. Under this doctrine, the US legislative arm has the authority to effectuate congressional occupation of a specific field which translates into state law being displaced by US laws on the specific subject matter. Ryan Patton, Federal Preemption in an Age of Globalization, 37 Case W. Res. J. Int'l L. 111 (2005) Available at: https://scholarlycommons.law.case.edu/jil/vol37/iss1/7 In these cases, US courts will have jurisdiction over the matters occupied by US laws.
[3] The Puerto Rico Oversight, Management, and Economic Stability Act.
[4] Section 204 of PROMESA requires that PR laws and certain rules, regulations, and executive orders are submitted for approval to the FOMPR.
[5] Municipalities impose a property tax on the appraised value of all taxable personal property of up to 10.33% per annum and on taxable real property of up to 12.33% per annum. Tax Rates for Real and Personal Property for Fiscal Year 2022-2023 published by Puerto Rico Municipal Revenue Collection Center, available at: https://portal.crim360.com/crimpr/CMS/DOCUMENTOS/download/269.pdf
[6] The volume of business tax is another tax levied by municipalities, with varied tax rates that cannot exceed 0.5% for nonfinancial businesses and 1.50% for financial businesses. Article 7.202 of Act 107 of August 14, 2020, as amended, known as the "Puerto Rico Municipal Code".

[7] There is an exception to this rule for certain businesses under the Incentives Code. Exempt businesses that are Priority Projects grantees under the Incentives Code which are treated as disregarded entities under the US Code are conferred equal treatment in PR and thus are treated as disregarded entities for PR tax purposes.
[8]US Code §731(c)(3)(C)(i) property and §954(c)(1)(B) property; further clarified by US Regs §1.954-2(e)(1). Includes money, stock in a corporation, notes, bonds, debentures and similar debt instruments, foreign currencies, property that yields dividends, interest, rent, royalties, or annuities among others.
[9] PR Code §1010.01(a)(30).
[10] Fiddler v. Srio. de Hacienda, 85 DPR 316 (1962).
[11]US Code §951(b) defines a U.S. shareholder, with respect to any foreign corporation, as a US person (as defined in US Code §957(c)) that owns 10% or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation, or 10% or more of the total value of shares of all classes of stock of the foreign corporation. US Code §957(c) adheres to the meaning of §7701(a)(30) under which a US person is defined generally as any domestic corporation, domestic partnership, domestic trust or estate, or US individual citizen or resident.
[12]US Code §957(c)(1).
[13] Large Business and International Active Campaigns are listed in the following IRS website: https://www.irs.gov/businesses/corporations/lbi-active-campaigns

HOW TAX CARROTS AND TAX STICKS CAN TRANSFORM THE WILD ECONOMY INTO A CLIC ECONOMY

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The Club of Rome[i] is a group of scientists, educators, economists, humanists, industrialists, and civil servants founded in 1968 by the successful Italian industrialist and philanthropist Aurelio Peccei when the world's population was around 3.5 billion. In 1970 the Club of Rome tasked a group of scientists to undertake a study to define the physical limits to population growth and the constraints resulting from economic activities on the planet. In 1971 the findings of their studies in a report called 'the limits to growth'[ii] were presented at international gatherings in Ottawa, Moscow and Rio de Janeiro. Their report had 3 main conclusions:

1. If the present growth trends in population, industrialisation, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.
2. It is possible to alter these growth trends and to establish a condition of ecological and economic stability that is sustainable far into the future. The state of global equilibrium could be designed so that the basic material needs of each person on earth are satisfied and each person has an equal opportunity to realise his individual human potential.
3. If the world's people decide to strive for this second outcome rather than the first, the sooner they begin working to attain it, the greater will be their chances of success.

Needless to say the world was shocked following the publication of this report and the general consensus at the time was that urgent action was needed to alter the trends. Fast forward more than 50 years and the world's population is around 8 billion whilst the world's economy is still based on a flawed system that is predominantly WILD (Wasteful, Idle, Lopsided and Dirty). Non-governmental organizations (NGOs), Governments, Policymakers and Public Interest Groups have time and again called upon businesses and consumers to change their behavior aimed at converting the WILD economy into a CLIC ® (Circular, Lean, Inclusive and Clean) economy. [iii]

Not until 2015 serious traction was achieved when the so called Paris Climate Accords covering climate change mitigation, adaption and finance as well as the Sustainable Development Goals were agreed upon. As a result Governments around the world have been using their legislative and regulatory toolkit to address climate change and force businesses in general and Multi National Enterprises (MNEs) in particular to become more sustainable and responsible around their obligations towards society and the world in which they operate.

A key instrument available to Governments, in addition to green policy and regulatory measures, is green tax policy aimed at use of revenue-generating, revenue-spending and revenue-neutral fiscal instruments for improving the sustainability aspects of doing business. This article discusses the various levies (the tax sticks) and incentives (the tax carrots) that Governments are deploying as part of their green tax policy and how MNEs are responding to and addressing these policy measures.

THE DIFFERENCE BETWEEN SUSTAINABILITY AND ESG

Although sustainability and Environmental, Social and Environment (ESG) are often times considered similar there is one fundamental difference. Sustainability is an umbrella term which could mean different things for different businesses whereas ESG is specific and measurable. The Environmental dimension includes areas like reducing carbon emissions, improving resource efficiency, reducing waste and complying with environmental regulations.
The Social dimension focuses on employees, customers, communities and includes workplace safety, employee engagement, diversity and inclusion, customer satisfaction and data privacy.
The Governance dimension addresses business leadership and structure and includes executive remuneration,

shareholders rights, how audits are conducted and preventing bribery, corruption and money laundering.

GOVERNMENT ACTIONS

Governments around the world are using tax measures to adjust market failures, to try and reduce emissions, meet their commitments on carbon neutrality and tackle climate change, as well as to raise revenue and fund important policy objectives. While these goals are shared, the policies established to achieve them vary greatly.
Historically there have been twin tax policy approaches to driving transformation change in business and consumer behavior addressing the environment impact using either tax sticks or tax carrots. The European Union (EU) had traditionally lead and focused on tax sticks whereas the United States of America (US) had primarily focused on tax carrots.[vi] Since 2016 a third policy approach to drive transformational change for businesses addressing their social and governance impact has been adopted which is public disclosures in the form of providing tax transparency (tax profiling).

The current economic climate with a global Covid-19 pandemic potentially past its peak presents opportunities for both governments and businesses to achieve a 'deep green' recovery that provides dual benefits of both increasing investment spent as well as decreasing environmental damage. Supplementing environmental policy and regulations, fiscal instruments in the form of tax carrots and tax sticks can help address price issues and are likely to offer the most effective measures to achieve meaningful change.

TAX STICKS

A whole range of tax levies exist in many countries around the world aimed at reducing the carbon footprint of doing business and stimulating circular business models. They are mostly in the form of carbon emission taxes and environmental resource based taxes such as fuel taxes, energy taxes, waste taxes and plastic taxes. Sometimes the taxes are levied on a national/federal level and sometimes on a local/state/municipal level.

Whichever taxing mechanism is being used there may be the risk of high carbon prices and environmental taxes being regressive as they are ultimately passed on by businesses to end consumers. As a result, their impact is felt disproportionally by poorer members of society especially if the tax falls on heating fuels, housing and transport.

For instance, the French president Emmanuel Macron sought to increase fuel taxes in 2018 to target carbon emissions by raising petrol and diesel taxes. This tax reform was complemented by reducing wealth taxes mainly for the rich and this resulted in violent riots throughout Paris and other parts of France by the so called 'yellow vest' movement. As a result, the French government decided to bow to the protesters and the planned tax hikes were suspended proclaiming that 'no tax deserves to endanger the unity of the nation'.[vii]

There is also the risk of increased production in, or sourcing of high emission products from, a second country with less strict climate policies (so called "carbon leakage") meaning that tax sticks could possibly even have a net negative effect on the overall carbon emissions. To address carbon leakage in the EU, a Carbon Border Adjustment Mechanism is considered which will be a charge on imports of iron, steel, aluminum, fertilizer, cement and electricity based on the price of EU Emissions Trading System.[viii] This raises concerns however about protectionism and negative impact on world trade. The general consensus is that global cooperation would be better and should be in the form of a global carbon pricing mechanism. Unity and cooperation must be striven for, acknowledging that different countries are at different stages of the journey to curtail greenhouse gas emissions and use different tools. The inconvenient truth is that time is running out whilst unity is difficult to achieve given nationalism, protection of national interests and the political necessity to preserve economic competitiveness, especially those of the superpowers in the world such as the EU, the US and China.

In the Dutch Caribbean there are currently no tax sticks used as a policy instrument by the Governments of Aruba, Curaçao and St Maarten. They are currently not considered which I assume is because its impact would be felt disproportionally by poorer members of their societies.

TAX CARROTS

There are thousands of different sort of 'green' tax incentives available to businesses around the world varying from sustainability grants and incentives to tax exemptions. The main incentives are centered around decarbonizing the world's economy (reduction goal), expanding and using existing technology (switch goal) and creating new technology around renewable forms of energy solutions mainly solar, wind and water (innovate goal).
Most grants and incentives reduce the costs of doing business by focusing on (partial) project cost reimbursement, tax rate discounts or tax deduction for amounts investment in – inter alia- energy efficient buildings & processes, production and use of hydrogen-based fuels, renewable energy solutions, recycling of materials, green R&D initiatives, carbon capture technologies, and limiting the uses of plastics and packaging. Tax exemptions for businesses could for example come in the form of exemptions from environmental taxes based on achieved emission, water and waste use reductions, or in the form of corporate tax exemptions relating to the production or use of renewable energy solutions.

Some very successful and transformative businesses would not even have survived or existed without these tax incentives. For instance, Tesla is essentially a massively loss making company were it not for the emission credits it is selling to other car manufacturers coupled with the tax credits and subsidies its customers are receiving when buying and driving their electric vehicles.[x]

In the Dutch Caribbean there are currently no such tax carrots used as a policy instrument by the Governments of Aruba, Curacao and St Maarten and they are currently not considered. In order to maintain their international competitiveness and demonstrate that sustainability is taken seriously by the respective Governments and business initiatives to reduce their carbon footprints are being encouraged and sponsored it would be welcomed if tax carrots are to become part of their tax policies.

TAX PROFILING

The call for public tax transparency by mainly MNEs comes from a mistrust by some stakeholders resulting from the perception that businesses misuse the international corporate tax system to avoid paying their 'fair share' of tax. Some businesses have already responded with greater public tax transparency to demonstrate that their approach to tax is sustainable and responsible. Tax transparency may take different forms with disclosures of information that is quantitative, qualitative or sometimes both.

Quantitative disclosures provide details of how much tax was paid during a certain time period and where such taxes where paid. Often, additional information is provided such as how many employees were employed in a certain jurisdiction as well as what the revenue and profit before taxation was in the jurisdictions where there is taxable presence. For many MNEs this information is already available because this needs to be provided to the tax authorities in the jurisdiction where the Company is headquartered under the so called Country-by-Country Reporting (CbCR) obligations. CbCR is solely aimed however at corporate taxation assisting tax administrations to determine if related parties within an MNE are dealing with each other on an arm's length basis – i.e. that there is no artificial profit shifting and tax base erosion taking place.

Qualitative disclosures describe a company's approach to tax. Some MNEs have already made their board approved tax strategy or tax policy publicly available. For large companies and groups operating in the UK this is even a legal requirement since 2016. In Poland legislation is in force since 2021 requiring companies with Polish revenues in excess of EUR 50 million to publish a progress report including both quantitative and qualitative tax information. There are various other countries such as Australia, Denmark, the Netherlands and Spain where such disclosures are strongly encouraged and are aimed at building trust between corporate taxpayers and tax administrations.

Increasingly, businesses are not only disclosing on a voluntary basis corporate tax payments but also payment information for other kinds of taxes which are being borne and which are being collected on behalf of the government by doing business in a country. This is mainly driven by public pressure from consumers, NGOs and tax transparency advocates. Such disclosures usually take the form of a tax contribution report which is made publicly available through corporate websites. Where businesses are voluntarily disclosing tax information they are encouraged to report in accordance with recognized tax transparency standards such as the Global Reporting Initiative's tax standard (GRI 207) as issued by the Global Sustainability Standards Board which are applicable as from 2021 for companies that have elected to endorse GRI Standards and identified tax as a material topic to disclose its management approach to tax as well as their CbCR. Examples of such reports are those of the Swedish based Fortum Group and the (now) UK based Shell Group.

Businesses should expect additional government actions on enhanced tax reporting in the near future. For instance political consensus was achieved within the EU on a public CbCR Directive which was published in December 2021. This Directive must be codified by the EU Member States in their domestic legislation and will require both EU headquartered MNEs and non EU headquartered MNEs (with large subsidiaries in the EU) with global revenues of at least EUR 750 million for two consecutive years to publicly disclose their corporate tax payments on a country-by-country basis for all jurisdictions within the EU and jurisdictions found on the EU list of uncooperative jurisdictions (the so called EU tax haven blacklist). In the meantime in the US the US House of Representatives has recently passed the Tax Havens and Offshoring Act requiring corporations registered with the US Securities and Exchange Commission to publicly disclose CbCR information. Although the adoption and implementation date of these new public tax reporting obligations has stalled somewhat it is expected they will become a reality for businesses rather sooner than later. The practical relevance of enhanced tax reporting in the Dutch Caribbean is likely to be limited given the limited number of local headquartered MNEs which would fall within the scope of such regulations.

HOW BUSINESS IS RESPONDING

Most MNEs are evaluating their business strategies, their investment profiles as well as their risk and business operating model in response to – inter alia - the various ESG related tax measures. In addition, to finance their transition toward a greener future they are identifying and applying for tax credits, grants & incentives and funding's that they are eligible to.

Environmental taxes are usually not on the priority business radar but an increasing number of taxes and resulting tax audits potentially giving rise to interest and penalties in case of non-compliance demands that businesses have access to the required data and ensure that proper reporting is in place requiring high quality data, clear processes and controls.

The increasing importance of environmental taxes, carbon pricing and their impact on the price of the product and margin will likely transform the tax function within an MNE to be a key player of the ESG strategy, value chain and business model discussion.

As governments, consumers, investors, employees, and society at large are demanding transparency from businesses on how they address ESG issues and policies, their tax transparency reporting and strategy continues to evolve. Businesses are therefore re-defining their approach to tax transparency and coordinate it with their broader sustainability strategy. This means that more comprehensive and detailed standards are being developed. More tax information needs to be provided and be made available to assess the value impact and investment proposition from an economic, environmental and sustainability perspective. One of the most important considerations in determining tax transparency are the cost and efforts to produce reliable data and define the strategy and approach to tax. All MNEs that have had to prepare and submit CbCR filings have learned that the extraction and aggregation of tax data and ensuring completeness, accuracy and consistency of this data across often times multiple ERP systems is a significant undertaking. Some MNEs are likely to consider an assurance process to validate the data integrity before using this in publicly available tax transparency reports. With a solid tax strategy and supporting governance and control framework the larger MNEs are usually well positioned to obtain and provide reliable data and determine the degree of tax transparency that is right for them. Smaller MNEs – especially those that currently do not prepare and provide CbCRs and do not have a tax strategy and operational tax risk control framework- are likely to struggle.

CONCLUSIONS

Public revenue streams can effectively counter undesirable market outcomes. Governments around the world are increasingly using tax policy to drive transformational change of the WILD economy into a CLIC economy. The main green tax policy tools addressing the environmental impact of doing business are tax sticks in the form of carbon emission taxes and environmental taxes and tax carrots in the form of sustainability incentives and environment tax exemptions. A relatively new tax policy instrument in their toolbox addressing the social and governance impact of doing business is tax profiling which takes the form of both qualitative and quantitative disclosures. All these fiscal instruments contribute to price correction and redirecting consumers, investment and finance to sustainable initiatives, forcing businesses in general and MNEs in particular to evaluate their business strategy as well as their approach to tax. There are currently no tax sticks, tax carrots and tax profiling obligations in the tax policies of the Dutch Caribbean Governments. Reliable data and solid governance and control frameworks are required to comply with the various tax obligations and safeguard their tax effectiveness. It is hoped that the various ESG related tax measures and initiatives will help prevent the rather sudden and uncontrollable decline in both population and industrial capacity within the next 50 years as predicted by the Club of Rome and that tax can truly save the world.

Maarten Koper

[i] https://www.clubofrome.org/
[ii] https://www.donellameadows.org/wp-content/userfiles/Limits-to-Growth-digital-scan-version.pdf
[iii] https://www.sfi.ch/en/about-us/news/transitioning-from-a-wild-to-a-clic-economy
[iv] https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement
[v] https://www.undp.org/sustainable-development-goal
[vi] https://taxfoundation.org/outsourcing-carrot-or-stick-response/
[vii] https://www.kazu.org/2018-12-04/france-freezes-fuel-tax-hike-in-face-of-yellow-vest-protests
[viii] https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/carbon-border-adjustment-mechanism-cbam-council-agrees-its-negotiating-mandate/#:~:text=The%20Commission%20presented%20its%20proposal,than%20those%20of%20the%20EU).
[ix] https://oxfordtax.sbs.ox.ac.uk/article/how-and-why-a-global-carbon-tax-could-revolutionize-international-climate-change-law
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WITH FOREIGN SUBSIDIES REGULATION, EU CASTS WORLDWIDE STATE AID NET INCLUDING ON THE CARIBBEAN

By Wessel Geursen, Senior legal adviser at De Brauw Blackstone Westbroek and affiliated PhD-fellow VU University Amsterdam.[1]

As a consequence of recent geopolitical developments, the EU has adopted several new legislative instruments to protect its interests, particularly the internal market.[2] On 30 June 2022, the European Parliament and Council of the EU reached a provisional political agreement on the text of the foreign subsidies regulation (FSR).[3] With this regulation, the EU aims to prevent distortions of the level playing field within its internal market that are caused by subsidies given by third countries to undertakings which are active on the EU market. Although the EU cannot prohibit third countries from providing subsidies,[4] the FSR imposes obligations on recipient undertakings when doing business in the EU.[5]

The new regulation pursues the same goal as (a) EU state aid rules which try to prevent the distortion of competition by Member States; and (b) the provisions concerning subsidies in the EU-UK Trade and Cooperation Agreement (TCA) following Brexit.[6]

With the FSR, the rules combating distortions of competition by States (either Member States under the EU state aid rules, or third countries under the new FSR) becomes worldwide. This also affects the Caribbean region. In that region, one will find (i) third countries; (ii) jurisdictions which are part of a third country, such as the British overseas jurisdictions; and (iii) jurisdictions which are part of a Member State, such as overseas countries and territories (OCT) and outermost regions. These jurisdictions are not known for providing large amounts of subsidies, instead they have the reputation of having advantageous tax regimes. And it goes that a lot of multinational undertakings make use of those regimes. The question to be answered in this article is to what extent the EU anti-subsidy rules apply to Caribbean states and jurisdictions and more specifically to their tax legislation.

TAXATION AS STATE AID OR SUBSIDY

To began with the latter, subsidies have been defined very broadly in the FSR proposal by the European Commission and should not be understood in the narrow sense of a direct payment of public money to an undertaking. When a third country foregoes revenue that is otherwise due by an undertaking this is also considered a foreign subsidy, such as tax exemptions. Tax legislation of third countries might therefore fall within the broad scope of the FSR. Article 2(2) FSR explicitly mentions taxation benefits provided by third countries, such as fiscal incentives, setting off of operating losses and debt forgiveness. An advantageous tax measure provides the company with a benefit which distorts competition; not so much because the company actually receives money from the government, but because the company has to pay less to the government and the tax advantage therefore reduces the company's costs. Under EU state aid law, similar fiscal benefits have been characterised as state aid, for example tax waivers, tax exemptions (either individual or general), reductions in the taxable base, lower rates and advantageous tax rulings.

CARIBBEAN THIRD COUNTRIES

The EU has concluded two multinational agreements with a lot of third countries in the Caribbean region. Although the 2008 EU-Cariforum Economic Partnership Agreement contains rules equivalent to EU competition rules, it does not contain anti-subsidy rules equivalent to the EU state aid rules.[7] The 2021 agreement between the EU and the Organisation of African, Caribbean and Pacific States (OACPS)[8] to which 16 Caribbean countries are party does contain such rules. According to Article 52(5) of that agreement parties have to undertake to implement "rules and policies to effectively tackle anti-competitive business practices, including subsidies related to economic activities granted by the Parties, which have the potential to distort the proper functioning of markets". Whether distortion by subsidies will be prevented therefore depends on national law of the third countries. Regardless of that national legislation, the FSR will apply to undertakings which have been granted a subsidy by a Caribbean third country, including benefits arising from their tax legislation.

BRITISH OVERSEAS JURISDICTIONS

Spread around the world are overseas jurisdiction which are part of the United Kingdom of Great Britain and Northern Ireland (UK). In the Caribbean these include: Anguilla, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands. The UK became a third country upon withdrawal on 1 February 2020[9] and while from 1 January 2021, EU legislation does not apply anymore to the UK, the rules of the withdrawal agreement and TCA still apply. The TCA contains subsidy rules which are similar to the EU state aid rules. However, the TCA does not apply to the British overseas jurisdictions at all and therefore neither the TCA subsidy rules.[10] Consequently in relation to the EU, the British overseas jurisdictions are in the same position as a third country with which no trade agreement has been concluded. Therefore, the FSR will apply to undertakings which are subject to British overseas tax legislation that qualifies as a subsidy.

OCT AND OUTERMOST REGIONS OF MEMBER STATES

State aid rules do apply to the outermost regions since they are part of the internal market, such as the French Caribbean jurisdictions of Guadeloupe, French Guiana, Martinique and Saint Martin. The OCT are not part of the EU's internal market. The state aid rules do therefore not apply to the OCT, such as the Caribbean jurisdictions which are part of the Kingdom of the Netherlands[11] and the French Saint Barth. Article 355(2) TFEU provides that the EU-OCT association regime applies in relation to the OCT and more specifically the OCT Association Decision. The Commission had proposed to incorporate subsidy rules in the current OCT Association Decision which are similar to the state aid rules, but the Council and EP watered down Article 60(d) of the OCT Association Decision 2021/1764[12] to only a transparency obligation for OCTs when subsidising goods.[13] In the TBG Limited-case, a free movement of capital case involving the OCT, the European Court of Justice (ECJ) interpreted a free movement of capital provision in the OCT Association Decision along the lines of internal market provision Article 63 TFEU on the free movement of capital. According to the ECJ, it could interpret the provision of the OCT Association Decision similar to Article 63 TFEU because it "has a particularly wide scope, close to the scope of [Article 63 TFEU]".[14] With regard to subsidies under the OCT Association Decision, the EP and Council have explicitly chosen to limit Article 60 of the OCT Association Decision and to deviate from the Commission's proposal which in its proposed form was close to the EU state aid rules. Article 60 of the OCT Association Decision has therefore a very narrow definition of subsidies which is not along the lines of the EU state aid rules. Therefore, I am of the opinion that an analogy with the TBG Limited-case where a provision of the OCT Association Decision was interpreted along the lines of another provision of EU law because of their similarity cannot be made with Article 60 of the OCT Association Decision and the EU state aid rules. If the EU legislature would have wished otherwise, EP and Council should have followed the Commission's proposal and not have narrowed down the scope of Article 60 of the OCT Association Decision. Consequently, the OCT Association Decision does in general not apply to subsidies in the form of fiscal advantageous regimes of the OCTs.

The remaining question is whether the FSR applies to undertakings which (i) are active within the EU's internal market; and (ii) have been granted subsidies by the OCTs. I think it is important to underline that the FSR does not impose obligations on the OCT, but on undertakings which want to be active on the EU's internal market. The FSR tries to prevent the distortion of competition in the internal market by undertakings which received subsidies and tries to create a level playing field because undertakings can in principle not receive state aid from Member States. When it comes to other rules of EU competition law, they apply to undertakings which are active in the internal market (by selling their products and services there) regardless of their place of residence. The EU's jurisdiction in such a case was confirmed by the ECJ in several judgements, most recently in the Intel-case. It considered the EU to have jurisdiction under public international law when the undertakings conduct "has anticompetitive effects liable to have an impact on the EU market."[15] In my view, the same could be argued for undertakings to which subsidies have been granted which distort competition on the EU market. The fact that those subsidies were granted by third countries does not eliminate the EU's jurisdiction.

A more technical and institutional counterargument against the application of the FSR to undertakings which were granted subsidies by OCTs is the legal basis of the FSR. It is based on two provisions: (i) Article 114 TFEU which is the basis for harmonising legislation in the internal market; and (ii) on Article 207 TFEU which is the basis for common commercial policy with regard to third countries. The basis of the OCT Association Decision is Article 203 TFEU and that provision should have been used as a basis for the FSR to also include subsidies from the OCT. Now it is only "targeted" at the internal market and third countries, but the EU legislature forgot to include Article 203 TFEU to "target" the OCT as well.

However, the following might invalidate this counterargument. The OCTs are not third countries, since they are part of a Member State. Nevertheless, they do not belong the EU's internal market and are therefore at par with third countries. With regard to the free movement of capital under Article 63 TFEU which applies both within the internal market and in respect of capital movements with third countries, the question arose whether it was applicable to movements of capital from OCTs to the internal market. Therefore, similar to the FSR which is "targeted" to the same areas as well. In the Prunus-case the ECJ ruled that this provision necessarily applied to the OCT as well because of the "unlimited territorial scope of that provision".[16] In that case advocate-general Cruz Villalón could not reconcile "free movement of capital which excludes OCTs while embracing all third countries (...) [and concluded that] in the absence of a specific set of rules in the decisions on association, Article 63 TFEU is applicable to OCTs."[17] When making an analogy between the Prunus-case in order to answer whether the new FSR is applicable to subsidies granted by OCTs, we must first conclude that the FSR also has a similar unlimited territorial scope as Article 63 TFEU. Secondly, given the legal basis of the FSR it "targets" both the internal market and third countries, just as Article 63 TFEU does. Therefore, the lack of Article 203 TFEU as a basis for the FSR to apply to OCT subsidies can be "repaired" by reasoning along the same lines as theECJ did in the Prunus-case.

CONCLUSION

Since the FSR explicitly mentions beneficial tax regimes, fiscal legislation of third countries may be affected, also in the Caribbean. This includes tax regimes in the British overseas jurisdictions, since they fall within the scope of the FSR and not within the subsidy rules of the EU-UK TCA after Brexit. Outermost regions are already subject to state aid rules and fiscal state aid also falls within the scope of those rules. With regard to the OCT, the EU state aid rules do not apply and no provision similar to state aid is included in the OCT Association Decision. The question is therefore whether the FSR can apply to undertakings which have been granted a subsidy by OCTs, including preferential OCT tax regime. Since the FSR is not addressed to the OCT, but to undertakings which are active on the internal market, the FSR might be considered to apply, just as other EU competition rules apply to those undertakings, regardless of their place of residence, or regardless of the jurisdiction which granted them a subsidy. The nexus with EU-territory is whether there are "anticompetitive effects liable to have an impact on the EU market", regardless of the place of its origin. According to the ECJ this effects-based approach complies with the principle of territoriality. The legal basis of the FSR "targets" the internal market and third countries. It lacks, however, a legal basis to "target" the OCT. In a similar situation in the Prunus-case that did not prevent the ECJ to declare the free movement of capital provision to apply in respect of the OCT even though that provision also only "targeted" the internal market and third countries. Therefore, it might be concluded that the FSR is also applicable to beneficial tax regimes of the OCT.

Wessel Geursen

[1] This publication is research output in the context of the project European integration in the Caribbean Region (EUinCARIB) of the University of Curaçao financed as a Jean Monnet Module by the European Commission.
[2]Such as export control under Regulation 2021/821 (OJ 2021, L206/1) and the coordination of foreign direct investment (FDI) screening between Member States under Regulation 2019/452 (OJ 2019, L79I/1).
[3]The final text still has to be published in the OJ, but a provisional text hast been published by EP online: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf.
[4] Although some subsidies might fall within the WTO Agreement on Subsidies and Countervailing Measures.
[5]Such as obligations to notify the receipt of those subsidies to the European Commission when they want to take over a company in the EU or when they want to participate in a public procurement by one of the EU Member States.
[6]OJ 2021, L149/1.
[7]Article 126 of that agreement (OJ 2008, L289/3).
[8]The agreement of 15 April 2021 has not been ratified yet, but is applied provisionally according to Article 98(4); https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf
[9]This is in accordance with the procedure provided for in Article 50(1) and (2) TFEU. This has become known as the Brexit.
[10] Article 774(4) TCA.
[11]Aruba, Bonaire, Curaçao, Saba, Saint Eustatius and Saint Maarten.
[12]OJ 2021, L355/6.
[13]Provided the subsidies have a significant negative effect on trade or investment between the Union and an OCT.
[14]ECJ, 5 June 2014, Joined case C-24/12 & C-27/12, X BV and TBG Limited, ECLI:EU:C:2014:1385, par. 48-49.
[15]ECJ, 6 September 2017, Case C-413/14 P, Intel Corporation Inc. (ECLI:EU:C:2017:632), par. 40-46, specfically 45.
[16]ECJ, 5 May 2011, Case C-384/09, Prunus SARL and Polonium SA (ECLI:EU:C:2011:276), par. 20.
[17]Opinion of 9 December 2010, Case C-384/09, Prunus SARL and Polonium SA (ECLI:EU:C:2010:759), par. 57-58.

CRYPTOCURRENCY IN ST MAARTEN

By Marco Aalbers, former inspector at the Tax Department of Sint Maarten

Much is written about bitcoin, bitcoin cash, ethereum and various other currencies, or better known as: cryptocurrencies. Cryptocurrency also seems to be on the rise on Sint Maarten. Cryptocurrency is increasingly used as a means of payment -among others in various businesses (bars, restaurants)- on Sint Maarten and as an investment. The value of the various cryptocurrencies has fallen sharply in recent weeks, but public interest in crypto does not seem to be waning.

The tax aspects of holding and investing in cryptocurrencies often remain underexposed, especially in the Caribbean. In this article I will therefore discuss the tax aspects without wishing to be exhaustive. In principle, the following applies to the other islands within the kingdom as well.

CURRENCIES

Cryptocurrencies are digital means of exchange that do not involve an (official) central counterparty such as a bank. Most transactions in cryptocurrencies take place via so-called exchange platforms. Cryptocurrency can be purchased there against payment of regular money or exchanged for other cryptocurrencies. Cryptocurrencies can also be acquired through mining. Mining is the method by which cryptocurrencies are generated and the transactions involving new coins are verified is known as mining. Mining is not profitable due to the high energy rates on Sint Maarten. The tax treatment of mining differs and will therefore not be discussed further due to its limited importance. Cryptocurrencies are in principle no different from other currencies. Most cryptocurrencies generally do not generate returns in the form of dividends or interest (also known as a split-off). A feature of currencies – including most cryptocurrencies – is that there is no split-off. Currency only knows value decreases and increases in value.

INDIVIDUALS

In most countries, crypto is viewed as an asset for tax purposes. In many countries, capital gains on disposal of assets are explicitly included in the taxation base. This is the case, for example, in the United States. In some countries, including the Netherlands, capital gains are taxed annually, even if they have not been realized (Box 3). This levy has been criticized for years and was recently the subject of a judgment by the Supreme Court in the Netherlands.

In Sint Maarten, cryptocurrencies held by private individuals are actually completely untaxed. As noted earlier, cryptocurrency does not yield revenue that splits-off, but only changes in value. According to Sint Maarten tax law, only income that is split off from an asset can be taxed. Movements in value cannot be taxed. Sint Maarten also has no wealth tax, so that the value itself remains untaxed. In other words: the taxation in Sint Maarten on cryptocurrencies held by private individuals is nil.

DATA EXCHANGE

In contrast to Europe, there is no legislation in Sint Maarten yet regulating that digital platforms are obliged to provide taxation-relevant information about their users to the tax authorities (and that this information is exchanged with other countries).

COMPANIES

What if a company such as a B.V. or N.V. buys or receives cryptocurrency from a customer to pay his bill?

PROFIT TAX

Pursuant to the National Ordinance on Profit Tax 1940, a legal person (B.V. / N.V.) runs a company with its entire assets. Unlike a personal Income tax entrepreneur, a B.V. / N.V. does not need to label its assets 'private' or 'business'. This means that the purchase (whether or not followed by the sale) of cryptocurrencies takes place within the business and will be taxed. The results of a sale must be taken into account in accordance with good commercial practice (in Dutch: Goed koopmansgebruik). Taxation must take place when a profit has been made, i.e. in the event of an actual sale. A loss may be taken if the cryptocurrency would fall in value (below its cost). If a company owns crypto on the balance sheet date, this is valued at cost price or lower market value. If a company is paid for its services or deliveries in cryptocurrencies, the cryptocurrencies must be converted into a regular currency to calculate the value. The converted amount is part of the business revenue. The foregoing is based on the fact that the annual accounts are prepared in accordance with standards that are generally considered acceptable. This means that it provides such insight that a responsible opinion can be formed about the equity and the result of the business.

TAX ON BUSINESS TURNOVER

If the company receives cryptocurrency for its supplies or services, this is taxed. Under the National Ordinance Tax on Business Turnover (TOT), the compensation consists of everything that the entrepreneur receives with regard to the supply of a good or the provision of a service. Even if the point of view would be that it does not concern regular currency, there is a (partial) compensation in kind. In this case, the compensation is set at the total amount (economic market value) of the consideration. In addition, the fees charged by a crypto exchange platform to the entrepreneur, may not be deducted from the taxable business turnover.

PAYROLL TAX

It is also not relevant for payroll tax how cryptocurrencies are classified. Article 6 of the National Ordinance on Wage Tax shows that wages comprises everything received because of past or current employment under whatsoever name and in whatsoever form. Salary/wages paid by a company via cryptocurrencies can be seen as wages in kind. This salary / wages must be converted to regular currency (money value) at the time the cryptocurrency is received.

FUTURE

Cryptocurrency does not seem to be leaving the Sint Maarten market anymore. The legislator might therefore in the future choose to amend the legislation so that value increases of (crypto) currencies can be taxed when held by private individuals. Looking at the current cryptocurrency market conditions, it should be noted however, that value decreases should then also be deductible. Whether this change in legislation is feasible in the near future is the question. Legislation comes with supervision. As mentioned before, at the moment it does not matter whether or not the Tax Authorities of Sint Maarten are aware of the possession of cryptocurrencies in private.

If Sint Maarten chooses to profile itself as 'the crypto-friendly island', that could mean that institutions that manage cryptocurrencies want to establish themselves on Sint Maarten. If the government then chooses to take a piece of the pie, legislation must also be developed which will oblige these institutions – just like banks – to inform the tax authorities of Sint Maarten about their cryptocurrency-assets. Perhaps it is time for a task force composed of representatives from the private sector, central bank and the government? However, the question is whether the already understaffed government of Sint Maarten currently has the personnel capacity for this.

Marco Aalbers

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