In brief

Views on recent developments in tax

The corporate tax system: the good, the bad and the ugly

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Last week's IFS/CIOT lecture, 'Are we heading towards a corporate tax system fit for the 21st century?', was held in the Great Room of the RSA, under the 18th century mural, The Progress of Human Knowledge and Culture. Listening to the lecture and subsequent panel discussion took my mind not to painting but to music, and in particular the haunting two-note melody that Ennio Morricone composed for *The Good, The Bad and The Ugly*. This was not, of course, a reflection on the speakers themselves, but upon their content.

Mike Devereux provided an academic analysis of the corporate tax system, setting out why he thought that this was a bad system and that the OECD's BEPS project was going to promote the wrong behaviour, namely to put more substance in tax havens. He also repeated his prediction of two decades ago that corporation tax would be abolished, this time extending his original 10-year timeframe to the end of the 21st century. Following a comparison of cost sharing with equity investment, he briefly outlined other alternatives, before alighting on the destination-based corporation tax concept, which the House of Lords Economic Affairs Committee (EAC), advised by Mike, had concluded was worthy of a review. Finally, he concluded with the announcement that, following the government's rejection of the EAC's recommendation of a full review of the corporate tax system, the Oxford Centre for Business Taxation would be setting up its own review.

In response to Mike's conclusion that the corporate tax system was 'broken and unfixable' (as described by the moderator, IFS director Paul Johnson), Bill Dodwell of Deloitte painted an altogether different picture. Whilst maybe not going quite as far as saying the system was 'good', he did imply that the system was as good a system as one could get.

Finally, Sir Nick Macpherson concluded that any system was going to be imperfect, or Ugly. As permanent secretary of the Treasury, Sir Nick expressed the caution one would expect and want from someone tasked with maintaining tax revenues. He warned against grand change that could imperil tax receipts and suggested that the way forward should be focused on fixing the worst elements rather than seeking divine beauty.

Looking to the future, I'm reminded that, in the film, it's the Good and the Ugly that survive and the Bad that falls at the end. Reflecting on the debate, this would seem quite apposite, as a lot will need to happen before Mike's prediction of the death of corporate tax comes true.

OECD Paris meeting: 'super-FATCA' is coming soon

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The news that the Organisation for Economic Co-operation and Development (OECD) is working to develop a draft common reporting standard (CRS) and a model competent authority agreement ('model CAA') to enable the multilateral automatic exchange of financial account information should be welcomed by financial institutions and account holders. The OECD is well placed to develop a standardised solution and this is important because, without standardisation, there is a danger of fragmentation of approach, design and implementation, with associated cost ramifications for all parties.

The OECD's work is born out of the FATCA initiative developed by the US and by the subsequent drive arising from the call by the G5 (France, Germany, Italy, Spain and the UK) to develop a multilateral automatic tax information exchange pilot. Since the date of the G5 announcement, over 30 countries are known to have endorsed the plans. The OECD's plans appear to have the most momentum and political support in terms of developing a true global standard and it seems likely that the G5 initiative will leverage this work rather than seek out an alternative solution.

There is much to welcome in the OECD's direction of travel. Financial institutions already grappling with implementing FATCA will be pleased that the OECD's starting point is the Model 1 Inter-Governmental Agreement (IGA). This, in substance, recognises the fact that both governments and financial institutions around the world are already working and investing to implement it, making it a logical starting point for a multilateral solution.

Meetings took place in Paris at the OECD's headquarters during the week commencing 14 October 2013 to further progress these plans and consult with business representatives. After the meeting, the OECD secretariat will be preparing a revised draft of the model CAA and CRS that takes into account feedback received. This will then move forward for approval from the OECD's Committee for Fiscal Affairs in early 2014. For early adopting countries, it is possible that reporting under this model could take place in 2016. This then requires financial institutions to change existing processes and procedures, such as customer on-boarding, well in advance of this date.

Ultimately, we believe automatic exchange of financial account information will soon become a reality. Financial institutions should keep a close watch on this rapidly developing story and think about what it means from an organisational and business perspective. Proportionality in terms of the final reporting requirements does need to be balanced, but there is a risk this will not be achieved due to the political pressure to obtain full information, regardless of cost and the utility value of such information. If the OECD's plans fragment at the implementation stage, that would increase the risk for global financial institutions that will need to identify agreement variances. The system challenges that may be thrown up should not be underestimated. Reporting under FATCA that could be performed on a manual basis – due to the low numbers of reportable persons – may require systemic solutions in a multilateral context. Such systemic solutions require lead times to build and implement.

Proposals for CGT on sales of UK property by non-residents: 'conflicts with ATED'

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The newspapers are full of the latest idea from the Treasury – to charge foreign residents to capital gains tax on UK properties. This idea pops up occasionally, but it looks a bit more serious this time. It will not bring in any money, but that is no guide.

Since April, we have had a new tax called the annual tax on enveloped dwellings (ATED). This applies to companies owning UK residential properties worth more than £2m. The Treasury wanted to stop people buying houses through companies and avoiding stamp duty land tax. It took them ages to grasp that you do not actually save SDLT by buying a UK property through a company. It is true that if you have a property in a company, you could sell the shares in the company and the purchaser would pay less stamp duty – but nobody ever did that. Nobody in their right mind would buy a company and all its unknown liabilities without a significant discount. More importantly, such properties would invariably be standing at a capital gain and the purchaser would be taking over the inherent capital gain on which they would eventually have to pay tax. This is miles more important than the SDLT liability. When the Treasury eventually understood, they were too far down the road with the ATED charge, so it was introduced anyway.

One of the express policy reasons for the ATED charge was to encourage people to take properties out of companies. This new CGT idea conflicts entirely with that policy. Imposing a charge on foreign residents with UK properties encourages them to hold properties in companies, because a sale of shares in a foreign company by a foreign resident cannot easily be taxed. Once we start trying to tax foreign people on their foreign assets, we will truly have gone mad.

I would expect that a new CGT charge would be rebased to 2014. To impose it retrospectively would be an outrage – even the ATED charge only applies to increases in value from April 2013. Of course rebasing would mean there would be no tax yield – for years.

So if there will be no tax yield – what is this all about? It is difficult to avoid the conclusion that it is simply bashing the rich – and if they are foreign as well, so much the better. It is always more satisfactory to impose taxes on people who do not have a vote. And the voters will like it too, because taxes on other people are always the more popular.

I wish somebody (without an agenda) would explain to George Osborne that this just creates a web of unbelievable complexity which few people can understand. I guess it is only good for tax lawyers – so maybe we should keep quiet.

VAT and pension fund management: the ongoing saga

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The next stage in the ongoing debate about the VAT treatment of pension fund management is due to be reached on 12 December, when the advocate general's opinion in the Danish case of *ATP PensionService A/S* (C-464/12) is due to be delivered.

The case concerns the treatment of the 'management' of a 'defined contribution' pension arrangement that is, it seems, open to employees from a wide range of employers, rather than being a specific scheme for staff of a particular business. It follows that the scheme has more in common with 'special investment funds' that employees might invest in to save for their retirement, but there are also differences, especially the fact that payments into the fund are effectively 'locked in' until the individual retires.

At the hearing, it was suggested that the fact that employees bear the 'investment risk' which is reduced by being spread (in common with other types of 'special investment funds') distinguished the case from that of *Wheels Common Investment Fund and Ors* (C-424/11), which concerned a 'defined benefit' arrangement where the employer bears the 'investment risk'. In the *Wheels* case, the CJEU decided that the fund was not a 'special investment fund'. However, in the *ATP* hearing, the Danish tax authority was supported by the UK and the European Commission in its view that the fund was not a 'special investment fund' and hence that the management of it could not qualify for exemption. It also contended that the services supplied did not amount to 'management' in any event, being more in the nature of administrative services.

If the opinion, and ultimately the CJEU, agrees with the Danish tax authority that the fees do not qualify for exemption, further questions will arise – who is the recipient of the relevant supplies and do they have any right to recover VAT on them? The CJEU's decision in the Dutch case of *Fiscale eenheid PPG Holdings BV cs* (C-26/12) suggests that the may be scope for VAT registered employers to reclaim VAT on the costs of operating their pension schemes. HMRC's reaction to the decision in that case is awaited with interest.

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