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In this issue

Legislation

President Biden lays out $2 trillion infrastructure plan to be paid for with tax increases

President Joe Biden on 31 March 2021 delivered a speech in Pittsburgh where he sketched out his ambitious $2 trillion-plus infrastructure proposal. The President laid out his arguments for the American Jobs Plan, which essentially is infrastructure investment over 8 years extending to the power grid, electric vehicles, and broadband, among other areas, paid for with proposals like increasing the corporate tax rate and changing the international provisions of the *Tax Cuts and Jobs Act* (TCJA).

The President provided the inspirational context, saying the plan calls for "investing in American-based companies and American workers" to fix roads that businesses rely upon, providing safe drinking water and access to the Internet, and making the US competitive in markets like battery technology, biotechnology, computer chips, and clean energy.

The President said: "We have to move now. Because I am convinced that if we act now, in 50 years people are going to look back and say, this was the moment that America won the future."

Prior to the speech, the White House outlined the proposed package, indicating it would be paid for with tax increases that, for the most part, were discussed during the Presidential campaign.

More specifically, the American Jobs Plan calls for a renewed electric grid, and high-speed broadband for all; creating jobs and raising wages and benefits for essential home care workers; and revitalizing manufacturing, securing US supply chains, investing in R&D, and providing training for "the jobs of the future." The latter category calls for $50 billion in semiconductor manufacturing and research, as called for in the bipartisan CHIPS Act. The plan also calls for a $174 billion investment in electric vehicles.

Specific details of the tax increase proposals will likely be included in the President's FY 2022 budget plan. However, according to a White House fact sheet released on 31 March, the Made in America Tax Plan, proposed alongside the American Jobs Plan, would:

- Increase the corporate tax rate from 21% to 28%
- Increase the Global Intangible Low-taxed Income (GILTI) rate to 21%, calculate it on a country-by-country basis, and eliminate the 10% return on tangible assets
- Encourage other countries to adopt strong minimum taxes on corporations
- "Deny[ies] deductions to foreign corporations on payments that could allow them to strip profits out of the United States if they are based in a country that does not adopt a strong minimum tax"
- "Further replace[s] an ineffective provision in the 2017 tax law that tried to stop foreign corporations from stripping profits out of the United States"
- Make it "harder for U.S. corporations to invert"
- Deny[ies] companies expense deductions for offshoring jobs and provide a credit for expenses for onshoring
- Eliminate the Foreign-derived Intangible Income (FDII) deduction
- Impose a 15% minimum tax on corporations based on "book income"
- Eliminate tax preferences for fossil fuels, and
- Strengthen business tax enforcement

"If passed alongside President Biden's Made in America corporate tax plan, it [infrastructure plan] will be fully paid for within the next 15 years and reduce deficits in the years after," the fact sheet states.

The second part of the Build Back Better plan, focused on social spending such as health care, childcare, and education, is expected to be detailed in the coming weeks, and will include additional tax proposals, according to White House Press Secretary Jen Psaki on 31 March.

Senate Finance Committee holds international tax hearing

The US Senate Finance Committee on 25 March 2021 held an international tax hearing that highlighted the opposing positions of congressional Democrats, who favor a dramatic overhaul of the international tax provisions in the *Tax Cuts and Jobs Act* (TCJA), and congressional Republicans and the business community.

Democrats generally voiced support for raising revenue by changing the Global Intangible Low-taxed Income (GILTI) provisions, the Base Erosion and Anti-abuse Tax (BEAT), and the Foreign Derived Intangible Income (FDII) rules. Democratic witnesses made the case for international tax changes to fund priorities such as infrastructure and other proposals in President Joe Biden's Build Back Better plan, and made the argument that the TCJA created incentives for US companies to move tangible assets and jobs outside the United States. Other witnesses and Republican committee members suggested there is no need to change the provisions.

The committee hearing underscored fundamental disagreement over US international tax policy. Finance Committee Chairman Ron Wyden (D-OR) made clear in his closing remarks that he has always supported tax reform that would tax the foreign earnings of US companies at the full US rate, while the TCJA represented an effort to move to a more territorial system in which the US largely does not tax the active foreign earnings of US global companies. The hearing also focused on whether FDII is indeed an effective export incentive, and whether the BEAT is doing enough to prevent erosion of the US tax base.

Kimberly Clausing, US Treasury Deputy Assistant Secretary (Tax Analysis), said post-TCJA, "the use of tax havens to avoid tax continues unabated" and a "stronger minimum tax, stronger measures to tackle the profit shifting of foreign multinational companies, and close cooperation with our allies all have an important role to play."

She said while under the GILTI minimum tax, the first 10% return on tangible assets is free of US tax and subsequent income is taxed with a 50% deduction, "our tax system would benefit from a much stronger minimum tax." Under questioning, she added that the BEAT should be revisited and that the Biden Administration is studying what changes should be made, noting the Congressional Joint Committee on Taxation (JCT) estimates that the BEAT is not raising near the revenue originally estimated and that it creates a disincentive to invest in clean energy projects because of the interaction between the BEAT and tax credits.

Ahead of the hearing, the staff of the JCT released a document that discussed the legal and economic background of US taxation of cross-border activity, with particular attention on provisions newly enacted or substantially revised in the TCJA. In an opening statement at the international hearing, Chairman Wyden called the JCT report "jaw-dropping" for finding that the TCJA reduced the average US tax rate paid by the largest US corporations by more than half.

(The JCT document also summarized international efforts to address tax challenges of the digitalization of the economy, and the implications for the United States.)

Congressional Democrats introduce international tax legislation

On 11 March 2021, Rep. Lloyd Doggett (D-TX) and Senators Sheldon Whitehouse (D-RI), Elizabeth Warren (D-MA), et al., introduced the *No Tax Breaks for Outsourcing Act* (H.R. 1785/S. 714). Among other things, the bills would eliminate the deductions for Global Intangible Low-taxed Income (GILTI) and Foreign-derived Intangible Income (FDII); exclude certain high-taxed income from the GILTI computation (thereby denying excess foreign tax credits on that income); and eliminate the exclusion equal to 10% of certain qualified tangible property (the QBAI exclusion).

Rep. Doggett and Senator Whitehouse also introduced the *Stop Tax Haven Abuse Act* (H.R. 1786/S. 725) that includes changes to the Base Erosion and Anti-Abuse Tax (BEAT) to lower the applicability threshold to $100 million in gross receipts (as opposed to the current $500 million); include certain capitalized amounts as base erosion payments; and eliminate the 3% base erosion percentage gating threshold.

While the bills are not expected to pass in their current form, individual provisions are an indicator of current thinking by some House and Senate Democrats and could be included in some form in future legislation.

President Biden signs $1.9 trillion American Rescue Plan Act of 2021

President Joe Biden on 11 March 2021 signed into law the $1.9 trillion *American Rescue Plan Act of 2021* (H.R. 1319) COVID-19 stimulus/relief package. The Senate passed the bill on 6 March and the House approved the Senate-amended version of the legislation on 10 March.

Murillo tapped as Treasury Deputy Assistant Secretary for International Tax Affairs

The US Treasury Department on 2 March 2021 announced that Jose Murillo had accepted the position of Deputy Assistant Secretary for International Tax Affairs in the Office of Tax Policy. Most recently, Murillo was the Director of the International Tax and Transaction Services practice in EY's National Tax Department in Washington, DC.

The legislation includes provisions on taxes, health care, unemployment benefits, direct payments, state and local funding and other issues. About half of the $1.9 trillion bill comprises revenue provisions that fall under jurisdiction of the congressional tax-writing committees, and over half of that is attributable to direct payments of $1,400 and an advanceable child tax credit expansion that takes the form of periodic payments from the IRS. The final bill also includes repeal of the Section 864(f) worldwide interest expense allocation election.

Treasury and IRS news

IRS says assumption of reinsurance agreement does not result in base erosion payments

In PLR 202109001, the IRS concluded that a domestic taxpayer (Taxpayer) did not make a base erosion payment when it and two related foreign corporations (FC1 and FC2) entered into an agreement (Agreement) under which FC1 will be substituted for FC2 as retrocessionaire. Taxpayer had previously retroceded the risks to FC2 after originally assuming them from a related domestic insurer (Corp A). According to the IRS, the Agreement did not increase Taxpayer's liability under the Base Erosion and Anti-abuse Tax (BEAT) imposed by Section 59A.

The IRS also indicated that amounts paid or accrued by Taxpayer under its original reinsurance agreements will remain base erosion payments if they meet the definition of a base erosion payment under Section 59A and its regulations.

The IRS did not particularly elaborate in the PLR on what payment or deemed payment could be subject to BEAT. Presumably, the potential BEAT issue underlying the PLR is whether, under US federal income tax principles, the Agreement results in a deemed payment from Taxpayer to FC2 from the accrued value that may be embedded in either the insurance or investment assets supporting the reserve liabilities.

IRS opens initiative on virtual currency

The IRS Office of Fraud Enforcement has begun a new initiative focused on financial crime and fraud that involves virtual currency. The initiative, Operation Hidden Treasure, "is basically an umbrella operation for all of our virtual currency omitted-income cases," according to the director of the Office.

Another IRS official explained that Operation Hidden Treasure "is all about finding, tracing, and attributing crypto to U.S. taxpayer[s]." She added that taxpayers should be aware that virtual currency transactions are not anonymous.

Transfer pricing news

IRS APMA program director discusses taxpayers' treatment of COVID-related costs

The IRS Advance Pricing and Mutual Agreement (APMA) Program is seeing "questionable treatment of COVID-related costs," according to the program director.

Speaking at a virtual tax conference on 5 March 2021, APMA director John Hughes said that APMA is seeing the following COVID-related issues: (i) taxpayers are classifying costs as nonoperating items to improve the controlled party's operating profitability for purposes of a comparable profits method or transactional net margin method analysis, which may result in a compensating adjustment; and (ii) taxpayers with an advance pricing agreement nearing the end of its term are raising COVID-related issues prematurely, which may complicate bilateral competent authority negotiations.

US, Japan reach agreement on tax treaty arbitration process

The IRS in Announcement 2021-5 indicated that the US and Japan competent authorities had reached agreement on the US-Japan tax treaty arbitration process. The agreement implements the arbitration process in paragraphs 5, 6 and 7 of Article 25 of the 2003 US-Japan income tax treaty, as amended.

IRS releases Section 965 practice unit

The IRS in March 2021 released a practice unit (IRC 965 Transition Tax Overview) on the Section 965 transition tax. Practice unit materials serve as job aids and training materials for IRS staff and provide helpful insight into how the IRS may interpret various areas of taxation. The practice unit materials are a great resource for a quick refresh on the provision and issues that may arise.

Another IRS official added that he is seeing taxpayers invoking *force majeure* to terminate arrangements. "If there is reason to believe that unrelated parties in the same circumstances would not invoke *force majeure*, it raises questions," the official said. The arm's-length standard may require one of the parties to compensate the other for terminating the arrangement, he added.

Taxpayers should be cautious when taking non-conventional transfer pricing positions as a result of COVID-19. Although many of these issues have not yet been challenged, the comments by the APMA director make it clear that they are on the IRS's radar.

Furthermore, taxpayers that already have advance pricing agreements should consider all complications that may arise before attempting to raise COVID-related issues prematurely or invoking *force majeure* to terminate the arrangement entirely.

IRS APMA Program releases annual APA update

The IRS Advance Pricing and Mutual Agreement (APMA) Program issued the 22nd annual Advance Pricing Agreement (APA) report (the Report) on 23 March 2021, in Announcement 2021-06. The Report discusses the APMA Program, including its activities and structure for calendar year 2020, and gives useful insights into the operation of the APA Program.

The number of APA filings remained the same in 2020 as in 2019, with taxpayers filing 121 APA requests each year. The total number of APAs concluded, however, increased from 120 to 127 and the median amount of time to finalize an APA decreased from 38.8 months in 2019 to 32.7 months in 2020.

OECD developments

OECD official floats BEPS 2.0 Pillar Two simplification

An OECD official in early March 2021 was quoted as saying there is a possibility for two simplification measures to be adopted as part of a future BEPS 2.0 Pillar Two agreement, targeted for mid-2021. Pillar Two calls for the introduction of global minimum tax rules which include income inclusion rules and an undertaxed payments rule (referred to collectively as the Global Anti-Base Erosion (GloBE) rules) and a subject-to-tax rule.

According to the official, one proposed simplification would allow in-scope multinational enterprises to use their Country-by-Country report data to compute their jurisdictional effective tax rates for purposes of the global minimum rules. The second proposal would provide a de minimis profit exclusion, under which a jurisdiction would be excluded if the multinational has less than 2.5%, or €100,000 of an in-scope multinational enterprise's profits.

A third administrative guidance option has also been proposed – which is favored by many taxpayers – that would create a so-called "angel list" of jurisdictions identified as low-risk jurisdictions with appropriate tax bases and tax rates. An in-scope multinational enterprise operating in a listed jurisdiction would be assumed to have an effective tax rate higher than the minimum threshold. The OECD official noted that this third simplification proposal has received a mixed reaction in Working Party 11 (Aggressive Tax Planning), however, because of the political issues surrounding the proposal.

IRS updates FATCA FAQs

The IRS has updated its frequently asked questions (FAQs) for the *Foreign Account Tax Compliance Act* (FATCA). Specifically, updated FAQ 23 under General Compliance extends penalty relief for the 2020 and 2021 calendar years for withholding agents that withhold and report on Form 1042 and 1042-S by 15 September 2021 (for 2020) or 15 September 2022 (for 2021) a dividend-equivalent payment made with respect to a derivative referencing a partnership.

OECD publishes jurisdictions currently participating in the International Compliance Assurance Programme

On 22 March 2021, the OECD Forum on Tax Administration (FTA) published a list of 19 jurisdictions (Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Russia, Singapore, Spain, the United Kingdom and the United States) that have so far confirmed their participation in the next phase of the International Compliance Assurance Programme (ICAP).

The OECD indicates that the list will be updated as additional tax administrations confirm their participation. The announcement of the list follows the release of the new ICAP Handbook on 18 February 2021.

The list of participating jurisdictions was accompanied on the OECD website by a spreadsheet providing additional information regarding each participating tax administration's approach to ICAP implementation and operation. The OECD indicates that this spreadsheet will be updated as further information is received.

ICAP is a voluntary tax risk assessment and assurance program designed to facilitate open and co-operative multilateral engagement between large multinational enterprise (MNE) groups that are willing to engage actively and transparently with tax administrations in multiple jurisdictions where the group has business activities. It utilizes a group's Country-by-Country reports, transfer pricing master file and local files and other information provided by the group and aims to provide an efficient, effective, clear and coordinated approach to achieving early tax certainty and assurance for MNEs.

Final version of Platform for Collaboration on Tax treaty negotiation toolkit released

The Platform for Collaboration on Tax (PCT) – a joint initiative of the International Monetary Fund, OECD, United Nations and World Bank Group – in March 2021 issued the final version of their Toolkit on Tax Treaty Negotiations. The toolkit is aimed at helping developing countries in regard to their tax treaty negotiations. Five other PCT toolkits are available here.

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