CorporateLiveWire

CORPORATE TAX 2022
VIRTUAL ROUND TABLE

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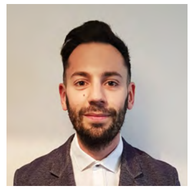
Introduction & Contents

In this roundtable our chosen experts discuss the latest trends and outline the recent regulatory changes and noteworthy case studies relating to tax. Highlighted topics include a discussion on the latest Pillar Two rules, the impact of COVID-19, and the biggest challenges facing multinational enterprises. Featured jurisdictions include: Chile, Germany, Nigeria, Spain and USA.



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Editor In Chief

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Meet The Experts

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Carolina del Campo has participated in many M&A transactions of Spanish companies investing abroad, advising on international tax matters, transfer pricing and the interpretation of double tax treaties, and negotiating mutual agreement procedures and advance pricing agreements.

She is a member of the Spanish High Body of National Tax Inspectors (on leave of absence), where she worked as coordinator and deputy director in the Sub-Directorate General for Non-Resident Taxation (1997-2013). She was head of the International Relations Coordination Unit, and team coordinator in the National Office for International Taxation.

She speaks regularly in master programs specializing in international taxation at universities and leading business schools. She has collaborated with many publications on international taxation and transfer pricing.

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Joseph joined Deloitte in 1998 and is the Lead Partner of Tax & Legal.

He has more than 22 years of experience in providing tax advice and consulting services to both foreign and Chilean investors on a variety of International Tax subjects, involving interpreting domestic tax law and tax treaties in connection with complex cross-border transactions, designing incoming and outcoming investment structures, developing tax efficient exit strategies, and implementing reorganizations for large multinationals.

During two years Joseph led the Chile desk at the Deloitte International Core of Excellence group in New York.

Academic background

Attorney from the Universidad de Concepción (Chile).

Q1. What do the latest Pillar Two rules mean for businesses?

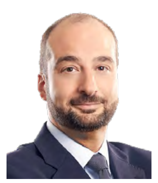
Joseph Courand

Courand: On 8 October 2021, the OECD/G20 Inclusive Framework on BEPS issued an implementation plan agreed by 136 of the 140 members, describing the agreement on the two-pillar approach to address the challenges that the digitalisation of the economy brings from a tax revenue perspective. Under the so called Pillar I profits obtained by the largest and most profitable multinational enterprises will be relocated to market jurisdiction, allowing them to obtain tax revenues from them that otherwise would not be available. Pillar Two will impose a minimum tax on multinationals with gross revenues in excess of €750 million and requires that certain jurisdictions agree to a subject to tax rule (STTR) in their treaties.

According to the OECD, the implementation of Pillar One is expected to relocate each year USD 125 billion to market jurisdictions, and Pillar Two is likely to generate around USD 150 billion of additional global tax revenues annually. The implementation plan aims at having both Pillars in effect I 2023, except for the undertaxed payment rule of Pillar Two which should become effective in 2024.

Since 2013, the global integration of countries has been exponential and fueled by the BEPS project and the Inclusive Framework, which has allowed the implementation in a relatively short period of tax principles that allow closing loopholes and eliminate differences among systems that allowed double "non-taxation".

The final result of these measures remain to be seen, especially regarding the redistributive effect of tax revenues, but all indicates that the process will continue to increase, facilitated by the existence of institutions, legal instruments, and a methodology that have proved to be effective.



Len Teti

Teti: "Pillar Two" is a complicated set of tax rules designed to result in a global minimum tax of 15% of book income for the largest multinational corporations. It is likely to result, over time, in a levelling of the playing field for global multinational companies. It will be harder, and less effective, for companies to move assets (especially intangible assets) to low-tax jurisdictions.

It is hard to generalise the effects but one thing that is clear is that many businesses with income in mostly high-tax jurisdictions will be largely unaffected in absolute terms; they are likely already paying at least 15% of their book income in income taxes in those jurisdictions. In relative terms, they may be better off because their competitors will pay more in taxes than they do today. On the other hand, because book income may exceed taxable income, and because of the taxpayer-unfriendly treatment of certain tax credits under Pillar Two, even multinational corporations with most of their income in high-tax jurisdictions could be paying less than 15% of book income today in some jurisdictions and therefore could be facing a tax increase.

A similar dynamic exists with multinationals whose parent is located in jurisdictions that already have a minimum tax, or at least that tax extraterritorial profits on a current basis. These multinationals – which include U.S.-parented groups because of the United States' "GILTI" regime – might be viewed as becoming more competitive with other groups that do not have minimum taxes on worldwide income; to date, however, most business groups in the U.S. are not viewing Pillar Two as a welcome development.

None of this will make compliance simpler. Countries with low tax rates today are likely to raise their rates up to 15% in order to capture income that would otherwise, under Pillar Two, be taxed elsewhere. The thought process will be that if income is going to be taxed somewhere else if we don't tax it, why shouldn't we tax it here, where the money is earned. Thus multinational companies will face larger compliance burdens in local jurisdictions throughout the world, on top of already increased burdens in their home countries.

Dr. Markus Brem

Brem: In various countries like Germany, the Pillar Two rules are not yet implemented but are a matter of discussion in the circles of professional experts, law makers, and government bureaucrats. With the fundamental geopolitical changes triggered by the war in Ukraine, I hypothesise that there will be some delay in getting Pillar Two implemented in many countries.

In addition to its basic intention to capture the global tax base with a minimum corporate income tax rate of 15%, the Pillar Two system would definitely increase the compliance work related to the computation of the tax base for multinational groups targeted by these provisions. Many tax professionals in the tax consulting industry will be satisfied that the set of rules appears highly complicated to implement – complexity feeds their consulting business, doesn't it? Parenthetically speaking, a tax rate of 15% does not reveal much about the tax base.

Also, one should anticipate that such a set of rules will spill over to govern business segments which are still below the thresholds established for the Pillar Two model. In other words, the international tax regime and the domestic tax provisions are likely to shift into an approach of formulary apportionment not only for the very large multinationals with consolidated group revenues above $750 million, but also those which generate $100 million or $50 million or even less. You may wish to compare safe harbour definitions such as the default ratios (*Richtsatzsammlung*) defined by the German Ministry of Finance (20 Dec 2021). This development may take a few years, but it will most likely lead to maintaining the domestic system of taxing cross-border business in a consistent manner.

Carolina del Campo

Campo: Businesses are very interested in the evolution of this works, from OCDE and UE perspective. They are conscious that certain structures or ways of doing business might need to be reviewed.

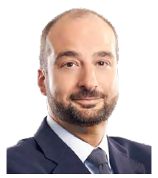
On the other hand they are also very concerned about the extra formal costs this may incur via new reporting and accounting systems. They are facing a similar situation as when country-by-country reporting ("CbCR") was implemented from a formal perspective as new information has to be captured and the indirect costs will be an issue to consider.

Kelechi Ugbeva

Ugbeva: Nigeria is among four countries that have not signed up to the Two-pillar solution, rather the Nigerian government introduced digital services taxes. This stems primarily from the perception that tax revenue from the application of the digital services tax would be maximised compared to provisions under the Two-Pillar Solution. There is concern that the in-scope Multinational Enterprises under the Two-Pillar Solution will be limited because of the strict minimum thresholds for its application.

"Countries with low tax rates today are likely to raise their rates up to 15% in order to capture income that would otherwise, under Pillar Two, be taxed elsewhere."
- Len Teti -

Q2. How has tax policy in the United States changed under President Biden?



Len Teti

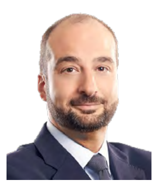
Teti: There is no doubt that the policy of the Biden administration is more focused on raising rates for the highest individual and corporate earners than in the Trump administration. These differences of policy emphasis have not yet resulted in meaningful law changes. Indeed, aside from the Administration's participation in the OECD process that produced Pillars One and Two, the changes on the domestic front have been mainly ones of political dialogue rather than policy itself. Democrats have a razor-thin majority in both houses of Congress and have struggled to unify a coalition behind any specific tax policies. The failure of the proposed "Build Back Better" legislation in the 2021 legislative session illustrates this failure to coalesce.

This year is an election year for the entire House of Representatives and one-third of the Senate. Republicans are likely to remain unified in opposition to dramatic tax changes before the election, in no small part because they believe they will be able to capture the House in the elections. Democrats, therefore, are forced once again to try to build consensus around domestic legislative priorities; to the extent those priorities involve tax changes – in particular, raising taxes on individuals or small businesses – they will be faced with very unpleasant TV advertisements about having raised taxes in an election year.

Q3. How has COVID-19 impacted the tax landscape?

Joseph Courand

Courand: Last year, the Chilean Congress approved several tax measures to protect jobs, alleviate financial pressure on Chilean companies, and introduce several tax incentives to fuel the growth of the economy. However, once the COVID-19 crisis is over and the economy starts to recover, we should expect the government to look for new sources of revenue to pay for the costs of the crisis, which will likely involve an increase of taxes or the implementation of new taxes.



Len Teti

Teti: One dramatic change relating to taxes involves the prevalence of remote work, not just during 2020 and 2021, but going forward. The state and local tax issues arising from employees no longer working in certain designated offices located in particular cities and states are myriad. These issues touch both employers and employees. For example, employers need to determine whether to withhold taxes in states where their employees' designated offices are located or, instead, in states where the employees are living (and working). This determination requires an analysis of several states' laws, and the answers may not always be clear. For employees, there may be obligations to file personal tax returns differently than before COVID-19 began. Similar issues exist internationally, for employees who work in different countries from those in which their assigned office is located. From a U.S. legal perspective, the thorniest issues may be lawsuits by states claiming that their residents cannot constitutionally be taxed by other states where the residents are not physically working. These cases will take many years to wend through the courts.

A more practical change on the M&A landscape relates to the law changes Congress introduced in March and April of 2020 as the pandemic was beginning. There were notable changes to the rules governing the use of tax attributes and the deferral of payroll taxes to the end of 2021 and 2022. The effect of these law changes has been that virtually all M&A contracts now include specialised terms designed to deal with these new rules.

A few other examples: the IRS has experienced a dramatic backlog in processing returns (millions of returns remained unopened), and COVID-19's supply chain disruptions have led to a U.S. policy of encouraging companies to source their supplies domestically. Lawmakers have proposed tax credits for building domestic manufacturing plants, such as for computer chips (e.g., the "Facilitating American-Built Semiconductors Act", which appears to have bipartisan support).

Dr. Markus Brem

Brem: The COVID-19 pandemic has been triggering a lot of additional compliance work in the course of applying for financial assistance from various state-aid relief programmes. Tax consultants and other experts are quite busy these months and years with regard to the application processes and the reporting requirements.

This COVID-19 beast is likely not dead. Business organisations are struggling with shortcomings from absenteeism and illness amongst their employees as well as shortfalls caused by similar effects on the side of their suppliers and customers. The value chains have become disordered. Obviously, this impacts the tax sphere of the economy, too.

The digital transformation has gotten a strong boost with the effects of reorganisation of business processes, business transactions, and business models such as online shopping, home office work, and the rise and fall of certain industries or individual companies in such industries. As one of many examples, travel costs (financial, time) could be reduced significantly.

We should anticipate that, as long as governmental policies are involved in such short-term support programmes and long-term transformation processes, both the corporate and the individual taxpayer will have to pay for it – today or tomorrow. Hence, the tax burden can be expected to increase commensurately in the near future. Also, one can forecast that the public expenditure quota (i.e. the ratio between the scales of the public sector and private sector in the economy), may further shift to "more government".

Last but not least, tax technology currently becomes ubiquitous. For example, as a transfer pricing practitioner I do forecast that not only is documentation of transfer pricing a purely digital affair, but business processes allow broadly integrated data analytics and reporting so that the compliance work related to transfer pricing becomes an integral part of the sustainable approach towards governance, risk, and control. VAT developments in parts of Europe tell us how it will work. And COVID-19 has taught us that things will change – for sure.

Carolina del Campo

Campo: There are different aspects in the tax area that have been impacted:

Tax residency: In some cases, individuals have found that the country where they have been forced to lockdown in is different to the country of tax residency. Although the OECD has given some guidance in this sense, not all Tax Administrations have completely implemented them. This may create situations of change of residence in some cases, or permanent establishment situations. Some Tax Administrations are providing guidance, but it does not solve all the cases and the conclusions are not clear

Transfer pricing: the forced closing of many businesses has reduced the revenue down to zero, while some of the overhead costs have remained. This has supposed and impact in the profit and loss of many businesses. Special reference has to be made to those limited risk distributors that obtained a fixed remuneration based on sales; these businesses are not supposed to have losses, and their Tax Administration may ask for a compensation of those losses to the parent company. On the other hand, the parent entity may not be able to justify that adjustment. In these cases, we may face some disputes with Tax Authorities in the coming years. The same issues may also be found with the management fees.

Kelechi Ugbeva

Ugbeva: COVID-19 disruption has led to the creation of a VAT automated collection system known as VATrac which is meant to aid VAT collection for specific businesses such as; branded shops, super stores, general supermarkets, and restaurants nationwide. The Federal Inland Revenue Service (FIRS) has established available e-platforms which are used for the purpose of filing tax returns, payment of taxes and application for TCCs.

Q4. How are businesses adapting their tax strategies in response to the current climate?

Joseph Courand

Courand: Although most Chilean companies went through a major restructuring of their operation and business models, the outcome has been positive as many of them have been able to reduce their costs, allowing them to compensate for the revenue reduction. Companies are revisiting their business models by deconstructing their value chain to reorganise their assets and functions and redefine their business and tax strategies, taking a holistic approach while doing so.

Dr. Markus Brem

Brem: With regard to the business climate and the changes in global politics, business organisations have learned of late that resorting to local resources and expertise can help to mitigate uncertainty and shortcomings caused by such external shocks. So, while foreign direct investment and growth may continue to be a driver of business and "globalisation", we believe that companies will further invest in sourcing domestically. They will seek to secure resources regionally such as within the European Union, and they will have to revise their global strategy with regard to force majeure impacting business. Data and intangibles continue to flow globally, even on an increasing scale, while people may remain home to manufacture products locally.

Another driver for change comes from the impacts of climate change. Resilience is the key word to cope with impacts from decades of raping the environment, our natural resources, and the non-privileged strata within society. Mankind is beginning to understand now that the normal way of life is unsustainable from the perspectives of ecology, resource efficiency, and societal impact. And tax systems will play a significant role in transforming this way of life into something more sustainable.

Carolina del Campo

Campo: The actual global scenario is affecting businesses from different perspectives:

Crisis and COVID: they could be considered separately but the truth is the final result is the same, an impact in the profit and loss accounts. They are reviewing the business models, as things need to be performed differently – more cost effective – and also looking for some alternatives, especially in those cases where the dependence of raw materials is high, or certain markets are not available any more. Although we may think this is quite far from taxation, any change in the business model will have an impact on transfer pricing issues and, consequently, on final taxes paid.

Changes in the international taxation scenario: BEPS, Pillar I and Pillar II and the domestic legislation changes are increasing the tax pressure on MNEs. These entities are now reviewing part of the structures that were implemented in order to minimise the impact the new legislation may have.

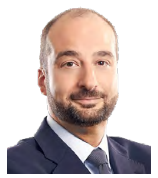
Consequently, there is an internal review in many industries, particularly from the business side, that may change the way business is conducted in the coming years.

Q5. What is the current stance on taxation for the digital economy in your jurisdiction?

Kelechi Ugbeva

Ugbeva: The Government of Nigeria published the Significant Economic Presence Order, 2020 (Order). The Order provides that a foreign company shall have significant economic presence in Nigeria in any accounting year where it derives 25 Million Naira [USD $60,140) annual turnover or its equivalent in other currencies from any or a combination of digital activities which include streaming of content amongst others.

Q6. Have there been any other recent changes or interesting developments?



Len Teti

Teti: In the last few months the IRS announced a special programme that enables taxpayers to receive certain private letter rulings more quickly than before. Rulings are now available within three months in most cases; prior to the new programme taxpayers usually needed to wait six months or more. The IRS has explained publicly that the purpose of the new programme is to encourage taxpayers to use the IRS's ruling programme more frequently. The IRS is apparently eager to be aware of transactions that are occurring in the marketplace, and this new programme has been a welcome step forward in relations between large corporate taxpayers and the government.

Another interesting development in the M&A practice is the increasing prevalence of rep and warranty (R&W) insurance and even specialised tax insurance in the context of M&A deals. To be sure, some sellers are still providing robust first-dollar indemnities for pre-closing tax liabilities, but the increase of private equity sellers has meant that many sellers are no longer willing to accept such terms. Buyers are forced to cover these risks on their own (i.e., by self-insuring) or by acquiring private policies at closing. This, in turn, has put pressure on the diligence process because insurers want to make sure the buyers have done adequate diligence before underwriting policies (and risks discovered during diligence are generally excluded from coverage). In addition, specialised tax insurance policies are increasingly available to M&A parties to help cover identified tax risks or issues. Negotiating these policies can complicate the process of executing M&A deals but I have seen in my practice several examples where the policies themselves made the deal possible. Without them the deal would have cratered.

Dr. Markus Brem

Brem: Triggered by the war in Ukraine, the German government seeks to reduce its reliance on Russian gas and oil. I guess this will evolve as a very interesting policymaking process. And, of course, it will trigger changes in the German tax system. Incentives for sustainability are expected to enter the tax policies and the tax systems such that firms with even a small carbon footprint, using finite natural resources, will see higher tax rates compared to "sustainable business models". Experts from the consulting industry are already claiming such changes.

"ompanies are revisiting their business models by deconstructing their value chain to reorganise their assets and functions and redefine their business and tax strategies, taking a holistic approach while doing so."
- Joseph Courand -

"Triggered by the war in Ukraine, the German government seeks to reduce its reliance on Russian gas and oil. I guess this will evolve as a very interesting policymaking process."
- Dr. Markus Brem -

Q6. Have there been any other recent changes or interesting developments?


Carolina del Campo

Campo: One of the most important developments we have had in the EU is the Danish cases, where the beneficial owner concept has come into place for interest and dividends.

This concept was a typical aspect that needed to be considered when applying a double tax treaty in order to apply the limited source taxation. However, the Court in these new cases has also incorporated the concept of beneficial owner for the implementation of the parent-Subsidiary Directive and Interest Directive, or even domestic exemptions regarding interest and dividends.

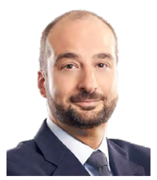
In the case of Spain, the interest exemption (interest paid to a resident in the EU) existed long before the Interest Directive was approved and it does not incorporate any specific anti-abuse rule. Tax authorities have considered that the Danish cases can be applied, even if it is a domestic exemption without any reference to the beneficial owner, and have initiated many tax audits to review interest and dividend payments made from Spain to any other European country.

It may appear to be a European issue, but it has a great impact in the funds sector as they are resident in a third country but make investments in Europe through entities established in the EU.


Kelechi Ugbeva

Ugbeva: There is in effect, the provision of the Tax Pro-Max by the FIRS which enables seamless registration, filing, payment of taxes and automatic credit of withholding tax as well as other credits to the Taxpayer's accounts among other features. It also provides a single-view to Taxpayers for all transactions with the Service.

Q7. Have there been any noteworthy case studies or examples of new case law precedent?


Len Teti

Teti: On 4 April 2022, a U.S. District Court (trial court) ruled that certain temporary regulations promulgated by the Trump administration are invalid because they did not comply with rules designed to give taxpayers notice of law changes and an opportunity to comment on them.

The regulations at issue were designed to close a loophole created by the Tax Cuts and Jobs Act of 2017 (TCJA). The loophole allowed certain taxpayers to repatriate money to the U.S. without it ever being taxed. The taxpayer in the case took advantage of this loophole in a 2018 transaction. The government promulgated the regulations in 2019 and made them retroactive, such that they would, if valid, catch the taxpayer's transaction.

The court's decision invalidating the regulation is the latest example of taxpayers successfully challenging the govern-ment's regulations. The government will no doubt appeal this ruling to the U.S. Court of Appeals. Eventually, these sorts of issues may be resolved by the U.S. Supreme Court.

The case is *Liberty Global, Inc. v. United States*, Civil Action No. 1:20-cv-03501-RBJ, US District Court for the District of Colorado.


Dr. Markus Brem

Brem: With regard to transfer pricing, a small taxpayer case has been pending at the Federal Tax Court since summer 2020 (BFH I R 54/19). The cost plus method and the issues of base shifting as well as some procedural features are questioned by the taxpayer (petitioner) and the case has the potential to shake the fundamentals of Germany's transfer pricing practices.

Interestingly, it's a case which falls into the small-case category of "below €5 million of product deliveries", hence being treated as not subject to the full burden of documentation provisions of the applicable regulations on income allocation and documentation (2003).

Also, we have learnt that the Ministry of Finance launched its administrative principles on documentation right in December 2020 – just a few weeks after the Ministry jumped into this court case formally as one of the parties of the case. The court decision is expected in 2022 – it is a decision that is worth following closely.


Kelechi Ugbeva

Ugbeva: In *CHI Limited v. FIRS* tax tribunal appeal, the tribunal issued a judgement which gave an expansive interpretation of Section 17 of the VAT Act, as it relates to the concept of stock-in-trade to include overheads (utilities) that are directly involved in the final production of a company's products.

Q8. What challenges exist for multinational enterprises (MNEs) operating across countries implementing a different transfer pricing framework?


Joseph Courand

Courand: The main challenges that MNEs face is the lack of consistency in the different jurisdictions of the transfer pricing adjustments and flows deriving therefrom, preventing MNEs to have business models that have consistent results in the different jurisdictions. The lack of tax certainty in many jurisdictions is also an increasing issue among MNEs as it poses challenges when determining the expected return over their investments.


Dr. Markus Brem

Brem: MNEs should be aware of whether they are small or mid-sized taxpayers or large corporate groups. The former are exposed to a high level of arbitration, while the latter may enjoy a stronger negotiation potential subject to their sheer size with respect to number of employees, business volume, and tax base.

Secondly, transfer pricing models with Russia may collapse as the country has opted to exit from international regimes on governance such as international tax regimes. While double tax treaties may still be valid on paper, they hardly can be exercised and practiced in an environment of aggressive attacks against a neighbouring country and large swaths of the western world enacting direct sanctions. The effects on relationships with China and India are difficult to foresee at this moment with regard to transfer pricing policies and regimes.

Q8. What challenges exist for multinational enterprises (MNEs) operating across countries implementing a different transfer pricing framework?

Dr. Markus Brem

Finally, as pointed out earlier in CorporateLiveWire publications (e.g. *Tax Expert Guide 2020*, p. 15), we are in the middle of the transition from a tangible-based global economy to an intangible one. Products are, at an increasing rate, manufactured domestically, while templates, models, data, and services are of a global nature. Digitalisation, the shortage of natural resources, the uncertainties from global crises like war or climate catastrophes, and the like, trigger the need to reflect on local and regional processes of manufacturing and consumption. At the same time, the global scale behind the business models of such products and services will lead to a more of an increase of cross-border transactions of intangibles compared with tangibles. Hence, residual profit split models, royalty models, and truly global approaches to transfer pricing may become more favourable to the disadvantage of transfer pricing on "tangible" exchanges.

Carolina del Campo

Campo: Transfer pricing is normally ruled by OECD Guidelines, which simplifies the situation, although not all countries follow the same principles.

In recent years, there has been an increased pressure from tax administrations regarding transfer pricing, and the main impact has been the double taxation generated. There are different mechanisms in place to eliminate it – such as, mutual agreement procedures, and advance pricing agreements – but not every country has the resources and technical skills to implement them. EU, North America, some Asian countries are easy places to conduct these kind of negotiations, but when other countries are involved, double taxation may be confirmed.

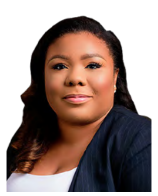
There has been quite an important evolution in this mechanism and tax administrations are starting to cooperate in this area. Joint audits are probably a good approach towards the final solution, but it needs to put in contact all the affected tax administrations and this is not always easy.

MNEs are very conscious of these limitations, but they need to live with transfer pricing – the potential solutions that are implementing are negotiate in advance with tax authorities in order to avoid the tax audit and double taxation. There are many programmes that are being implemented in different countries and the OECD and EU are also backing up all these multilateral solutions.

Q9. Are there any compliance issues that investors need to be aware of?

Joseph Courand

Courand: Compliance obligations are increasing dramatically in an effort from governments to improve the IRS fiscalisation over its taxpayers and prevent tax evasions. These increases on the tax compliance obligations are putting pressure on taxpayers, which must allocate resources for that purpose, increasing costs and risks of penalties for not being in compliance. To mitigate the effects of the increasing tax compliance obligations, taxpayers are relying more and more on technology tools, which enable them to obtain and structure large amounts of data in an efficient, safe and organised way, reducing the errors that derive from human manipulation of data.



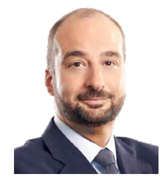
Kelechi Ugbeva

Ugbeva: Nigeria endeavours to simplify compliance issues for investors. Recently, Nigeria has eliminated and discarded disincentives to the taxation of investors. Some of these eliminated disincentives include the removal of taxation of dividends from retained earnings, removal of further taxation of franked investment income, elimination of taxation from distributions made by a real estate investment company, and the stipulation of minimum tax for insurance companies in Nigeria at 0.5%. For most investors, withholding tax is the final tax paid on dividends and it is deducted at source with no requirement for registration.

Q10. What steps should be taken to ensure the swift resolution of domestic and cross-border tax disputes?

Joseph Courand

Courand: Most tax disputes derive not from the tax position adopted, but from the lack of evidence to provide proof of the facts upon which the taxpayer's position is grounded. Most of tax disputes should be resolved at the administrative level if the taxpayer's position has been thoroughly analysed by the taxpayer at the time it was undertaken, and the taxpayer has the documentation and other means of evidence to prove within the relevant audit its position.



Len Teti

Teti: My practice does not often involve resolving disputes with taxing authorities, but where I have been involved in disputes, the experiences have taught me a few key lessons.

First, I tend to get involved only when things have begun to go poorly. In other words, my clients tend to involve me only when the taxing authorities have already pursued audits, often over the course of several years, and not been able to resolve issues. In the course of reviewing the history of the audit, I often realise that the dispute has developed in part because the taxing authority has not understood the factual or legal issues properly and, as a result, has begun to draw incorrect or problematic conclusions. Thus, one key lesson is to develop a plan for tax examinations well before the taxing authority asks its first question. At the time a transaction is planned and executed, external advisors and in-house tax directors should be planning the audit defence.

Secondly, when questions do come, it is important to be as transparent as possible with the inquiry. As a general matter, taxpayers take great care in planning and executing transactions. They should not be embarrassed to explain what they have done, and they should do so with confidence and openness that makes evident to investigators why there is no basis to challenge them. Simply put: solving tax disputes swiftly and efficiently is really about taking all opportunities to avoid disputes from arising in the first place.

Dr. Markus Brem

Brem: I advocate for a strong revision of the corporate tax system. "Better an ending with pain, than pain with no end", is a saying in the German language. Citizens increasingly feel that the tax system is unfair and unjust – so it is inside the domain of "transfer pricing". Indeed, digitalisation is the trigger for Pillar One, and the unjust tax burden is that of Pillar Two (this was disclosed by the Panama Papers).

Hence, let's prepare for a revision of the tax system towards burdening unsustainable behaviour, taxing "excessive" gains and profits, and incentivising the more truthful perspectives. Likewise, smaller entrepreneurs will have to be supported in their harsh economic environment competing with large players if the tax system is going to be effective in facilitating this transformation process. The tax system will have to reflect the advantages accrued through economies of scale to fulfil its promise of neutrality. Hence, large organisations could face a higher burden due to their comparative advantage secured by their business models and governance structures.

Questions should be: Can tax be kept domestic if the world will have to find global solutions more than ever? Can we afford a process of beyond two decades to find new answers concerning fundamental changes such as the evolution of the digital economy or the ecological burnout of the earth?

My answer is "no"! If societal and political processes on finding such answers require the passage of a full generation, or even more, then the conflict is likely to find its way through other "resolution processes" – processes which are less multilateral and often neither mercy nor fair dealing. War would be one such adverse alternative and this is definitely not the one we want to see, isn't it?

Q10. What steps should be taken to ensure the swift resolution of domestic and cross-border tax disputes?

Carolina del Campo

Campo: There are many mechanisms now that can be used by companies in order to solve tax disputes:

Avoidance of double taxation and, consequently, no dispute: most tax administrations offer programmes – APA programmes for transfer pricing and ICAP for OECD initiative – to start some conversations with companies before the tax audit takes place. These mechanisms can enhance relationship programmes (such as customer compliance in UK) where a dialog is maintained and the tax administration may define the level of risk of the company.

During a tax audit: a cooperative attitude is normally a key aspect to end up in a better position in a tax audit, as the tax administration can make a more informed decision. Some countries also have joint audits for those cases where the company is present in different countries. In this case, the adjustment will not generate double taxation.

After tax audit: Local courts are always an option but when another jurisdiction is involved it may not eliminate double taxation. MAPs (Mutual agreement procedures) are the usual solution in international situations or transfer pricing issues; this may lead to arbitration, which is the new tool that will help speed up the MAP in coming years. Some countries include mediation programmes or similar ones which involve the tax administration but not the audit team.